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# JUDGES AND OFFICERS

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## SUPREME COURT

### Chief Justice

| | |
|---|---|
| PHIL S. GIBSON | San Francisco |

### Associate Justices

| | |
|---|---|
| JOHN W. SHENK | San Francisco |
| DOUGLAS L. EDMONDS | San Francisco |
| JESSE W. CARTER | San Francisco |
| ROGER J. TRAYNOR | Berkeley |
| B. REY SCHAUER | Los Angeles |
| HOMER R. SPENCE | San Francisco |

### Clerks

| | | |
|---|---|---|
| William I. Sullivan | Clerk | San Francisco |
| I. M. Johnson | Chief Deputy Clerk | San Francisco |
| Loren F. White | Deputy Clerk | San Francisco |
| Harry M. Gardiser | Deputy Clerk | San Francisco |
| L. A. Endres | Deputy Clerk | Sacramento |
| Henry P. Crabtree | Deputy Clerk | Los Angeles |
| William J. Sinkford | Deputy Clerk | Los Angeles |

# DISTRICT COURTS OF APPEALS

## FIRST DISTRICT—SAN FRANCISCO

### *Division 1*

PRESIDING JUSTICE

RAYMOND E. PETERS - - - - - - - - - - San Francisco

ASSOCIATE JUSTICES

LOUIS H. WARD - - - - - - - - - - - - San Francisco
A. F. BRAY - - - - - - - - - - - - - San Francisco

### *Division 2*

PRESIDING JUSTICE

JOHN T. NOURSE - - - - - - - - - - - - San Francisco

ASSOCIATE JUSTICES

C. J. GOODELL - - - - - - - - - - - - San Francisco
MAURICE T. DOOLING, Jr. - - - - - - - - - Hollister

CLERKS

WALTER S. CHISHOLM - - Clerk - - - - - - San Francisco
W. B. SULLIVAN - - - - Deputy Clerk - - - San Francisco
JOHN J. NOONAN, Jr. - - Deputy Clerk - - - San Francisco

## SECOND DISTRICT—LOS ANGELES

### *Division 1*

PRESIDING JUSTICE

JOHN M. YORK - - - - - - - - - - - - - Los Angeles

ASSOCIATE JUSTICES

WILLIAM C. DORAN - - - - - - - - - - - Los Angeles
THOMAS P. WHITE - - - - - - - - - - - - Los Angeles

### *Division 2*

PRESIDING JUSTICE

MINOR MOORE - - - - - - - - - - - - - Los Angeles

ASSOCIATE JUSTICES

MARSHALL F. McCOMB - - - - - - - - - - Los Angeles
EMMET H. WILSON - - - - - - - - - - - Los Angeles

## DISTRICT COURTS OF APPEALS—Cont'd.

*Division 3*

PRESIDING JUSTICE

WALTER DESMOND - - - - - - - - - - - Los Angeles

ASSOCIATE JUSTICES

CLEMENT L. SHINN - - - - - - - - - - - Los Angeles
PARKER WOOD - - - - - - - - - - - - Los Angeles

CLERKS

JAMES E. BROWN - - - - Clerk - - - - - - Los Angeles
JOHN W. SHENK III - - - Deputy Clerk - - - - Los Angeles
WM. E. DORAN - - - - - Deputy Clerk - - - - Los Angeles

## THIRD DISTRICT—SACRAMENTO

PRESIDING JUSTICE

ANNETTE ABBOTT ADAMS - - - - - - - - Sacramento

ASSOCIATE JUSTICES

ROLFE L. THOMPSON - - - - - - - - - - Sacramento
PAUL PEEK - - - - - - - - - - - - - Long Beach

CLERKS

GEORGE N. DIDION - - - Clerk - - - - - - - Sacramento
THOMAS J. DILLON - - - Deputy Clerk - - - - Sacramento

## FOURTH DISTRICT

*Fresno—San Bernardino—San Diego*

PRESIDING JUSTICE

CHARLES R. BARNARD - - - - - - - - - - - - Fresno

ASSOCIATE JUSTICES

E. J. MARKS - - - - - - - - - - - - San Bernardino
LLOYD E. GRIFFIN - - - - - - - - - - - - San Diego

CLERKS

EARL J. VERDECKBERG - - Clerk - - - - - - - San Diego
LLOYD E. HIDDEN - - - - Deputy Clerk - - San Bernardino
ROY M. BOSTWICK - - - Deputy Clerk - - - - - Fresno
GEORGE J. KOBELIN - - - Deputy Clerk - - - - San Diego

## APPELLATE DEPARTMENT, SUPERIOR COURT

### LOS ANGELES COUNTY

Presiding Judge

HARTLEY SHAW - - - - - - - - - - - - - Los Angeles

Judges

EDWARD T. BISHOP - - - - - - - - - - - Los Angeles
JESS E. STEPHENS - - - - - - - - - - - Los Angeles

Clerk

Jerome B. Williams - - - - - - - - - - - Los Angeles

### SAN FRANCISCO COUNTY

Presiding Judge

FRANKLIN A. GRIFFIN - - - - - - - - - San Francisco

Judges

EDWARD P. MURPHY - - - - - - - - - San Francisco
HERBERT C. KAUFMAN - - - - - - - - - San Francisco

Clerk

S. I. Hughes - - - - - - - - - - - - - San Francisco

### SAN DIEGO COUNTY

Presiding Judge

L. N. TURRENTINE - - - - - - - - - - - San Diego

Judges

GORDON THOMPSON - - - - - - - - - - San Diego
ROBERT B. BURCH - - - - - - - - - - - San Diego

Clerk

Dean Shultz - - - - - - - - - - - - - - San Diego

### SACRAMENTO COUNTY

Presiding Judge

PETER J. SHIELDS - - - - - - - - - - - Sacramento

Judges

MALCOLM C. GLENN - - - - - - - - - - Sacramento
RAYMOND T. COUGHLIN - - - - - - - - - Sacramento

Attorney General

Fred N. Howser - - - - - - - - - - - - Los Angeles

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# CALIFORNIA REPORTER

## 185 PACIFIC REPORTER

## SECOND SERIES

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30 Cal.2d 676

### PEOPLE v. EGGERS.

**Cr. 4761.**

Supreme Court of California, in Bank.
Oct. 3, 1947.

Rehearing Denied Oct. 27, 1947.

**1. Homicide ⇨332(2)**

In murder prosecution, it is the exclusive province of the jury to determine from the evidence whether the killing was willful, deliberate, annd premeditated act of defendant, but evidence on which determination is made is subject to review on question of its legal sufficiency to support the verdict. Pen.Code, §§ 187, 189.

**2. Homicide ⇨332(2)**

The Supreme Court, in reviewing the evidence in a murder prosecution, may not substitute its judgment for that of the jury, and, where there is substantial evidence in support of the jury's verdict, the jury's determination must be upheld. Pen.Code, §§ 187, 189.

**3. Homicide ⇨332(2)**

To justify the reversal of a judgment of conviction for first-degree murder, the record must clearly show that the evidence could not be interpreted as supporting the verdict. Pen.Code, §§ 187, 189.

**4. Homicide ⇨253(3)**

Evidence justified first-degree murder conviction if it showed that the killing was the result of willful, deliberate, and premeditated intent to kill, but express evidence of deliberate and premeditated purpose to kill was not required to be shown, since it could be inferred from proof of such circumstances as would furnish a reasonable foundation for such a conclusion. Pen.Code, §§ 187, 189.

**5. Homicide ⇨230**

Where there is no direct evidence in regard to the means by which a homicide was accomplished, the evidence does not support a verdict of murder in the first degree unless proof of intent is shown by surrounding circumstances. Pen.Code, §§ 187, 189.

**6. Homicide ⇨144**

The elements of murder in the first degree may not be inferred from the killing alone, but are matters of fact, which cannot be implied as matters of law. Pen.Code, §§ 187, 189.

**7. Homicide ⇨161**

In arriving at the intention of the defendant in a prosecution for first-degree murder, regard should be given to what occurred at the time of the killing, if indicated by the evidence, as well as to what was done before and after that time. Pen.Code, §§ 187, 189.

**8. Homicide ⇨253(3)**

Evidence of surrounding circumstances was sufficient to justify conclusion of a deliberate intention to kill and to warrant conviction of husband for first-degree murder of wife. Pen.Code, §§ 187, 189.

**9. Criminal law ⇨554**

In murder prosecution, jury was justified in accepting such portions of defendant's testimony as appealed to it, and in rejecting those portions which it did not believe.

**10. Criminal law ⇨813, 1186(4)**

The giving of an instruction which, though correctly stating a principle of law, has no application to the facts, is error, but does not justify a reversal unless it is affirmatively shown that the error would prejudice the rights of the defendant. Const. art. 6, § 4½.

**11. Criminal law 🔑814(20), 1186(4)**

In murder prosecution, giving of instruction that stated that every killing perpetrated by means of torture is murder in the first degree was error, in absence of any evidence from which it could be inferred that deceased died as result of torture, but error did not require reversal where evidence tended to prove that killing was willful, premeditated, and deliberate, and record clearly showed that defendant suffered no prejudice. Pen.Code, §§ 187, 189; Const. art. 6, § 4½.

**12. Criminal law 🔑823(15)**

In murder prosecution, giving of instruction, in conjunction with another instruction defining reasonable doubt in the language of the statute, that law does not require that degree of proof which produces absolute certainty, and only that degree of proof is necessary which convinces mind and directs and satisfies the "conscience" of those who are bound to act conscientiously on it, was not erroneous on ground that it told the jury that they should let their conscience be their guide. Pen.Code, § 1096.

**13. Criminal law 🔑829(1)**

Refusal of defendant's proffered instruction is not error, when the law on the subject has been correctly stated in other instructions.

**14. Homicide 🔑286(3)**

In murder prosecution, instruction which related to the time for deliberation was not erroneous because of the provision that thoughts may follow each other with great rapidity and cold calculating judgment may be arrived at quickly. Pen.Code, §§ 187, 189.

**15. Criminal law 🔑814(3)**

In murder prosecution, defendant's requested instruction, that extrajudicial statements made by him could not be used for purposes of impeachment if they were induced by threats, menace, or promises of reward, was properly refused, where there were no extrajudicial statements of defendant amounting to a confession, and he denied his guilt until he became a witness in his own behalf.

**16. Criminal law 🔑814(8)**

In murder prosecution, refusal to give defendant's requested instruction concerning killing in heat of passion or with considerable provocation was proper, where, as defendant related the circumstances, the shooting was accidental. Pen.Code, §§ 187, 189.

**17. Criminal law 🔑1144(15)**

In murder prosecution, wherein question of defendant's guilt was submitted to jury with instruction not to consider question of defendant's sanity, presumption was that jury obeyed such instruction, and defendant's motions for new trial and for an order declaring a mistrial on ground that jury disobeyed the instruction and was guilty of misconduct were properly denied, though, when jury returned guilty verdict, one juror stated that she had a closed mind on question of defendant's sanity, and foreman informed judge that, if question of defendant's sanity were submitted to that jury, there would be a hung jury. Code Civ.Proc. § 657; Pen.Code, § 1181.

**18. Criminal law 🔑624, 1189**

The issues presented by pleas of not guilty and not guilty by reason of insanity constitute but one trial, but the issues are to be tried separately, and error in the trial of the issue of sanity does not entitle the defendant to a retrial on the issue presented in the plea of not guilty.

**19. Criminal law 🔑867**

Fact that jury, after having returned a guilty verdict in murder prosecution, allegedly was improperly dismissed by trial judge because judge was of opinion that jury could not agree on question of defendant's insanity, did not require setting aside of guilty verdict. Code Civ.Proc. § 1003; Pen.Code, § 1026.

**20. Criminal law 🔑996(1), 998**

A court has jurisdiction to modify, revoke, or set aside its orders. Code Civ. Proc. § 128, subd. 8.

**21. Criminal law 🔑624**

In murder prosecution, wherein question of defendant's guilt was submitted to jury with instruction not to consider question of defendant's sanity, but, when jury returned guilty verdict, one juror stated that she had a closed mind on question of defendant's sanity, and foreman informed judge that if question of defendant's sanity were submitted to that jury there would be a hung jury, court was justified in revoking its order that the same jury should be retained to try the sanity issue. Code Civ. Proc. § 128, subd. 8; § 1003; Pen.Code, § 1026.

**22. Criminal law ⚷720(6)**

In argument to the jury, it is the district attorney's province to state to the jury the various conclusions that he draws from the evidence, and to make clear to the jury that conclusions in his opinion should be drawn from the evidence introduced, so long as he keeps within the scope of conclusions that may properly be drawn.

**23. Criminal law ⚷720(6)**

The right of counsel to discuss the merits of a case, both as to the law and facts, is wide, and he has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom, and the adverse party cannot complain if the reasoning be faulty and the deductions illogical, as such matters are ultimately for the jury's consideration.

**24. Criminal law ⚷720(6)**

In argument before the jury, any reasonable inference may be drawn from the evidence, and it is a matter within the trial court's discretion to determine whether counsel stays within the permissible range of discussion.

**25. Criminal law ⚷1037(1)**

In murder prosecution wherein technical director of scientific crime investigation laboratory of police department testified that he found tiny fragments of bone tissue as well as deposits of fat, tissue, and human blood on defendant's gun with which defendant allegedly shot deceased, and that a spectrographical analysis of a small fragment of bone showed elemental constituents of bone, except phosphorous, arguments of prosecution to jury, based on the testimony of the technical director, that defendant had tortured the deceased, was not prejudicial misconduct, at least in the absence of objection.

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Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Arthur R. Eggers was convicted of murder in the first degree, and he appeals.

Judgment and order denying new trial affirmed.

James A. Starritt, of Los Angeles, for appellant.

Fred N. Howser, Atty.Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

EDMONDS, Justice.

Arthur R. Eggers has been convicted of the crime of murder of the first degree and sentenced to death. The proceedings to be reviewed include not only the trial upon the merits, but also the hearing in regard to the issue presented by his plea of not guilty by reason of insanity and the motion for a new trial.

On the morning of January 2nd, the headless, handless torso of a woman, wrapped in a blanket and tied with a rope, was found in a ravine off a mountain highway in San Bernardino county. The discovery was given newspaper publicity the same afternoon. Later in the afternoon, or early in the evening of the same day, Eggers, a clerk employed in the office of the sheriff of Los Angeles county, filed a report stating that Dorothy Eggers, his wife, was missing. According to this report, Mrs. Eggers last had been seen three days before at about 9 a. m.

The body, subsequently identified as that of Dorothy Eggers, had two bullet wounds, one of which penetrated the heart and caused death. The missing head and hands were never recovered.

It appears that at the time of the homicide Eggers and his wife, with two of her young nieces, lived in Temple City, a suburb of Los Angeles. He was assigned to duty in the Temple City substation of the sheriff's office. A room in the back of the house was rented to one Loomis, who had occupied it for more than two years.

Eggers told the jury that his marriage to Dorothy had been a happy one until two years before her death. She then told him, he declared, that she was starting the change of life and subsequently she had been difficult to get along with. He also mentioned having heard rumors that his wife had gone to dances and picked up men, but because he trusted her he "did not give it much thought."

Just prior to her "disappearance," Eggers and his wife had an argument about Christmas presents. She reproached him for not getting a present for Loomis and called him a "cheap skate," but she "had a mad on." At about the same time, as Eggers related the events, Dorothy told him that the "pink slip" showing ownership of their automobile had been burned accidentally. He obtained an application for a duplicate certificate which he "got her to sign" although "she was reluctant" to do so. The title to the car was in her name, and she also signed a power of attorney, which he prepared, authorizing him to transfer or otherwise deal with the automobile. His explanation of the reason for wanting the change in title was that she had been involved in two accidents and he wished to protect his interest in the automobile if she was "killed or something."

Witnesses other than Eggers testified that they had last seen Dorothy alive on the morning of December 28th. As a witness in his own behalf, Eggers stated that on December 29th he went to work at 5 p. m. and returned home at approximately 1 a. m. on the following morning. As he came near his home he heard the front door slam and saw a man, after coming from the house, walk hurriedly down the street. Eggers entered from the rear of the house, and upon turning on the lights found his wife standing without any clothes on in their bedroom.

As he related to the jury what then occurred, he told his wife, "Well, I am going to fix the old Doc from ever coming back here again." He grabbed a gun out of the chiffonier and Dorothy stepped into the hallway to intercept him. He tried to get out toward the front door and she struggled with him. After some struggling they worked their way to the bathroom. "I was trying to shove her away," he declared, "and she was trying to pull me, and then we both fell in the bathroom, and the gun went off."

According to his testimony, Eggers only remembers one shot. He next found himself "sitting on the toilet seat, crying and scared, and then I know I got in the car, and somebody else was in that car and kept saying, 'She is in back, she is in back.'" But he could not identify the other person. He drove out to Long Beach where he stayed until daylight. He then returned home, went to his bedroom and slept. His explanation as to why, after he shot his wife, he did not get a doctor for her, was: "I do not know whether she was hurt badly, or hurt at all, but I got an idea she was shot, and the next thing I know I was in the car."

Testimony offered by the state shows that the day after the body was discovered, Eggers went to San Bernardino "to look at it." He called at the sheriff's office there, but after some discussion with the deputy in charge, left without viewing the body. Before returning to Temple City, he telephoned to his brother-in-law in Los Angeles, and, being unable to reach him, had the call transferred to his own home where he talked with Loomis. He told Loomis to call the brother-in-law and tell him that the body was not that of Mrs. Eggers because the feet were too large; they "were as big as Garbo's."

He told Loomis he had seen the body, when he had not done so, Eggers explained, because he did not want anyone to know that he had been given the "brush-off" by the sheriff's office. In response to his inquiries, he told the jury, he was told that the body could not be that of his wife for it measured 58 inches from the shoulders to the soles of the feet. Eggers said that his wife was five feet five inches tall. Upon another occasion he fixed her height as five feet two inches. Other evidence tends to prove that she was five feet seven or eight inches in height.

At one time Eggers told the sheriff of San Bernardino county that the body was that of his wife, and he would claim it for burial, if he were in a position to do so. But, at the trial, he insisted that he believed her to be alive.

On January 4th Eggers sold his wife's engagement and wedding rings to a jeweler for $10, using an assumed name and giving a fictitious address. His explanation of this action was that he knew his fellow employees in the sheriff's office were suspicious of him, and if his wife's rings were found at his home "it would implicate" him. At one time he stated that he found the rings in a bureau drawer after her "disappearance"; previously he told the officers that he removed the rings from her body after the fatal shot.

One witness testified that on January 3rd she had seen Eggers working on the back of his automobile. He appeared to be cleaning the baggage compartment.

The record shows that two weeks later Eggers sold the car to one of the deputies in his office. The buyer noticed that the registration certificate was in the wife's name and, knowing of the missing person report, he asked Eggers how the car could be transferred without her signature. Eggers replied that she was available and he would get her signature; everything would be all right. Marie, the eldest of Dorothy's nieces living at the Eggers home, testified that he asked her to go to the Division of Motor Vehicles with him and sign her aunt's name to the papers. To comply with this request, she practiced writing Dorothy's name several times, but Eggers finally signed his wife's name to the ownership certificate and obtained another one in the buyer's name. After Eggers was arrested, the certificate showing that the car was owned by Mrs. Eggers was found among her effects.

Expert witnesses testified that although it appeared that the trunk compartment of the automobile had been cleaned recently, small spots of human blood were found in it. Human blood was also found in some grease on the floor of the garage at the Eggers' residence and in the bathroom of the house.

Eggers was arrested on January 22nd and statements were taken from him. In one of these statements he wrote out the directions to follow to find the place where he had thrown his gun and also a saw which, the prosecution maintains, was the instrument used in severing the head and hands from the body.

The blanket in which the body had been wrapped was identified as one belonging to Eggers. The gun and saw were found by following the directions given in his statement. Upon the gun there was a fatty, greasy substance and human blood. Numerous bits of tissue, bone and fatty debris were found under nearly its entire surface. One piece of bone, a rather large fragment, was forcibly wedged between the clip and frame.

A ballistics expert testified that the bullets found in the body of Mrs. Eggers were fired from this gun. The saw bore the initials "A E," which appeared to have been there for some time. Eggers told the jury that he found the gun and saw in the "screen room" at his house several days after his wife had been shot, and because he felt they had been placed there by someone to "frame him" for the murder, he disposed of them.

Upon this evidence, the jury returned a verdict of guilty of murder of the first degree, without recommendations as to the punishment to be imposed. The court then ordered that the issue as to the sanity of Eggers be submitted to the same jury. But before the sanity hearing commenced, the trial judge was informed by one of the jurors that she "had a closed mind" upon the question. And the jury foreman "practically served notice" upon him "that if the same jury were retained it would be a hung jury." The jury was then dismissed and another jury impaneled to hear the sanity issue because, in the judge's opinion, "the members of the jury have disregarded the instructions we gave them about discussing the sanity of the defendant on the first issue." The hearing proceeded notwithstanding the objections of counsel for Eggers, who moved for a mistrial. Following the overruling of objections and denial of the motion, the jury found that Eggers was sane at the time of the commission of the crime.

The judgment is challenged upon four grounds. First, it is contended, the evidence is insufficient to support a conviction of murder in the first degree. Second, the court erred prejudicially to the substantial rights of the accused in instructing the jury. The third point relied upon for reversal is that the procedure followed in impaneling a second jury for the determination of the issue of sanity rendered the trial upon the merits a mistrial and the subsequent hearing a nullity. Lastly, Eggers claims that the argument of the district attorney before the jury was unfair and prejudicial to him in the determination of the degree of the crime.

Several recent decisions of this court are relied upon to support his contention that if his own testimony is not worthy of belief and was disregarded by the jury, then the only proof is that Dorothy Eggers was killed by him, presumably in an unlawful manner. Under such circumstances, he argues, there is not a single fact which affirmatively shows (1) that he shot his wife with malice aforethought (2) that he possessed an abandoned and malignant heart, or (3) that he acted intentionally, wilfully and with premeditation, and he is guilty of no more than murder in the second degree.

Murder is defined as "the unlawful killing of a human being, with malice aforethought." Sec. 187, Penal Code. To constitute murder of the first degree (Sec. 189, Penal Code) the homicide must have been perpetrated "by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing" or one committed in the perpetration of certain enumerated felonies.

[1-3] It is "the exclusive province of the jury to determine from the evidence whether the killing was the 'wilful, deliberate and premeditated' act of defendant" People v. Wells, 10 Cal.2d 610, 624, 76 P. 2d 493, 501. However, "as is true as to all factual issues resolved by a jury, the evidence upon which the determination is made is subject to review on the question of its legal sufficiency to support the verdict." People v. Holt, 25 Cal.2d 59, 90, 153 P.2d 21, 37. This court may not, in reviewing the evidence, substitute its judgment for that of the jury, and, where there is substantial evidence in support of the jury's verdict, its determination must be upheld. People v. Holt, supra; People v. Smith, 15 Cal.2d 640, 104 P.2d 510; People v. Wells, supra; People v. Rico, 180 Cal. 385, 181 P. 663; People v. Mahatch, 148 Cal. 200, 82 P. 779. Conversely, to justify the reversal of a judgment of conviction, the record must clearly show that the evidence could not be interpreted as supporting the verdict. People v. Tedesco, 1 Cal.2d 211, 219, 34 P.2d 467.

[4] Applying these rules, the evidence justifies the conviction of Eggers for murder of the first degree if it shows that the killing was the result of a wilful, deliberate and premeditated intent to kill. But express evidence of a deliberate and premeditated purpose to take life need not be shown. Deliberation, premeditation and wilfulness may be inferred from the proof of such facts and circumstances as will furnish a reasonable foundation for such a conclusion. People v. Smith, supra, 15 Cal.2d at page 647, 104 P.2d 510; People v. Cook, 15 Cal.2d 507, 514, 102 P.2d 752; People v. Dale, 7 Cal.2d 156, 159, 59 P.2d 1014; People v. Machuca, 158 Cal. 62, 64, 109 P. 886; People v. Mahatch, supra, 148 Cal. page 202, 82 P. 779.

[5-8] When there is no direct evidence in regard to the means by which the homicide was accomplished, it does not support a verdict of murder in the first degree unless proof of intent is shown by the surrounding circumstances. No rule can be laid down as to the character or amount of proof necessary to show deliberation and premeditation; each case depends upon its own facts. These elements of murder in the first degree may not be inferred from the killing alone, but are matters of fact, which cannot be implied as matters of law. However, the nature of the weapon used, or acts of malice which, in the usual course of things, would cause death, or great bodily harm, tend to provide a reasonable basis for a conviction of murder in the first degree. In arriving at the intention of the defendant, regard should be given to what

occurred at the time of the killing, if indicated by the evidence, as well as to what was done before and after that time. People v. Cook, supra. Here, the record establishes more than the fact that Dorothy Eggers was unlawfully killed by her husband, and from the evidence as to the relations between Eggers and his wife up to the time of the homicide, the type of weapon employed, its condition when found, the means of disposing of the body, the efforts made to prevent identification, and his conduct both prior to and immediately after the crime was committed, the conclusion of a deliberate intention to kill is fairly deducible.

[9] It is only the testimony of Eggers which tends to show lack of premeditation. The jury apparently rejected his explanation of how the killing occurred and in doing so refused to accept the "portions of the evidence as might have tended to show lack of premeditation, when weighed against other evidence adduced to the contrary. The jury was justified in accepting such portions of defendant's testimony as appealed to it, and in rejecting those portions it did not believe." People v. Smith, supra, at page 648 of 15 Cal.2d, at page 514 of 104 P.2d.

Eggers refers to People v. Kelley, 208 Cal. 387, 281 P. 609, where the crime was reduced from murder of the first degree to manslaughter. But there the decedent "was killed under circumstances tending to show an accidental or unpremeditated killing." People v. Murphy, 1 Cal.2d 37, 40, 32 P.2d 635, 637. The evidence tended to prove that the victim died while engaged in a voluntary debauch with the defendant and the fatal injuries appeared to be the natural result of the orgy. In People v. Howard, 211 Cal. 322, 295 P. 333, 336, 71 A.L.R. 1385, "the record is entirely destitute of evidence tending to establish the circumstances and conditions actually existing just prior to and at the time of the striking the fatal blow" if the defendant's statement was disregarded. People v. Mendez, 27 Cal.2d 20, 29, 161 P.2d 929. But neither of these cases is here in point because the physical facts and circumstances concerning the death of Dorothy Eggers provide ample evidence from which the jury could conclude, beyond a reasonable doubt, that the killing was wilful, deliberate and premeditated.

Nine assignments of error are made concerning the instructions to the jury. Eggers first contends that it was prejudicial error to state that every killing perpetrated by means of torture is murder of the first degree. It was erroneous to give a definition of torture, he asserts, because the evidence presented against him is insufficient, as a matter of law, to prove that the death of Dorothy Eggers was accomplished by torture. He does not question the textual correctness of the instruction, but he asserts that the giving of any instruction upon this subject "amounted to a statement to the jury that there was evidence before it from which killing by torture might be found and made the basis of a verdict carrying the death penalty." The evidence does not show sufficient facts from which it can be inferred that Dorothy Eggers died as the result of torture.

[10, 11] It is error to give an instruction which, although correctly stating a principle of law, has no application to the facts of the case. People v. Roe, 189 Cal. 548, 558, 209 P. 560; People v. Silver, 16 Cal.2d 714, 722, 108 P.2d 4; People v. Mandell, 48 Cal.App.2d 806, 817, 120 P.2d 921. To charge the jurors as to an issue not predicated upon some theory logically deducible from the evidence presents for consideration a question not properly determinable by them. However, the giving of such an instruction does not justify a reversal of the judgment unless it is affirmatively shown that the error would prejudice the rights of the defendant. In the present case, considering his admissions and the evidence tending to prove that the killing was wilful, premeditated and deliberate, the record clearly shows that the defendant suffered no prejudice. Accordingly, there is no error justifying a reversal of the judgment. Const., Art. VI, Sec. 4½.

[12] Eggers also argues that the following instruction is misleading and erroneous: "The law does not require demonstration or that degree of proof which, excluding all possibility of error, produces absolute certainty, for such degree of proof

is rarely possible. Only that degree of proof is necessary which convinces the mind and directs and satisfies the conscience of those who are bound to act conscientiously upon it." It is asserted that the use of the word "conscience," in effect, told the jury to "let your conscience be your guide" and ignore the rules of reasonable doubt and burden of proof. The instruction, says Eggers, "leaves the whole decision to conscience." But it has been held that such an instruction, given in conjunction with one defining reasonable doubt, is not erroneous. People v. Derenzo, 46 Cal.App.2d 411, 416, 115 P.2d 858. In the present case reasonable doubt was defined in the language of section 1096 of the Penal Code. The challenged instruction refers to a degree of proof "which convinces the mind and directs and satisfies the conscience". By the two instructions, read together, the jurors were told that each of them must satisfy his conscience as to the guilt of Eggers and be convinced, beyond a reasonable doubt, as to his guilt.

[13] The next assignment of error is the refusal to give an instruction which Eggers concedes was covered by instructions given, but "from a prosecution viewpoint". It is not error to refuse a proffered instruction when the law on the subject is correctly stated in other instructions. People v. Morales, 26 Cal.App.2d 442, 444, 79 P.2d 771.

[14] Complaint is also made of the following instruction which relates to the time for deliberation: "The law does not undertake to measure in units of time the length of the period during which the slayer must deliberate and premeditate or ponder over the killing before he has formed the intent to kill. The true test is not the duration of the time but the extent of the reflection. Thoughts may follow each other with great rapidity and cold calculating judgment may be arrived at quickly. It is for you to say from all the evidence in this case whether or not the defendant premeditated the slaying of Dorothy Eggers, if you find from the evidence beyond a reasonable doubt that he did kill her." Eggers takes the position that under the law as stated in People v. Honeycutt, 29 Cal.2d 52, 172 P.2d 698, 702, and People v. Bender, 27 Cal.2d 164, 163 P.2d 8, the instruction was prejudicially erroneous. However, this is not the "repeatedly criticized stock instruction" which, in the Honeycutt case, this court held was erroneous. To say that "thoughts may follow each other with great rapidity and cold calculating judgment may be arrived at quickly" is not the same as saying that one "may premeditate the moment he conceives the purpose." Indeed, the instruction here challenged shows that it was carefully prepared to meet the requirements recently laid down by this court in the Honeycutt and Bender cases. As was said in the Honeycutt case, "the jury may be told that the brain can function rapidly [but] they must not be misled into thinking that an act can at the same time be hasty, hurried, and deliberate or impulsive, unstudied, and premeditated." People v. Honeycutt, 29 Cal.2d 52, 60, 172 P.2d 698, 703. Moreover, "deliberation" and "premeditation" were properly defined in other instructions.

Eggers also complains of the court's failure to give certain instructions which he proposed. One, upon the subject of conjecture or surmise, was sufficiently covered by another requested by him, stating the law in this regard. The same is true as to one relating to the effect of disbelief of the testimony of a witness.

[15] An instruction requested by Eggers to the effect that extra-judicial statements made by him could not be used for purposes of impeachment if they were induced by threats, menace or promises of reward, was also refused. The law in regard to such statements was not stated to the jury, but the evidence did not require it to be included in the charge to the jury. No extra-judicial statements of Eggers amounted to a confession. In fact, he denied his guilt or any connection with the death of his wife until he became a witness in his own behalf and the rules as to proof of the voluntary character of extra-judicial statements apply only with respect to confessions (People v. Fowler, 178 Cal. 657, 664, 174 P. 892) or to statements which include an important incriminating fact. People v. Nagle, 25 Cal.2d

216, 223, 153 P.2d 344. The principles applicable to the extra-judicial statements made by Eggers are fully stated in the general instructions as to credibility of witnesses. Furthermore, his testimony does not show that any of such statements was made because of threats or menace. The promise that if he confessed he would be sent to Mendocino was allegedly made by Jones and Rotchford, two defense witnesses, and the conversations of Eggers with them are not in evidence.

[16] Eggers also declares that the theory of his defense was ignored by the refusal to give an instruction requested by him concerning killing in the heat of passion or with considerable provocation. But, as he related the circumstances, the shooting was accidental. At no time has he asserted that he shot his wife in the heat of passion or with provocation. The refusal to give the instruction was, therefore, not error, and the instructions given defining voluntary manslaughter sufficiently covered the subject. And, for reasons which have been stated, an instruction directing the jurors that they could not find Eggers guilty of murder in the first degree was properly refused.

Considering the procedure which followed the determination of the issue presented by the plea of not guilty, the record shows an unusual situation. After the trial judge was informed by one of the jurors that she had "a closed mind" upon the issue of insanity and the foreman declared that no verdict would be returned if the same jury was retained, the judge called counsel into his chambers. He explained what had occurred and stated that "in the interest of the defendant, the State and * * * the taxpayers * * * it would be better to dismiss this jury and impanel another one." The judge also stated that, notwithstanding the juror's denial, he believed that in deciding the issue of guilt, the question of insanity had been discussed, contrary to his admonitions. Counsel for Eggers objected to the dismissal of the jury, declaring that he would move for mistrial and request a new trial.

The jury was dismissed over these objections. Motions for an order declaring a mistrial and a new trial were denied and a new jury was impaneled to determine the insanity issue. Counsel for Eggers thereupon objected to the introduction of any evidence as to his sanity upon the grounds that the court was without jurisdiction because (1) it had erred in dismissing the former jury and (2) it should have declared a mistrial for misconduct of the first jury. This objection was overruled. Following the presentation of evidence, Eggers was found to be sane at the time of the commission of the crime.

[17] Counsel does not now press the point that there was any misconduct on the part of the first jury. In fact, he concedes that the trial judge was not justified in concluding that his order to the jurors directing them not to consider the sanity of Eggers had been disobeyed. This position is required by the law. "The presumption is that the jury performed their duty with fidelity to their oath, and that they observed the admonitions of the judge as to their conduct, and this presumption can be overthrown only by showing some act of positive misconduct." People v. Kramer, 117 Cal. 647, 649, 650, 49 P. 842. In the face of the positive denial by the juror that the admonitions of the trial judge had been disobeyed, there is no basis for a conclusion that there was any actual, much less prejudicial, misconduct. The motions for a new trial and for an order declaring a mistrial were, therefore, properly denied. Sec. 657, Code, Civ.Proc.; sec. 1181, Penal Code.

But a further point urged on behalf of Eggers is that, although there was no misconduct upon the part of the jurors, they were dismissed because of the assumed misconduct. To dismiss the jurors, it is argued, after they were directed to try the second issue, was beyond the court's jurisdiction and an acquittal is in order since "jeopardy has attached" when the jury has been sworn and it stands charged with the deliverance of the defendant.

[18, 19] It is true that the determination of the issues presented by the pleas of not guilty and not guilty by reason of insanity constitute but one trial. People v. Marshall, 209 Cal. 540, 547, 289 P. 629.

But it is a single cause with separate issues to be tried separately (People v. Leong Fook, 206 Cal. 64, 76, 77, 273 P. 779), and error in the trial of the issue of sanity does not entitle the defendant to a retrial upon the issue presented by the plea of not guilty. People v. Messerly, 46 Cal.App.2d 718, 720, 116 P.2d 781; People v. Mallette, 39 Cal. App.2d 294, 300, 102 P.2d 1084; People v. Lamey, 103 Cal.App. 66, 70, 283 P. 848. The dismissal of the jury did not, therefore, affect the validity of the determination of guilt. Although judgment cannot be pronounced upon the verdict as to the issue of not guilty until the sanity of the defendant has been determined, the first verdict will not be set aside upon the basis of alleged error occurring after the trial of the first issue is completed. People v. Marshall, supra, 209 Cal. at page 548, 289 P. 629.

[20, 21] Section 1026 of the Penal Code authorizes a separate trial upon the issue of insanity and specifically authorizes the court, in its discretion, to retain or dismiss the jury which tried the first action. The direction to retain the first jury is denominated an order. (Sec. 1003, Code of Civil Proc.), and every court has power to amend and control its orders so as to make them conformable to law and justice. Code, Civ.Proc., Sec. 128, subd. 8. Unquestionably the trial court was invested with jurisdiction to make an order retaining the jury, and it must be conceded that it has jurisdiction to modify, revoke, or set its orders aside. Imperial Beverage Co. v. Superior Court, 24 Cal.2d 627, 150 P.2d 881; Harth v. Ten Eyck, 16 Cal.2d 829, 108 P.2d 675; De la Beckwith v. Superior Court, 146 Cal. 496, 80 P. 717; Burbank v. Continental Life Ins. Co., 2 Cal.App.2d 664, 38 P.2d 451; Struck v. Superior Court, 138 Cal.App. 672, 32 P.2d 1110; City of Los Angeles v. Oliver, 102 Cal.App. 299, 283 P. 298. The rule as stated in De la Beckwith v. Superior Court, supra, at page 499 of 146 Cal., at page 718 of 80 P. is as follows: "It is a most common occurrence for a trial court to change its rulings during the progress of a trial upon questions of law, and no one would contend that it is not within its power to do so, or that it should not do so when satisfied that the former ruling was erroneous." The ruling that the same jury be retained to try the insanity issue occupied no better position in this regard than any other determination and, under the circumstances shown by the present record, the court was fully justified in revoking it.

In a supplement to his opening brief, Eggers contends that the trial was so infected with unfairness caused by the prosecution's arguments that the jury was swayed by prejudice in fixing the degree of the offense. The basis for this conclusion is that the arguments before the jury by the prosecution as to torture was "entirely predicated on the unwarranted theory that pieces of bone were found on the gun" and this conclusion has no factual basis in the evidence.

The Technical Director of the Scientific Crime Investigation Laboratory of the Los Angeles Police Department testified that he found "tiny fragments of bone tissue" as well as deposits of fat, tissue and human blood upon the gun. He made a spectrographical analysis of a small fragment of the bone "to determine whether or not it contained the elemental constituents of bone." Calcium, magnesium, and borum, and a trace of copper, elements consistent with the composition of bone, were found. He stated that phosphorous was not shown in this analysis and although phosphorous is present in all bone, he "would have had to use a larger sample" to demonstrate its presence. From this testimony it is argued that the test did not show human bone.

[22-25] The testimony of the expert was the basis of the argument of the district attorney. "It is the province of a district attorney to state to a jury the various conclusions that he draws from the evidence, and to make it clear to the jury that conclusions in his opinion should be drawn from the evidence introduced, so long as he keeps within the scope of conclusions which may properly be drawn." People v. McKenzie, 12 Cal.App.2d 614, 615, 616, 55 P.2d 1200. "The right of counsel to discuss the merits of a case, both as to the law and facts, is very wide, and he has the

right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom. The adverse party cannot complain if the reasoning be faulty and the deductions illogical, as such matters are ultimately for the consideration of the jury." People v. Sieber, 201 Cal. 341, 355-356, 257 P. 64, 70. In the argument before the jury, any reasonable inference may be drawn from the evidence, and it is a matter within the discretion of the trial court to determine whether counsel stays within the permissible range of discussion. People v. Hoyt, 20 Cal.2d 306, 318, 125 P.2d 29. Assuming that, giving effect to these rules, counsel "illogically deduced" that a finding of torture could be inferred from the evidence, at least in the absence of objection, it does not amount to misconduct which has prejudiced defendant's rights.

The judgment and the order denying a new trial are affirmed.

GIBSON, C. J., and SHENK, CARTER, SCHAUER, TRAYNOR, and SPENCE, JJ., concur.

Rehearing denied; CARTER, TRAYNOR, and SCHAUER, JJ., dissenting.

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**30 Cal.2d 694**

## PEOPLE v. HILLS.

Cr. 4767.

Supreme Court of California, in Bank.

Oct. 3, 1947.

Rehearing Denied Oct. 27, 1947.

**1. Homicide** 🔑253(3)

To establish first-degree murder, the premeditated or deliberate intent need not be shown by direct evidence, but may be inferred from the proof of such circumstances as will furnish a reasonable foundation for such a conclusion. Pen.Code, § 189.

**2. Criminal law** 🔑260(11)
**Homicide** 🔑332(1)

In prosecution for first-degree murder, the drawing of an inference of premeditated or deliberate intent is a matter exclusively within the province of the jury, or of the trial court when a jury trial has been waived. Pen.Code, § 189.

**3. Criminal law** 🔑1159(3)

On appeal from a conviction, it is not the province of the Supreme Court to determine conflicts in the evidence, or to choose between different inferences which reasonably may be drawn from the testimony, but the sole question, so far as the admissible evidence is concerned, relates to its sufficiency to support the verdict.

**4. Homicide** 🔑332(2)

If there was substantial evidence in record to support first-degree murder conviction, the determination was required to be upheld by the Supreme Court. Pen.Code, § 189.

**5. Homicide** 🔑147

In prosecution for first-degree murder, evidence of the means used in killing deceased may support an inference that the killing was willful, deliberate, and premeditated. Pen.Code, § 189.

**6. Homicide** 🔑253(3)

Evidence, and inferences to be drawn therefrom, justified finding of a deliberate intention to kill and warranted conviction of husband for first degree murder of wife. Pen.Code, § 189.

**7. Criminal law** 🔑1134(1)

An appellate court's function is to correct errors of law.

**8. Criminal law** 🔑260(11)

Where a jury has been waived, before conviction may be set aside on appeal, it must clearly appear that on no hypothesis is there sufficient evidence to support the conviction.

**9. Criminal law** 🔑260(11)

The trier of fact is the sole judge of the weight and worth of the evidence.

**10. Criminal law** 🔑1128(1)

A "Memoranda of Decision" filed by trial judge in murder prosecution wherein jury was waived, stating conclusions that trial judge had drawn from the evidence, did not constitute findings of fact and could not be used to modify the judgment.

**11. Criminal law ⟹531(3)**

In first-degree murder prosecution, wherein trial by jury was waived, evidence sustained trial judge's finding that confessions and extrajudicial statements made by defendant were not procured by either mental or physical coercion. Penal Code, § 189.

CARTER, SCHAUER, and TRAYNOR, JJ., dissenting.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Frederick R. Hills, Jr., was convicted of murder in the first degree, and, from the judgment and order denying a new trial, he appeals.

Judgment and order affirmed.

Hahn, Ross & Goldstone, Sanford Simon, and S. S. Hahn, all of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

EDMONDS, Justice.

When charged with the crime of murder of the first degree, Frederick R. Hills, Jr., waived a trial by jury. He was convicted of that offense and the death sentence was imposed. His appeal from the judgment and from an order denying a new trial challenges these determinations principally upon the ground that the evidence is insufficient to support the conclusions of the trial judge in regard to his guilt.

The victim of the homicide was Doris Hills, the appellant's wife. She was described as being about five feet tall and weighing less than one hundred pounds. At the time of her death, they were living together. The two sons of the couple had left the home of their parents but a daughter, with her husband and a small child, were members of the household.

It appears that Mr. and Mrs. Hills had a happy married life until about four years ago, when they quarreled over the marriage of their daughter, Carol, at the age of sixteen. Hills opposed her marriage but his wife gave the necessary consent. The argument was never forgotten and continued to be the cause of much bitterness between the parents.

Carol married a soldier and while he was away on military duty, she and her baby returned to the family home. When Carol's husband was discharged from the army, he joined them and the three continued to live with Mr. and Mrs. Hills.

Difficulties between Carol and her husband accentuated the discord in the Hills' home, and a controversy between Mr. Hills and one of his sons added to the family disturbance. The son, Richard, tried to borrow money from his father to buy an automobile. Hills either did not have it or refused to make the loan and suggested that Richard obtain the necessary amount by selling his two motorcycles. Richard borrowed the money from a friend. The dispute caused hard feelings between Hills and his son, and Richard was ordered out of the home. He has lived with his aunt since that time.

There were other causes for inharmony. As a result of physical difficulties, for two or three years Mrs. Hills had been nervous and irritable, and she and her husband engaged in many discussions regarding the rearing of children. Apparently these arguments were unending.

Financial matters also brought about dissension. Hills closed a joint bank account which had been maintained by him and his wife and deposited the money in his own name. A quarrel followed in which Hills claimed that his wife did not "know the value of a dollar," spent too much money and overdrew the account. Shortly before her death, Mrs. Hills inquired of an attorney in regard to her property rights in the event of a divorce. There was testimony that Hills knew of these inquiries, although at another time he denied any knowledge of them.

Hills admits that he killed his wife on a December night, but he has given several different versions as to the manner in which it was accomplished. However, the testimony of Carol, her husband, and Hills is without conflict as to the events which preceded the homicide.

At the dinner table, Carol's baby was making considerable noise. Her husband told her to keep the baby quiet, which prompted Mrs. Hills to say, "Well, that sure is a heck of a way to bring up a kid," whereupon she walked out of the room. Hills went to milk the cows. When he returned, his wife was reading a magazine; Carol, her husband and the baby were in another room. The young people went to bed. Hills started reading a magazine and later asked his wife why she had "jumped on" Carol's husband. She replied that she did not like him any more. There was some discussion about the other children. Hills then left the house to check the boiler in the greenhouse.

Upon his trial, Hills declared that, on his way back from checking the boiler, he was struck across the shoulders and did not know exactly what happened. According to his testimony, the next thing he remembered was seeing his wife lying on the floor of the shed. After turning on the light he tried to discover what had happened. Upon listening to her heart and not hearing any beat, he attempted to revive her by artificial respiration.

He then recalled that he walked up and down, wondering what to do next, and later dug a hole. Upon cross-examination he admitted burying his wife in this hole, which was in a squash patch. He then went to bed without awakening his daughter or her husband.

The next morning Carol prepared his breakfast. He asked her if she knew where her mother was, attempting to hide his distress from her. Later he and Carol went to friends in the neighborhood, asking if they knew anything about the whereabouts of Mrs. Hills. In his testimony, Hills admitted that he then knew his wife was dead and had been buried in the garden. But he declared that at times he suffered "black-outs" which were caused by a dusting powder used by him for killing bugs in the greenhouse. He attributed loss of memory as to just what had happened in the shed at the time he killed his wife to one of these "black-outs."

Two days after the homicide, Hills and Carol reported to the police that Mrs. Hills was missing. A report made by Richard, the son, was then on file but Hills denied that he had any knowledge of it at that time.

It was more than a month after the crime was committed before Hills was questioned by the police. He then told them that, following his wife's "flare-up" at the dinner table, he had gone out to take care of the boiler. When he came back to the house, he went to bed and did not see Mrs. Hills again. He got up several times during the night to check the boiler; each time he came back the lights were still on and he did not see his wife. When asked if this was not unusual he replied that she often read or sewed at night after he had gone to bed.

Some time later, he assisted the officers in searching the premises, but he did not lead them to the squash patch, nor indicate where his wife was buried. Although he then refused to take a lie detector test, he later submitted to one. But when he was informed that the result of the test was unsatisfactory, he declined to take another one. He placed his refusal upon the ground that the test hurt his chest and his heart troubled him.

The police did not visit him again for six months. They then went to his home at ten o'clock at night and arrested him on a charge of suspicion of murder.

The next morning Hills refused to take the lie detector test, but after consultation with his attorneys he agreed to do so. The test was given by the inventor of the instrument and lasted for about two hours. The officers were not present, but at various intervals they were given reports as to its progress.

Following the test, Hills told the officers that he had killed his wife. As he related the circumstances to them, on the night of the crime he made several trips to the greenhouse to check the boiler. During the last of these visits, while he was in the greenhouse, to his great surprise, he was struck across the shoulders with an iron bar. He whirled around and grappled with the person, who was unknown to him at the time. He felt a fur coat, and losing his head, struck at the person several times. He realized that his assailant was a woman, he said, and he grabbed her by the throat. At that time he did not know that she was his wife. A few moments later she stopped struggling and was lying on the floor. He then recognized her as his wife and tried to revive her by artificial respiration. He thought she was dead and decided to bury her. He went out and got a shovel and buried her in the squash patch.

Hills indicated to the officers on a map where the body was buried, and told them he would show them the grave. They took him to his home and started digging at the place indicated by him.

A pair of brown oxfords and a pair of blue denim slacks were first discovered. Hills identified the shoes as belonging to his wife. Stockings were stuffed in the toes of the shoes. About a foot deeper, a decomposed body was found, clothed in a fur coat, a blouse, slacks, a man's type underwear and shorts. The body was without shoes or stockings. The grave was between five and six feet deep.

In a statement given by Hills at that time he repeated the story he had told before, but said that he did not know how long it took him to dig the grave, or to bury his wife; also that he did not recall throwing the shoes and slacks on top of the body. He was certain that he did not take anything from the house to put in the grave. He did not call his wife to come out there, nor did he go out to the greenhouse with her. As he and his wife had not quarreled in weeks, he had no idea why she would come out and strike him with an iron pipe. He also denied any knowledge of his wife's inquiries as to a divorce and a division of the property. When he realized what he had done, he stated, he thought it best to make it appear that she had left him.

Later, during this same statement, Hills said he was not sure whether he went to the house and got her shoes and slacks and threw them in the grave, but "it could be." He also told the officers that he did not have any quarrel with his wife in the house; they were sitting on the wrapping bench in the greenhouse and got to arguing and he choked her, but did not strike her. His wife had accompanied him when he went out to check the boiler. They were talking about Richard and she berated him for ordering Richard out of the house. This argument caused him to become so angry that he strangled her.

A few days later, in an interview with Dr. DeRiver, official psychiatrist of the Los Angeles Police Department, Hills said that he and his wife had an argument while they were in bed. When the boiler started smoking, he got up and dressed and his wife said that she was going with him to finish the argument. They came back through the greenhouse to the shed and sat on a bench and continued the argument, which was about Richard, for about half an hour. He then "blew his top." Hills had called Richard a "God damn bastard," and his wife said that her husband "was ten times that," so they started tussling. He grabbed her throat and choked her, while she was on the floor of the shed. He stated he "never let go" of her after he got hold of her throat. After the grave was partly dug, he went back to the shed and she was cold; he felt the coldness when he picked her up. He told Dr. DeRivers that he did not know that he hated his wife; he did not believe that he had planned to kill her, nor did he think he intended to kill her.

The autopsy surgeon testified that because of the decomposed condition of the body, he was unable to give a definite cause of death. It was not certain that death was caused by manual strangulation; he could say that manual strangulation was present, but she may have died from suffocation. He explained that he had no way of knowing whether Mrs. Hills was dead when she was buried; it was possible that she was then still alive. Although there was no soil or dirt in what remained of the lungs, or in the chest cavity and bronchial tubes, it does not follow that she was dead at the time of burial because the soil, being moist, would not necessarily have been inhaled. Soil was found in the mouth and eyes, he said, but this would not necessarily be conclusive evidence that the person was buried alive. It would be possible for soil to be in the mouth whether the person was alive or dead when buried.

Upon this evidence the trial judge, sitting without a jury, convicted Hills of the crime of murder of the first degree and imposed the death sentence. As grounds for the reversal of the judgment, Hills maintains that although his wife may have been strangled, this could not be a circumstance tending to show premeditation or deliberation. He also asserts that it was error to admit his confessions and admissions in evidence as having been freely and voluntarily made. Finally, he argues that the record shows no crime of a degree greater than manslaughter.

[1, 2] To constitute murder of the first degree, there must be evidence showing that the killing was the result of a wilful, deliberate and premeditated intent to kill, or was accomplished by means of poison, lying in wait, or by torture, or was committed in the perpetration of certain enumerated felonies. Sec. 189, Penal Code. The premeditated or deliberate intent, however, need not be shown by direct evidence, but "may be inferred from the proof of such facts and circumstances as will furnish a reasonable foundation for such a conclusion." People v. Eggers, Cal.Sup., 185 P.2d 1; People v. Smith, 15 Cal.2d 640, 647, 104 P.2d 510; People v. Cook, 15 Cal.2d 507, 514, 102 P.2d 752; People v. Dale, 7 Cal.2d 156, 159, 59 P.2d 1014; People v. Machuca, 158 Cal. 62, 64, 109 P. 886; People v. Mahatch, 148 Cal. 200, 202, 82 P. 779. The drawing of the inference is a matter exclusively within the province of the jury, or of the trial court when a jury trial has been waived. People v. Erno, 195 Cal. 272, 279, 232 P. 710.

[3-5] It is not the province of this court to determine conflicts in the evidence, nor to choose between different inferences which reasonably may be drawn from the testimony. The sole question, so far as the admissible evidence is concerned, relates to its sufficiency to support the verdict. People v. Eggers, supra; People v. Holt, 25 Cal.2d 59, 90, 153 P.2d 21. The ultimate fact found by the trial court was that defendant was guilty of murder of the first degree. If there is substantial evidence in the record to support that judgment, the determination must be upheld. People v. Eggers, supra; People v. Holt, supra; People v. Smith, supra; People v. Wells, 10 Cal.2d 610, 76 P.2d 493; People v. Rico, 180 Cal. 385, 181 P. 663; People v. Mahatch, supra. And "evidence of the means used might support an inference that the killing was willful, deliberate, and premeditated." People v. Bernard, 28 Cal.2d 207, 211, 169 P.2d 636, 639.

[6] Applying these rules to the record in this case, from the evidence as to the relationship between Hills and his wife, and other members of his family, up to the time of the homicide, the manner of accomplishing the killing, the means of disposing of the body, the efforts made to prevent its discovery, and his conduct both prior to and immediately after the crime was committed, a deliberate intention to kill is fairly deducible.

[7-9] An appellate court's function is to correct errors of law; and where a jury has been waived, before the judgment may be set aside on appeal, it must clearly appear that upon no hypothesis is there sufficient evidence to support the conclusion reached by the trial court. The trier of fact is the sole judge of the weight and worth of the evidence. People v. Newland 15 Cal.2d 678, 104 P.2d 778; People v. Green, 13 Cal.2d 37, 87 P.2d 821; People v. Perkins, 8 Cal.2d 502, 66 P.2d 631; People v. Latona, 2 Cal.2d 714, 43 P.2d 260; People v. Tedesco, 1 Cal.2d 211, 34 P.2d 467; People v. Tom Woo, 181 Cal. 315, 184 P. 389. "It is a matter for the trial judge to be persuaded beyond a reasonable doubt and not this court." People v. Smith, 35 Cal.App.2d 73, 76, 94 P.2d 633, 634; see also, People v. Newland, supra, 15 Cal.2d at page 682, 104 P.2d 778. Clearly, from the record in the present case the required showing of premeditation and deliberation between the intent to kill and the homicide reasonably may be inferred.

The cases relied upon by defendant are not controlling. In People v. Kelley, 208 Cal. 387, 281 P. 609, the circumstances tended to show an accidental or unpremeditated killing and were not sufficient to show a deliberate or premeditated intent. And in People v. Howard, 211 Cal. 322, 295 P. 333, 71 A.L.R. 1385, the defendant's statement, showing his connection with the crime, indicated that the deceased was the aggressor in a quarrel which led to the homicide. If the defendant's statement was rejected as being untrue, the remaining evidence was insufficient to show that the intent was willful, premeditated, or deliberate. A deliberate intention may fairly be adduced, however, from the facts and circumstances surrounding the killing of Doris Hills.

[10] A "Memoranda of Decision" was filed by the trial judge in which he stated the conclusions which he had drawn from the evidence. His opinion does not constitute findings of fact and cannot be used to modify the judgment. Strudthoff v. Yates, 28 Cal.2d 602, 615, 616, 170 P.2d 873; DeCou v. Howell, 190 Cal. 741, 751, 214 P. 444; Scholle v. Finnell, 173 Cal. 372, 376, 159 P. 1179; Goldner v. Spencer, 163 Cal. 317, 320, 125 P. 347. But the credence which he gave to the testimony of Hills, and the inferences drawn from it and the evidence presented by the other witnesses, may be noted. He stated that there was ample evidence from which it could be found that Hills strangled his wife in the bedroom of their home and not in the shed; that the grave was prepared before the killing took place; and that she was still alive when buried. The motive for the homicide was said to be the belief of Hills that a divorce was inevitable and his unwillingness to give up any of the community property to his wife. The explanation of Hills as to a "black-out" was rejected, and the evidence was summarized as showing "nothing more nor less than a deliberately planned and premeditated murder which was carefully and craftily executed by this defendant."

[11] This determination finds full support in the record. The testimony also justifies the conclusion of the trial judge that the confessions and extra-judicial statements made by Hills were not procured by either mental or physical coercion. Moreover, no objection to their introduction in evidence was made.

The judgment and the order denying a new trial are affirmed.

GIBSON, C. J., and SHENK and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

The majority opinion fails to point to even a shred of evidence which might indicate that this homicide was premeditated. Indeed, it could not do so, for, as I read the record, there is no evidence, by way of inference or otherwise, of premeditation or deliberation. Although, as the majority opinion states, a premeditated or deliberate intent need not be shown by direct evidence, but "may be inferred from the proof of such facts and circumstances as will furnish a reasonable foundation for such a conclusion, and the drawing of the inference is a matter for the trier of the facts," nevertheless the facts or circumstances which furnish the "reasonable foundation" for the conclusion must be present. Here one may search the record in vain for them.

The majority opinion rests its conclusion merely upon the generalization that "from the evidence as to the relationship between Hills and his wife, and other members of his family, up to the time of the homicide, the manner of accomplishing the killing, the means of disposing of the body, the effort to prevent its discovery, and his conduct both prior to and immediately after the crime was committed, a deliberate intention to kill is fairly deducible."

The generalization means nothing. Every scintilla of evidence as to family relationship indicates that the killing must have been unpremeditated. Facts concerning the steadiness, good character, and loyalty of defendant in his family relationships abound in the record and there is no contrary showing. Some of these facts will be set forth later. As to the manner of killing and subsequent events, all indications point to the commission by defendant of an unplanned act, followed by an effort to protect the family by non-disclosure of the homicide.

Taking the elements mentioned in the above quoted general statement one by one, the first is "evidence as to the relationship between Hills and his wife, and other members of his family, up to the time of the homicide." In the third paragraph of the majority opinion it is said that up to the time the couple differed over the marriage of their daughter they apparently had a happy married life. Thereafter the home apparently became discordant. Nothing more is shown, however, than a period of general inharmony, such as has occurred at some time in many families. But even assuming that the discord was very aggravated, this would not be proof of premeditation. The mere fact that the evidence might give rise to an inference that the family life was extremely inharmonious, could by no possible stretch of the imagination lay a reasonable foundation for further inferring that the murder was premeditated. If the rule were otherwise every time motive is shown premeditation would necessarily be proven, but such is not the law.

The second element mentioned in the general statement of the majority is "the manner of accomplishing the killing." The evidence with respect to the manner of accomplishing the killing contains nothing upon which to base an inference of premeditation. Even if it be conceded that defendant strangled or choked his wife, that fact does not supply the element of premeditation, or of "torture" as that term is used in section 189 of the Penal Code. People v. Bender, 27 Cal.2d 164, 177, 163 P.2d 8. The evidence shows no more than that defendant killed his wife and buried the body; it does not show deliberation or premeditation.

The next element mentioned in the general statement is the "means of disposing of the body." The only evidence with respect to disposition of the body is that defendant secretly buried it. Let this be so. The fact that a perpetrator of homicide buries the body of his victim, does not show that the killing was premeditated. It merely shows an effort to conceal the homicide.

Lest it be inferred from the factual resume in the majority opinion and its analysis of the testimony of the autopsy surgeon, that there was a showing from which burial alive might be inferred, thus giving rise to a further inference of premeditation or deliberation, it must be pointed out that the analysis of that testimony is misleading and inaccurate. The majority opinion states, with respect to the testimony of the surgeon, that he was unable to give a definite cause of death; that "it was not certain that death was caused by manual strangulation; that he could not say that manual strangulation was present, but she may have died from suffocation. He explained that he had no way of knowing whether Mrs. Hills was dead when she was buried; it was possible that she was then still alive. Although there was no soil or dirt in what remained of the lungs, or in the chest cavity and bronchial tubes, it does not follow that she was dead at the time of burial because the soil, being moist, would not necessarily have been inhaled. Soil was found in the mouth and eyes, he said, but this would not necessarily be conclusive evidence that the person was buried alive. It would be possible for soil to be in the mouth whether the person was alive or dead when buried."

This resume does not present the real purport of the testimony, which was that the surgeon could not state the cause of death and could not tell what the condition of the body was at time of burial. On direct examination he testified that the body was "pretty well decomposed"; that he was unable to give "a specific, definite cause of death," but that there were findings which suggested a cause. He then explained "Well, my conclusion as to the findings was this: this advanced state of decomposition of the body does not permit of the usual findings in asphyxia. However, the tearing and loosening of the fibrous tissue supporting the junction of the body of the hyoid bone and the major cornu on the right side, and the consequent abnormal mobility of the bone at this point is consistent with trauma due to external pressure with subsequent asphyxia." He testified that he found no evidence of disease or poison, no broken bones, or bullet wound.

On cross-examination the witness was asked:

"Q. Now, what was it that attracted your attention in this particular instance to the fact that there was a possible death by manual strangulation? A. Well, I don't recall exactly. I think it seems to be general information, perhaps, from the newspapers I might have read; I am not certain of that."

In reply to the question, "In other words, you found apparently no evidence of violence or force used in causing the death of the deceased, is that right, other than what you stated about strangulation?" he answered, "That is right, and the evidence in the region of the neck, there was no extended trauma on the right side * * * The hyoid bone was not broken * * *."

The surgeon was then questioned further respecting the looseness or mobility of the hyoid bone, and said:

"I feel that there was a great likelihood of pressure being exerted to bring about that looseness.

"Q. And you could not say with certainty that the cause of death then, in this particular case was due to manual strangulation, could you? A. All I could say is that particular finding is consistent with pressure over that area, strangulation type.

"Q. That isn't the question I asked you, Doctor. I asked you if you could state with certainty—and we are dealing with certainties here—that the death in this particular case was caused by manual strangulation based upon your examination? A. No, I can't say that. I can only say that that was present, and if this person were alive at the time the pressure were exerted to bring about such changes, that it could very well and should have interfered with her breathing. I am unable to say, for example, whether or not this pressure could not have been brought about after the patient or this victim was dead.

"Q. But you do concede the difficulty in ascertaining the cause of death at all in this case because of the decomposition; isn't that correct? A. Yes, that is true."

On redirect examination the question was asked:

"Doctor, could you determine from the condition of this body at the time you performed the autopsy if this woman was actually dead when she was buried, or she may have been buried alive? A. *I have actually no way of knowing.*

"Q. And she could have been buried while she was still alive? A. Well, I think it is possible."

Thereafter, on recross examination, the doctor stated that "there was no dirt or soil in the mass of decomposed tissue that remained of the lungs," and that he did not recall finding any dirt in the eye sockets. It was then pointed out to him that his report stated that "The face, neck and scalp has a large quantity of black, moist dirt over it, the dirt filling the eye sockets, ear openings and mouth," but he reiterated that "there was no soil or dirt in the chest cavity or in the larger bronchial tubes or the lung tissue."

He was then asked:

"Now ordinarily if a person was buried while still alive, there was some dirt, that would be inhaled through the bronchial system or in the body itself proper? A. Not necessarily. It varies. If the patient was conscious and struggling and if the soil were perhaps loose and dry, it is possible to get some of it deep into the lung tissue * * *

"Q. Would you say, Doctor, that your findings here are consistent with only one finding as to the cause of death or inconsistent? A. I said it was consistent with asphyxia, but—what is your question again?

"Q. Would you say that your statement as to what the cause of death was here was consistent with no other finding? A. No, I didn't say that. I wouldn't say that."

Thereafter, on redirect examination, the following testimony was given by the doctor:

"Well, suffocation is a form of asphyxiation. Asphyxiation is the general underlying condition which is the interference with the absorption of air, oxygen, into the body.

"Q. And if a person was alive and buried and covered with wet soil, would they asphyxiate or suffocate? A. Yes, I would think so.

"Q. And you say you found soil in the mouth? And the eyes? A. Yes.

"Q. And that would be consistent with the finding that the person was alive when buried, would it not? A. Not necessarily. If this person were dead and had his mouth open, soil could go in.

"Q. But he also could do that if he was alive? A. That is right."

The matter was made even clearer on recross-examination:

"Q. Well, now, Doctor, just a minute here. You stated a moment ago that in your professional opinion that the cause of death was due to a trauma which was an injury to the hyoid bone. Now, if that occurred prior to the time that the body was placed in the grave, then the person would have been dead at the time, would they not? A. Well, not necessarily. The person might have been dead. The person might be asphyxiated and live a short time in that state of asphyxia.

Q. *You would have no way of determining that, whether death took place while the body was being placed in the grave or at the time?* A. *No, I wouldn't.*"

Although the doctor indulged in some speculation under the prod of the examiner, from his testimony as a whole and under any fair analysis of his statements, it is obvious that the purport was just this, and nothing more: That because of the decomposed condition of the body, he could not give the cause of death; that a loosened condition of the hyoid bone was consistent with death by strangulation; that he had no way of knowing whether the victim was dead or alive when buried; and that the presence of dirt in the face openings did not indicate a burial alive any more than it did a burial after death.

Such evidence affords no reasonable foundation for drawing an inference that the victim was buried alive and therefore the homicide must have been premeditated. The mere fact that a body has been buried and decomposed does not of itself give rise to the conflicting inferences that the deceased was alive or that he was dead when buried, any more than it could be inferred from the mere happening of an accident causing personal injury, either that the injured was negligent or that he was not negligent.

Certainly it is a wrong, terrible and irretrievable, to impose the death penalty merely because the burial and decomposition of the body of the victim makes it impossible to determine whether she could have been buried alive, and therefore the trier of the facts decides to infer a burial alive and from that doubtful inference draws the further inference of premeditation. The wrong is even more glaring when it is considered that in reply to the question: "Could you determine * * * if this woman was actually dead when she was buried, or she may have been buried alive?" the surgeon replied, "I have actually no way of knowing." If the prosecution's expert witness had no way of knowing the fact and refused to commit himself to even an inference, surely it was not for the court to draw the inference, and from it a further inference of premeditation, and on this foundation impose the extreme penalty. Indeed, since the expert testimony was uncontradicted, the court was bound to conclude that the inference could not reasonably be drawn.

The majority opinion refers to the statement of the doctor in reply to the question "And she could have been buried while she was still alive?" "A. Well, I think it is possible." But this answer did not qualify his other frank admissions that actually he had no way of knowing the fact. History is replete with cases of suspended animation where persons have unwittingly been buried alive, and the possibility therefore exists in any instance where burial follows close upon a supposed death. But defendant testified, and his statement was not shaken, that he thought his wife was dead when he buried her, and the expert refused to draw any inference to the contrary.

The next element mentioned in the general statement in the majority opinion is "the effort to prevent its discovery"; that is, the effort to conceal the crime. Certainly the fact that a perpetrator of homicide tries to conceal what he has done does not show premeditation. This is too obvious to require further comment. In fact, the natural reaction of a husband and father to an unintentional killing of his wife might be to protect the family by keeping the circumstances from public disclosure. In other words, he would be as apt to make an effort at concealment in the case of an unpremeditated killing as in the case of a planned murder.

Lastly, the general statement mentions defendant's conduct "both prior to and immediately after the crime was committed." The reference to the showing as to conduct before the crime was committed may be intended to point to inharmony in the home, which has already been mentioned, or perhaps to the suggestion of financial differences, although the sum involved in such differences, if any there were, was so insignificant and the showing on the subject so meager as to carry no weight. But even if it be conceded that there were financial differences, suggestions of divorce, quarrels, and the like, these alone do not constitute any evidence whatsoever of a premeditated killing. Let the fact be admitted that Mrs. Hills was nervous and irritable; that she had arguments with defendant respecting the children; that at dinner on the day of the homicide she left the room saying, "Well, that sure is a heck of a way to bring up a kid"; and that she and defendant later argued hotly in the green house. How does this prove the killing to have been premeditated? It simply shows no more than discord in the family or possible motive for the crime.

Defendant's conduct immediately after the crime was committed shows beyond doubt an effort at concealment. But evidence of concealment is not evidence from which to infer premeditation. The fact of the matter is that the evidence contains no proof whatsoever of premeditation and the writer of the majority opinion has not been able to put his finger on even one single circumstance which points to that element and so has taken refuge in the generalization above discussed.

The record shows clearly an attempt on the part of the trial court to make out a case of premeditation and deliberation where none exists. The evidence is sufficient only to establish that the homicide was murder; it is insufficient to establish that the murder was delibertate and premeditated. But the asserted prejudicial errors relate solely to the degree of the crime and do not warrant a reversal if the judgment is reduced to an adjudication of murder of the second degree. It is therefore my opinion that pursuant to the power vested in this court by section 1181 of the Penal Code, the judgment should be reduced to impose the penalty prescribed by law for murder of the second degree and that, as so modified, the judgment should be affirmed. People v. Bender, 27 Cal.2d 164, 163 P.2d 8; People v. Holt, 25 Cal.2d 59, 153 P.2d 21. The following full resume facts and discussion of the law points presented by this appeal will demonstrate the soundness of this conclusion:

Defendant, who is about forty three years of age, has lived in Los Angeles since his fourth year. In 1923, when he was nineteen years old, he married a girl of the same age, and they had three children, William, who is now about twenty-two years old and served in the Navy during the World War, Richard, now about twenty-one, who served in the Merchant Marine, and Carol, who is about nineteen.

Defendant always made ample provision for his family. He was a nurseryman of grade school education. For twenty years the family had lived on acreage used for the nursery, located near Van Nuys. During the war defendant not only kept up his nursery but also worked a night shift in the Lockheed Aircraft plant, thus working fourteen to fifteen hours a day.

According to testimony of the children, the marriage of their parents seeemed always happy, the home serene, and relations with friends and in-laws were harmonious. However, during the war years the wife worried over the children. She was small and frail, had had several operations, and while suffering from the menopause she became unusually nervous and irritable. Defendant, a soft-spoken man, apparently was patient with her, but he strongly opposed her attitude on certain problems concerning the children. Marked differences between the two arose when, at the age of fifteen, the daughter Carol wanted to marry a soldier. Both parents, and particularly defendant, objected because of her youth, but when she became sixteen the wife yielded and attended the marriage. Feelings aroused by the arguments had over this event were never wiped out.

After a child was born to Carol she came to live with her parents and when her husband was discharged from the service, he joined the family. Their married life was unhappy and Carol later sued for divorce. Defendant was continually annoyed by his wife's criticisms of the way Carol and her husband were raising their child. Defendant's long hours of work, combined with problems over the children and his wife's irritability, created an inharmonious situation in the home. In addition defendant had a difference with the son Richard over a loan requested for the purchase of a car. He ordered the boy from the house but the wife remained friendly with him and continued to see him.

At some time during this unsettled period defendant inherited the nursery acreage from his mother, but the estate of the mother was not closed. For some reason, perhaps because he thought it would aid a plan to close the estate or because he thought his wife might secretly give money to the children or otherwise misuse joint funds, defendant changed the joint bank account which he had with his wife to an account in his own name. There is some evidence that the wife knew of this. Defendant also discussed with the nursery foreman turning the business over to him for awhile so he and his wife could take a vacation together. The wife had inquired of an attorney concerning her property rights in event of divorce, telling the attorney that defendant and the son Richard were not friendly. She admitted that that was not a ground for divorce. The attorney suggested that he talk with defendant, because the matter seemed to be very minor, and to this the wife agreed. Defendant at one time denied and at another admitted that he knew of the visit to the attorney. He claimed he did not know the wife was told that she was entitled to half of the community property.

The nursery contained a greenhouse, lath house, other out buildings, and a large seventeen year old boiler house to heat the greenhouse. Defendant was running this boiler about twelve hours out of each twenty-four. It had to be checked at night one or more times and had been giving trouble.

At dinner on December 7, 1945, the grandchild cried and her parents tried to quiet her. Nevertheless, defendant's wife made a critical remark and left the room. Defendant went out to milk the cows. When he returned he and his wife had a discussion or argument about the children. Defendant then went to let the cows out and to check the boiler. About nine o'clock the children and grandchild went to bed and the wife prepared for bed.

At breakfast the following morning the wife did not appear and defendant inquired of his daughter as to her whereabouts. She could not thereafter be found. Neither the daughter nor her husband had heard any disturbance in the night. Inquiry was made of friends and relatives, and defendant apparently encouraged this. Finally the police were called and later investigators from the district attorney's office took up the search.

Defendant was interrogated at his home on January 14, 1946, and again on January 17th and 18th. The premises were searched and defendant was asked to take a lie detector test. He told the officers that after going to bed, he arose and checked the boiler two or three times on the night of his wife's disappearance; that the light was on in another room each time he came back to the house, but he did not see his wife; that it was not unusual for her to read or sew at night, and for him to go to bed; that the next morning he asked where she was. Defendant at first told the officers that he would not take the lie detector test, but later consented and went to the crime laboratory the afternoon of January 18th. On January 19th the police told defendant the test was unsatisfactory and asked him to take another. Defendant refused on the ground that it hurt his chest and his heart troubled him.

The next visit from the police was five months later, June 19th. They called on defendant at ten o'clock at night and said they would like to have him go with them. At the police station he was booked on suspicion of murder. He was taken to the crime laboratory about 9 or 9:30 the next morning, June 20th. The inventor of the lie detector machine was there from Chicago. Defendant declined to take a test. Between 4 and 4:30 in the afternoon his counsel arrived and refused to advise defendant to take the test. About eight in the evening the inventor of the machine returned and at that time defendant consented to a test. It was given by the inventor at ten minute intervals between which he reported his progress to the officers. It lasted until ten o'clock.

At that time defendant told the officers to take him home and he would show them where the body of his wife was buried. He said that on the evening of December 7, 1945, he had made several trips from the house to the nursery to fix the boiler; that as he was coming back through the greenhouse he was struck across the shoulders with an iron bar; that he grappled with his unknown assailant and felt a fur coat; that he realized it was a woman and found that he had strangled his wife; that he tried to revive her with artificial respiration but was unsuccessful; and that he then proceeded to bury her in a spot where the ground was soft.

The officers returned home with defendant and started to dig at a place indicated by him. They uncovered a pair of shoes which had belonged to the wife with stockings stuffed in the toes and a pair of slacks. About a foot deeper they unearthed her decomposed body clothed in a fur coat, a man's type of underwear and shorts, a blouse, and slacks. The officers then returned to their automobile and there took a more detailed statement from defendant. Defendant stated he did not know how long it took him to complete the burial and that he had no idea why his wife struck him. He made inconclusive statements on the question whether he went back into the house for his wife's clothes and threw them in the grave before completing it. He did say that when he realized what he had done, he thought it best to make it appear that his wife had gone away.

After this statement was taken the officers drove defendant to San Fernando for breakfast. About five in the morning, June 21st, they returned defendant to his home and there questioned him further. He was again interviewed between 9:30 a. m. and 12:45 p. m. at the Van Nuys city jail. Some of his statements in these several interviews or confessions were contradictory; for example, whether he and his wife were arguing when he went outside, and she went with him to complete the argument, or whether she came out unexpectedly. In the main, however, defendant adhered to his original story of being struck in the greenhouse unaware and grappling with an unknown assailant. He insisted throughout that he had no intention of injuring his wife and was appalled when he found he could not revive her. At the trial he took the witness stand in his own behalf and for the first time advanced the further information that he remembered nothing between the time he was struck across the shoulders and the time he saw his wife lying on the floor; that he experienced a blackout, similar to others previously suffered by him, caused by a certain dusting powder used to kill bugs. He recalled trying to revive his wife, but only partially recalled the burial.

The trial court found that the several confessions and statements of defendant were freely and voluntarily made. They were received in evidence without objection by his counsel, but defendant testified that they had been procured by mental and physical coercion practiced upon him by the police officials. However, the evidence sufficiently supports the trial court's finding on the subject.

As a motive for the crime the trial court stated he believed that defendant knew that a separation from his wife was inevitable and that rather than give his wife any property, defendant thought that the most expeditious way for him to handle the matter was to kill her; that he loved his money and property more than he did the woman who had been his help-mate and companion for more than twenty-five years. The contention that this finding lacks evidentiary support must be sustained. There is no evidence of inevitability of separation. On the contrary the evidence is to the effect that defendant and his wife planned to take a vacation trip together and that the wife knew when she visited the attorney that she had no ground for divorce. The change in the bank account was made a number of months prior to the killing, and apparently involved the transfer of only a small sum of money. Members of the family testified that defendant was generous with her in regard to money matters. The property which defendant was to inherit from his mother would become his separate property. So far as the evidence shows, defendant's arguments with his wife concerned only problems relating to the welfare of the children.

The trial court refused to credit defendant's testimony that he suffered a "blackout" which wiped out certain details concerning the circumstances of the killing. The evidence justifies the court's rejection of this theory.

The court found defendant's contention that he was guilty of nothing but manslaughter to be untenable, and in this connection stated that the evidence shows that the wife was not killed without malice during a sudden quarrel or heat of passion; that defendant's testimony was that he and his wife had not been quarreling; that no gun was used but the victim was strangled by defendant; that the court believed that the wife was killed in her bedroom and not out in the lath house as contended by defendant; that one could readily conclude that the wife was alive when she was placed in her grave; that it might be readily inferred that other people in the home knew something of the killing; that it is unlikely that they could not and did not hear what was taking place.

The court further stated that there is ample circumstantial evidence which would substantiate the belief that this defendant had already prepared the grave, five or six feet in depth, before the killing took place, and that it was his conclusion that the homicide was nothing more or less than a deliberately planned and premeditated murder which was carefully and craftily executed by defendant, a murder in the first degree.

The finding that defendant was guilty of a crime greater than manslaughter has sufficient evidentiary support. The absence of any evidence of a "considerable provocation" (Pen. Code, § 188), sufficient to reduce the offense to manslaughter, and the evidence that the deceased was strangled supports the trial court's conclusion that defendant acted with malice aforethought, that is, that the "circumstances attending the killing show an abandoned and malignant heart." Pen. Code, §§ 187, 188; People v. Bender, supra, 27 Cal.2d at page 178, 163 P.2d 8.

The further finding that the homicide was nothing more or less than a deliberately planned and premeditated murder which was carefully and craftily executed by defendant, a murder of the first degree, lacks support because of the absence of any evidence from which it may reasonably be inferred that the killing was "willful, deliberate, and premeditated" within the meaning of section 189 of the Penal Code. Only where there is evidence that the "intention unlawfully to take away the life of a fellow-creature" was a considered intent arrived at or carried out as a result of deliberation and premeditation, can the murder be that of the first degree. Where the evidence merely establishes that there was no considerable provocation and that the defendant acted with "an abandoned and malignant heart," "malice" may be "implied," and the murder is that of the second degree. Pen. Code, § 189; People v. Bender, supra, 27 Cal.2d at page 178, 163 P.2d 8; People v. Holt, supra, 25 Cal.2d 59, 87, 90, 153 P.2d 21; People v. Thomas, 25 Cal.2d 880, 901, 156 P.2d 7.

In an effort to find support for the trial court's conclusion that the killing was deliberate and premeditated, and therefore of the first degree, the attorney general refers to the trial court's stated belief that the wife was killed in her bedroom and was alive when placed in the previously prepared grave. But no evidence was adduced of such facts, nor is there to be found in the evidence any basis for such a belief or inference on the part of the trial court. The only evidence relative to the manner in which the killing was accomplished, other than conditions shown by the opening of the grave, is that contained in the statements of defendant. He consistently maintained the position that he had no intention of hurting his wife; that she was strangled outside the house; and that after he found that his efforts to revive her were unavailing, he dug the grave.

The trial court's belief that the wife was killed in the bedroom and not in the lath house is said by the attorney general to be a reasonable inference which the court could have drawn from the fact that when the grave was opened, shoes and stockings were found first, and underneath them, the clothed body with the feet bare. It is argued that the deceased would not have come out to the lath house in bare feet. Defendant could not recall taking off his wife's slippers after the killing, and stated that she usually wore slippers or shoes. He had no recollection of what actually occurred. If defendant had slain his wife in the bedroom and thereafter clothed her body, it is unlikely he would have overlooked putting on shoes and stockings. He may have removed shoes and stockings with some idea of preparing the body for burial, and then abandoned the idea. Although the court stated that it might be readily inferred that the other people in the home knew something about the killing, the testimony of members of the family was that any noise in the bedroom could have been heard clearly in other parts of the house. The daughter Carol testified that she went to bed about nine o'clock and stayed in the room all night with her husband and baby; that any screams by her mother could have been heard, or any noisy moving about; that no sound emanated from her mother's room. Certainly if the mother had called for help, the natural reaction of the daughter would have been to rush to her assistance. In short, the only direct evidence, and the inference reasonably to be drawn from that evidence, is that the killing took place beyond ear shot and outside the house. Moreover, from an inference that the crime was committed in the bedroom it would not necessarily follow that the killing was deliberate and premeditated. Furthermore, if the wife was killed in the bedroom, as the court found, she could not, as the court further found, have been buried alive.

The court's stated belief that one could readily conclude that the wife was alive when placed in the grave apparently grew out of a misconception of the purport of testimony given by the autopsy surgeon. His examination was hampered by the decomposition of the victim's body, but he stated that he found soil in the mouth and eyes. Asked the question "And that would be consistent with the finding that the person was alive when buried would it not?" he replied, "Not necessarily. If this person were dead and had his mouth open, soil could go in." He also admitted that he had no way of determining whether death took place while the body was being placed in the grave. In other words, the plain purport of this testimony was that nothing in the conditions found by him showed either that the victim was or was not still living when placed in her grave. Such testimony, coupled with the only other evidence on the subject, defendant's statement that the wife was dead when he buried her, does not give rise to an inference that she was buried alive. The only reasonable inference is that she was dead. It finds support in the surgeon's further statement that if a victim is conscious and struggling when buried and the soil is loose and dry, it is possible for soil to get deep into lung tissue, but that the soil in which the deceased was buried seemed moist and no dirt was found in the mass of decomposed lung tissue; also that the conditions found were consistent with strangulation type pressure. In short the surgeon could only say that under the conditions in the body found by him, death could or could not have been caused by manual strangulation or suffocation, and he had no way of determining whether death took place while the body was being placed in the grave. Such testimony affords no basis for an inference that the deceased was buried alive and therefore the killing must have been premeditated.

The court's further expressed belief that defendant had prepared the grave before the killing took place stems in part from his belief that the deceased was buried alive, for if such were the fact, naturally the grave would have been prepared prior to death. It also appears from the court's emphasis of the depth of the hole that he believed that defendant did not have time and strength to dig a five to six foot grave after the killing. Defendant, however, stated that he dug the grave after his efforts to resuscitate his wife failed, and there is no contradictory evidence. He stated he "probably" chose the particular site because the ground was soft. He was a man in the prime of life, hardened to fourteen or fifteen hours a day of manual labor, and experienced through his nursery work in ground conditions and digging. He was not pressed for time and it cannot reasonably be inferred that it was not physically possible for him to have completed the grave between the time of the murder and daylight.

The record shows no inconsistency between the physical facts proved and the uncontradicted statements of defendant. These statements adhered consistently to the fact that defendant did not want or plan to hurt his wife; that he was appalled when he found what he had done; and that he made every effort to revive her. They find support in the testimony given by friends and members of the family regarding defendant's family relations and the steadiness of his character and conduct over a long period of years. No proof was adduced from which it might reasonably be inferred that the killing was deliberate or premeditated.

In considering the effect of the evidence it was the duty of the trial court "to avoid fanciful theories and unreasonable inferences and not to resort to imagination or suspicion." People v. Holt, 25 Cal.2d 59, 90, 153 P.2d 21, at page 37. "Mere conjecture, surmise, or suspicion is not the equivalent of reasonable inference and does not constitute proof. An inference must be 'warranted by a consideration of the usual propensities or passions of men, [or] the particular propensities or passions of the person whose act is in question * * *.' (Code Civ.Proc., § 1960.)" People v. Bender, supra, 27 Cal.2d at page 186, 163 P.2d at page 21.

Because of the lack of any substantial evidence from which it reasonably can be inferred that defendant either formed or carried out the intent to kill deliberately, and with premeditation, in the ordinary meaning of those words, the judgment based upon the finding of murder of the first degree cannot be sustained. The evidence, however, sufficiently supports the other findings of the trial court, and establishes the homicide as a murder of the second degree.

It is my opinion, therefore, that the judgment should be modified by reducing it to murder of the second degree and as so modified, it should be affirmed. The cause should be remanded to the trial court with directions to pronounce judgment on defendant sentencing him to imprisonment in a state prison for the term prescribed by law for murder of the second degree.

TRAYNOR and SCHAUER, JJ., concur.

Rehearing denied; **CARTER, TRAYNOR, and SCHAUER, JJ., dissenting.**

81 Cal.App.2d 725

## PALO ALTO BLDG. CO., Inc. v. JONES et al.

Civ. 13378.

District Court of Appeal, First District, Division 2, California.

Oct. 9, 1947.

**1. Vendor and purchaser ⇨251**

Evidence supported judgment impressing vendor's lien on property for FHA loan, where it appeared that purchasers were to assume the loan but that, through error of title company, a deed was given to purchasers without calling for assumption of the loan.

**2. Vendor and purchaser ⇨251**

An agreement to create a vendor's lien need not be in writing. Civ.Code, § 3046.

**3. Husband and wife ⇨25(3)**

Where husband knew all circumstances of outstanding loan assumed by himself and wife upon purchase of property and that title company had made a mistake in failing to protect loan when transfer was made, and husband acted for himself and wife when he took title in name of wife as sole grantee, husband's knowledge would be imputed to wife as her agent and she could not claim as an innocent purchaser. Civ.Code, § 2332.

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Palo Alto Building Co., Inc., against Gwendolyn C. Jones, Samuel J. Jones (her husband), and others for vendor's lien on real property to secure payment of unpaid balance of purchase price. From a judgment for plaintiff, the defendants appeal.

Affirmed.

Joseph A. Brown, of San Francisco, for appellants.

Frank J. Fontes, of San Francisco, for respondent.

NOURSE, Presiding Justice.

This appeal presents no legal difficulties and no justification for the time and expense imposed upon the respondent.

The complaint prayed for a vendor's lien on real property to secure the payment of the unpaid balance of the purchase price. It alleged that Mr. and Mrs. Jones took over and exercised an option to sell the property which had been put in the name of another as mere title holder; that, through an error of the title company, a deed was given to the Joneses without calling for the assumption of an outstanding F.H.A. loan; that the Joneses had full knowledge of the mistake. The answer admitted that husband and wife were the owners in fee through this deed.

The trial court found that all these allegations were true and rendered judgment against the Joneses and impressed a lien on the property to secure payment of the amount of the F.H.A. loan.

[1] The evidence fully supports the findings. There is no conflict in the evidence except as to some of the testimony which the trial court rejected as incredible. Jones acted throughout for himself and his wife; he had full knowledge of the outstanding loan, full knowledge that the title company had made a mistake, and, for that reason, took title in the name of his wife as sole grantee.

[2] The first ground raised by appellants is that an agreement to create a lien must be in writing. The universally accepted rule in the case of vendor's liens is contra. Section 3046 of the Civil Code; 17 Cal.Jur. 718; 25 Cal.Jur. 740; Estate of Reid, 26 Cal.App.2d 362, 370, 79 P.2d 451.

The second and third points argued are but a restatement of the first. They rest on the unsound basis that the vendor's lien is a mortgage and must be in writing.

[3] The fourth point is that Mrs. Jones must be held to have been an innocent purchaser. Their answer admitted that Mr. and Mrs. Jones were the owners in fee under the deed. Mr. Jones knew all the circumstances of the outstanding loan and knew that the title company had made a mistake in failing to protect the loan when the transfer was made. There is no reliable evidence that the wife was an innocent purchaser. As agent for his wife the knowledge of Mr. Jones will be imputed to her. Section 2332 of the Civil Code reads: "As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other." Since Mr. Jones had knowledge of the loan and the mistake in the transfer he will be deemed to have communicated "in good faith" those facts to his wife.

Judgment affirmed.

GOODELL, and DOOLING, JJ., concur.

## KAMBOURIAN v. GRAY.

Civ. 15748.

District Court of Appeal, Second District,
Division 3, California.

Oct. 14, 1947.

Rehearing Denied Nov. 12, 1947.

Hearing Denied Dec. 11, 1947.

**1. Assault and battery 🔑35**

Evidence justified finding that defendant was guilty of unjustified attack on the plaintiff, as against defense that he acted in self-defense.

**2. Appeal and error 🔑842(7)**

Even if there were contradictions in plaintiff's testimony which cast doubt upon plaintiff's credibility, the argument that contradictions were such as would have justified jury in rejecting plaintiff's entire testimony presented no question of law.

**3. Evidence 🔑591, 594**

If plaintiff examines his adversary under statute for purpose of proving a fact essential to his cause of action and testimony given negatives existence of the fact, a failure of proof results unless plaintiff produces other evidence sufficient to establish the fact, but he has the right to produce such evidence. Code Civ.Proc. § 2055.

**4. Evidence 🔑591**

Testimony of defendant, when being examined by plaintiff under statute for purpose of proving fact essential to plaintiff's cause of action, that he was assaulted by plaintiff and acted in self-defense, was not binding on plaintiff, and did not establish insufficiency of evidence to justify verdict for plaintiff in action for injuries sustained in assault, where plaintiff did not rest his case merely upon defendant's testimony but gave his own account of the altercation up until time he lost consciousness. Code Civ.Proc. § 2055.

**5. Witnesses 🔑379(7)**

An original verified pleading could be used for purpose of impeachment.

**6. Appeal and error 🔑1048(7)**
**Witnesses 🔑386**

Where defendant's original verified answer denied only that defendant struck plaintiff "maliciously, unlawfully and without provocation", such denial was not inconsistent with defendant's testimony at trial wherein he admitted having struck plaintiff and defendant's objection to admission of original answer for purpose of impeachment should have been sustained, but, where attempted impeachment was obviously unsuccessful, no prejudice resulted to defendant from overruling of his objection.

**7. Assault and battery 🔑40**

$5,000 compensatory and $1,000 exemplary damages for injuries sustained in assault and battery was not excessive, in view of medical testimony as to extent of plaintiff's injuries.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by Harry S. Kambourian against Arthur E. Gray for injuries sustained in an assault and battery. From a judgment for plaintiff, the defendant appeals.

Affirmed.

Harry E. Templeton and William W. Kaye, both of Los Angeles, for appellant.

Byron R. Bentley and J. D. Willard, both of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

Defendant appeals from a judgment after verdict awarding plaintiff damages for injuries sustained in an assault and battery.

The parties engaged in physical encounter in the office of the Alco Construction Company, plaintiff being there engaged in waxing the floors and defendant having entered the office with Alco's consent for the purpose of examining certain blueprints and drawings preparatory to submitting a bid to Alco for plumbing work. During the encounter plaintiff sustained lacerations in the region of his left ear and left eye and a severe concussion, while defendant sustained no injury. The issue of liability depended upon which was the aggressor. Two juries have resolved that issue in favor of plaintiff, the first judgment having been vacated on motion for new trial for insufficiency of the evidence, and a verdict having been rendered on a second trial for $20,000 general and $5,000 exemplary damages, which were reduced to $5,000 compensatory and $1,000 exemplary damages on motion for new trial, consent to the modification having been given by plaintiff in accordance with conditions stated in the order.

[1] Defendant's main contention is that there was insufficient evidence to justify the implied finding that defendant was guilty of an unjustified attack. His defense was that he acted in self-defense. No other witness was present and the case was therefore one in which the ascertained credibility of the parties would be the controlling consideration. It is argued by defendant (1) that it would have been impossible for plaintiff to have received his injuries in the manner related by him, and that his testimony was therefore entitled to no consideration and carried no weight; (2) that he gave false evidence in some particulars and that his entire testimony should therefore have been rejected; (3) that defendant testified under section 2055, Code of Civil Procedure that he was assaulted by plaintiff and acted in self-defense; that this testimony is binding upon plaintiff for the reason that he did not categorically and explicitly deny it. A brief summary of the testimony of the parties will suffice to supply the answers to these several contentions. Plaintiff testified that he had waxed floors for Alco for about four years and had worked at a number of other plants which were doing government work; that on a Sunday when the altercation occurred he was in the Alco office waxing the floors, and when he first observed defendant standing inside the door, he asked him what he could do for him and defendant replied that he had come to get the blueprints; that plaintiff stated he could not let defendant have blueprints without a note from Mr. Clark or Mr. Metzdorf (of Alco company); that defendant said he was going to get the blueprints and that plaintiff or anyone else could not stop him; that plaintiff picked up a gallon can of wax, intending to place it over in the corner of the room, and turned his back upon defendant who was standing nearby. Plaintiff testified, "then when I bent over I don't know after that what happened to me"; that he was on the floor for some time and when he rose could not see out of his left eye; that for some time after he received the blows he was unconscious; that shortly after that when he was cleaning blood off the floor he found part of his dental bridge which had been broken. Defendant in the meantime had left. Plaintiff went to his home, was taken from there in a police ambulance to a receiving hospital where the injuries to his ear and eye were repaired. During his cross-examination portions of his deposition were read to him in which he had given the same account of the manner in which his injuries were received as he gave in his direct examination, although he added in his deposition that he had not seen anyone hit him. It appeared from the deposition and plaintiff's cross-examination that he considered the drawings and blueprints in the office to be in his charge and to pertain to government work that was being done; also that he refused to allow defendant to see them and that when defendant announced that he was going to see them plaintiff said "if you want it you could try and get it." It was clear, also, from plaintiff's testimony, that he did or said nothing more than this to provoke an altercation. We are not able to find in his testimony any basis for a claim that his account of the occurrence was incredible. It has been given full credit by two juries. To be sure, plaintiff's version accused defendant of an unwarranted and unexcused assault, but the fact that such conduct on defendant's part would have been unreasonable is a mere argument against the credibility of plaintiff, and this is a question that is not for our consideration. Although plaintiff could not testify in detail as to the nature of the assault, he testified that he was rendered unconscious and there was medical testimony that he suffered a concussion. He received several blows on the head, some of which could scarcely have been delivered while his back was turned to his assailant, but his failure to account in detail for the manner in which his injuries were received is no reason why his testimony should have been rejected as incredible. It appears to be the argument of defendant that plaintiff receiv-

ed no injuries other than those he could account for, but it is not denied by defendant that he struck the blows and the manner in which they were struck could have been inferred from the entire evidence. Plaintiff's inability to recall more of the details of the assault was a matter to be argued to the jury; his testimony was sufficient to show that the assault was unjustified and the injuries themselves disclosed the nature and severity of it.

[2] The second ground of attack upon plaintiff's testimony requires little comment. We have shown that it was not incredible and if, as defendant argues, there were contradictions in it which cast doubt upon plaintiff's credibility, the argument that they were such as would have justified the jury in rejecting his entire testimony presents no question of law.

The next point is equally untenable. Defendant, called under section 2055, testified that he went to the Alco plant carrying a key to the office which had been given him by an officer of the corporation, and with instructions to examine certain drawings which he would find in the office; that he found the office door open; that he found Kambourian there and told him the purpose of his visit; that he found the plans and while he was looking at them plaintiff told him to get out and drew a knife with a blade three or four inches long; that plaintiff called him a vile name, told him to get out, and that defendant rushed at plaintiff and struck him three times, on both sides of his face, before he could open the knife; that he demanded that plaintiff recall the epithet which he had applied, that plaintiff did so, and then attacked defendant with the open knife uttering threats to kill him; that defendant then pushed a chair against plaintiff, shoved him against the wall, and ran out of the office. This was the substance of defendant's account of the affair; further details may be omitted. Plaintiff was not recalled to the stand to refute defendant's testimony and defendant evolves from this situation the theory that the testimony of defendant therefore established, without contradiction, the claim of defendant that he acted in self-defense. It is said in the brief, "plaintiff contradicted no part of this testimony. In fact, by testifying that he did not know what happened and that he was unconscious, he was absolutely unable to contradict it. We therefore have the peculiar position of a plaintiff in a battery case proving complete self-defense * * * we are therefore not confronted with the familiar rule that an appellate court will not disturb the verdict where there is a conflict in the evidence."

To the question by plaintiff's attorney as to whether he had struck plaintiff, defendant answered in the affirmative, and to a further question he replied that plaintiff was the aggressor. The remainder of his testimony was elicited by his own counsel. Defendant's argument is, in effect, that the use of defendant as a witness was an admission by plaintiff of the truth of his testimony, and that plaintiff's claim that defendant was the aggressor was thereby completely refuted. Crouch v. Gilmore Oil Co., 5 Cal.2d 330, 54 P.2d 709; Kish v. California State Automobile Ass'n, 190 Cal. 246, 212 P. 27, and other cases relied upon by defendant lend no support to the argument.

[3, 4] It is elementary that if a plaintiff examines his adversary under section 2055, for the purpose of proving a fact essential to his cause of action, and the testimony given negatives the existence of the fact, a failure of proof results unless the plaintiff produces other evidence sufficient to establish the fact. He has, of course, the right to produce such evidence. Defendant's attempt to apply this rule must necessarily proceed from the premise that there was no conflict in the evidence as to which one was the aggressor. This would be assuming, contrary to the fact, that the only testimony as to the altercation was that given by defendant. Of course, if plaintiff had not testified at all, but had relied solely upon defendant's testimony given under section 2055, there would have been a complete failure of proof of an unlawful assault, even though the jury had rejected all of the defendant's testimony. That is far from the case. There was a direct conflict in the testimony. Plaintiff testified, not once, but several times, as to the circumstances of the encounter, and it

is clear that his testimony purported to cover all of the details which he could recall. In testifying fully as to his conduct and that of defendant he was necessarily testifying that the encounter did not occur in a wholly different manner, for if it occurred as related by him it could not have occurred as related by defendant. In the usual course, plaintiff would have been recalled to the stand and questioned as to whether he had attacked defendant with a knife, called him vile names and threatened to kill him, but this was unnecessary in view of the fact that none of these things could have occurred if plaintiff's sworn description of the encounter had been true. When plaintiff testified explicitly as to his words and conduct and those of defendant, his testimony was evidence that the incident took place in the manner described and was, of course, contradictory of the testimony of defendant that it occurred in an entirely different manner. The jury were required to determine the issue of liability from the entire evidence. Two accounts of the altercation were given which differed in every material respect. It was the province of the jury to choose between the two, or to give credit to all or a part of the testimony of either of the parties. Defendant's argument that plaintiff is bound by the testimony of defendant given under section 2055, if it had merit at all, would be beside the point. The jury were not bound by it if they did not believe it, and, of course, the verdict furnishes conclusive evidence that they did not believe it. We do not have the hypothetical case assumed by defendant, namely, that upon an essential issue plaintiff's case rests wholly upon the testimony of defendant given under section 2055. There was no insufficiency of evidence to justify the verdict.

[5, 6] A further contention is that the court erred in allowing plaintiff to use defendant's original answer in the cross-examination of defendant, inasmuch as it had been superceded by an amended answer. Plaintiff's purpose was to impeach defendant by showing that in the earlier pleading he had denied striking plaintiff, while in his testimony he admitted having struck him. It was proper to permit the use of the original verified pleading for the purpose of impeachment. Gajanich v. Gregory, 116 Cal. App. 622, 629, 3 P.2d 389. It was not sought to make use of it for any other purpose. Defendant contends that the original answer denied only that defendant struck plaintiff "maliciously, unlawfully and without provocation" and that this denial was not inconsistent with defendant's testimony at the trial. We are inclined to believe that the claimed contradiction was not shown and that this would have been a sufficient ground for sustaining defendant's objection. However, since the attempted impeachment was obviously unsuccessful, no prejudice could have resulted to defendant.

[7] Further claim is made that the damages are excessive. We think they are not. There was medical testimony to the effect that 18 months after the injury plaintiff suffered from severe headaches, vertigo and nervousness, and there was professional opinion to the effect that there had been some permanent injury to the brain which would not get better and which would probably get worse. There was also evidence of a definite impairment in plaintiff's ability to perform his accustomed work. The trial judge properly exercised his discretion in reducing the judgment upon motion for a new trial and we are satisfied from the record that he exercised it wisely. The judgment as it stands is clearly not excessive.

The judgment is affirmed.

WOOD, J., and VALLÉE, Justice pro tem., concur.

## ERIKSON v. SULLIVAN.

Civ. 3655.

District Court of Appeal, Fourth District, California.

Oct. 14, 1947.

Rehearing Denied Nov. 13, 1947.

Hearing Denied Dec. 11, 1947.

**Appeal and error ⟹611**

Where no request for record had been made by defendant, no record upon which he could rely or which could be considered in his behalf had been filed and no request for relief had been made, and a reading of partial record disclosed that findings and judgment were amply sustained by evidence, motion to dismiss defendant's appeal was granted.

◆

Appeal from Superior Court, San Diego County; Dean Sherry, Judge.

Action by Carl E. Erikson against J. F. Sullivan for declaratory relief to determine rights of parties under a mining lease and option and to secure continued possession of the premises by plaintiff, wherein the defendant filed a cross-complaint. From a judgment for plaintiff, the defendant appeals. On motion to dismiss appeal.

Appeal dismissed.

George A. Malette, of San Diego, for defendant-appellant.

William F. Reed, of San Francisco, for plaintiff-respondent.

BARNARD, Presiding Justice.

This is an action for declaratory relief to determine the rights of the parties under a certain mining lease and option, and to secure the continued possession of the premises by the plaintiff. After a six-day trial judgment was entered in favor of the plaintiff on December 11, 1946. After a motion to modify, a modified judgment was entered on January 13, 1947.

The plaintiff filed notice of appeal from a portion of the judgment on February 19, 1947, and on February 28, 1947, filed a request for a clerk's transcript and also a notice that he desired to set forth the oral proceedings by a settled statement. On February 20, 1947, the defendant filed a notice of appeal from the entire judgment, but no request for a transcript and no notice relating to the preparation of a record was ever filed by him.

The clerk's transcript, as requested by the plaintiff, was filed on May 24, 1947, but no settled statement prepared and certified in accordance with the rules of court has ever been filed. In July, 1947, the plaintiff noticed a motion to dismiss the defendant's appeal. When the matter came on for hearing the plaintiff withdrew his motion to dismiss in order to await the filing of a record.

On September 8, 1947, what purports to be a "statement of facts on appeal", accompanied by a reporter's partial transcript covering the testimony of two witnesses, was filed by the defendant. No attempt to comply with the rules was made either in the matter included therein or with respect to the manner of obtaining a settled statement. The purported statement contains the certificate of the trial judge that "The foregoing is but a small portion of a lengthy record and contains only a small portion of the testimony and other proof in the above entitled cause."

On October 7, 1947, the plaintiff moved to dismiss the defendant's appeal, or in the alternative for an order requiring the preparation of a reporter's transcript of the entire proceedings. Aside from any technical questions involved, it would be useless to require the defendant to go to the expense of having a complete reporter's transcript prepared since his counsel insisted at the hearing of the motion that the partial record here contains all of the testimony and evidence which he desires and upon which he would rely in support of his appeal. A reading of the partial record, which is here, discloses that the findings and judgment are amply sustained by the evidence in all respects in which a desire to attack them has been expressed.

No request for a record was ever made by the defendant, no record upon which he could rely or which could be considered in his behalf has ever been filed, and no request for relief has ever been made.

Under these circumstances, and in view of the fact that a review of the matter relied upon by the defendant could be of no benefit to him, the motion to dismiss his appeal should be granted.

The defendant's appeal is dismissed.

MARKS and GRIFFIN, JJ., concur.

**81 Cal.App.2d 799**

## PEOPLE v. MOORE et al.

**Cr. 4114.**

District Court of Appeal, Second District, Division 2, California.

Oct. 15, 1947.

Rehearing Denied Oct. 24, 1947.

Hearing Denied Nov. 13, 1947.

**1. Criminal law** 🔑**1144(13)**

On defendants' appeals from convictions after trial before jury, evidence would be viewed in the light most favorable to the people.

**2. Criminal law** 🔑**1160**

Inconsistencies and discrepancies in testimony are for the consideration of the trier of fact and in the second place for the consideration of the trial judge on a motion for new trial.

**3. Rape** 🔑**51(4)**

In prosecution for forcible rape evidence was not inherently improbable and supported verdicts of guilty.

**4. Criminal law** 🔑**1159(2)**

That the prosecutrix was a white woman 56 years of age and that defendants in prosecution for forcible rape were negroes and had administered a beating to nephew of prosecutrix at time of rape and that on several occasions evidence was introduced showing that prosecutrix had three grown sons and a nephew in the military service did not establish that jury returned verdicts of guilty as the result of bias and prejudice.

**5. Criminal law** 🔑**1036(1)**

In prosecution for forcible rape, an objection to introduction of evidence on ground that it was hearsay was waived where the objection was not urged in the trial court.

**6. Criminal law** 🔑**683(1)**

In prosecution for forcible rape, where the people introduced evidence of defendants' confessions as part of prosecution's case in chief and defendants denied making any confessions, people in rebuttal of defendants' denial could introduce additional testimony impeaching denial of defendants and corroborating previous testimony of officer testifying to the confessions.

**7. Criminal law** 🔑**1037(1)**

Objection to conduct of deputy district attorney in holding in front of jury a police report and having the witness certify that report was a correct statement of the facts was waived where defendants failed to make any objection to the procedure at time of trial.

◆

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Ray C. Moore and John I. Daniels were convicted of forcible rape and they appealed from judgments of conviction and from orders denying their motions for new trial.

Judgments and orders affirmed.

C. Ransom Samuelson and Shibley, Wanzer & Litwin, by George E. Shibley, all of Long Beach, for appellants.

Fred N. Howser, Atty. Gen. and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From verdicts of guilty on two counts of forcible rape after trial before a jury defendants appeal. There is also an appeal from an order denying their motions for a new trial.

[1] The evidence being viewed in the light most favorable to the people (respondent) and pursuant to the rules set forth in

People v. Pianezzi, 42 Cal.App.2d 265, 108 P.2d 732, the essential facts are:

At about 8:30 p. m. on September 12, 1946, the prosecuting witness, a widow 56 years of age, left her home in Long Beach in company with her nephew and walked several blocks to the ocean front. She had been having some trouble with her feet and had been making it a practice to wade in the ocean a little while every evening. Upon reaching the ocean the prosecutrix and her nephew removed their shoes and waded in the surf for approximately eight minutes at which time they observed the two defendants who were negroes in Navy uniforms standing on the sand laughing at them. The prosecutrix and her nephew walked through the water toward a nearby amusement pier and defendants followed them. The prosecutrix and her nephew then turned back in the direction from which they had come and were again followed by defendants. At one point defendants walked into the water while wearing their shoes. The prosecutrix said to them, "What's the big idea of coming out in the water and getting all wet?" To this query defendants made no reply, whereupon the prosecutrix said, "You boys are in the service, aren't you?" to which they said "Yes". The complaining witness continued to talk with defendants telling them that she was a mother and that she had boys in the military service and told them to be sure and write to their mothers since she had been very much worried when she did not receive letters from her boys.

As the four walked along the beach defendant Daniels fell behind the others and struck the prosecutrix's nephew, Mr. Heathcote, in the back. The other defendant struck him in the stomach and Mr. Heathcote fell to the sand. Defendant Daniels then grabbed the prosecutrix, put his hand over her mouth, and forced her down into the sand saying that if she would keep quiet and would not holler he wouldn't hurt her. While she resisted and was in fear, he tore buttons from her dress and performed an act of sexual intercourse with her. During this period defendant Moore had beaten Mr. Heathcote into insensibility. Defendant Daniels then told the prosecutrix to continue to lie on the sand and that if she did not he would choke her, whereupon defendant Moore came over and commenced an act of sexual intercourse with the prosecutrix telling her that he would "bash" her head in if she did not acquiesce in his demands. During the act a police siren was heard and both defendants left the scene of the crime, defendant Moore telling his victim not to holler or that they would come back and "take care of you".

Later defendants were arrested and voluntarily confessed to investigating officers that they had committed the crimes above described.

Contentions of Defendants

First: *There is no substantial evidence to support the judgments of guilty for the reason that the evidence is inherently improbable.*

This proposition is totally devoid of merit. In addition to the direct testimony of the prosecutrix in support of every material fact set forth above, defendants voluntarily confessed that they had perpetrated the crimes of which they have been convicted.

[2, 3] Inconsistencies and discrepancies in the testimony, if any, in the first instance are matters solely for the consideration of the trier of fact, and in the second place for the consideration of the trial judge on a motion for a new trial. The argument which counsel has addressed to this court on the subject was a proper argument to present to the trial jury but cannot be considered by us since there is substantial evidence to which attention has herein been directed to support the findings of the jury.

People v. Headlee, 18 Cal.2d 266, 115 P.2d 427, People v. Casillas, 60 Cal.App.2d 785, 141 P.2d 768, People v. Bales, 74 Cal.App.2d 732, 169 P.2d 262, relied on by defendants, are each factually distinguishable from the instant case. In each of the cited cases the court held that the evidence relied upon by the prosecution was so improbable as to be incredible and therefore the evidence did not support the judgments of conviction. In the present case it is patent in view of the prosecutrix's testimony, supported by the voluntary confessions of defendants, that the evidence is not inherently improbable and therefore it supports the verdicts of the jury.

Second: *The verdicts were the result of passion and prejudice upon the part of the jury.*

[4] In support of this contention defendants urge that the prosecutrix was a white woman 56 years of age; that defendants were negroes and had administered a beating to her nephew, and that on several occasions evidence was introduced showing that the prosecutrix had three grown sons and a nephew in the military service. These facts were all undisputed and we fail to find any support in them for the contention that the jury returned its verdicts as a result of bias and prejudice.

Third: *The trial court committed prejudicial error in the admission of hearsay testimony.*

This proposition is without merit. During the examination of Mr. Heathcote he testified as follows:

> "Well, my aunt was—she had a premonition that something— * * * Well, my aunt said she was afraid there would be some trouble. * * * My aunt said that we could get down by the amusement zone and possibly somebody might hear us. * * * Then my aunt said to me that maybe if she had a conversation with them about their mothers that we might eliminate any trouble we might have."

[5] Clearly such testimony was objectionable on the ground that it was hearsay evidence. However, this objection was not made at the time of the trial and it may not be urged for the first time on appeal. It is the general rule that an objection to the introduction of evidence on the ground that it is hearsay evidence is waived and will not be considered on appeal if such objection is not urged in the trial court. (People v. Conterno, 51 Cal.App.2d 167, 169, 124 P.2d 610; People v. Brazil, 53 Cal.App.2d 596, 601, 128 P.2d 204.)

Fourth: *The trial court committed prejudicial error in permitting rebuttal testimony tending to impeach the statements of defendants while testifying on their own behalf.*

[6] This proposition is devoid of merit. During the prosecution's case in chief they presented in evidence confessions of defendants through the testimony of Officer Dyer. After the people had rested defendants took the witness stand in their own behalf and denied that they had made any confessions. Upon rebuttal the people presented the testimony of Inspector Harrison in which he impeached the testimony of defendants that they did not make voluntary confessions, and he corroborated the previous testimony of Officer Dyer. This testimony of Inspector Harrison was properly admissible under the rule that where the people introduce evidence of a defendant's confession as part of their case in chief, additional evidence of a defendant's confession may be given in rebuttal of the defendant's denial that he had made a confession. (People v. Gerbel, 71 Cal.App.2d 325, 332, 162 P.2d 946.)

People v. Gerbel, supra, points out that People v. Rodriguez, 58 Cal.App.2d 415, 419, 136 P.2d 626, is not applicable to facts such as we have in the present case. In People v. Rodriguez the people had not introduced defendant's confession as a part of their case in chief. Therefore it was error to admit the confession on rebuttal. In People v. Gerbel, supra, and in the present case the confessions were introduced in the case in chief, therefore making inapplicable the rule as announced in People v. Rodriguez.

Fifth: *The deputy district attorney committed prejudicial error in holding in front of the jury a police report and having the witness certify that such report was a correct statement of the facts in the case.*

[7] This proposition is untenable for the reason that defendants failed to make any objection to the procedure followed by the deputy district attorney at the time of the trial. Hence they have waived any objection to his conduct and may not urge such conduct as error before an appellate court.

The record is free from error and the judgments find substantial support in the evidence. Therefore the judgments and orders denying the motions for a new trial are each affirmed.

MOORE, P. J., and WILSON, J., concur.

81 Cal.App.2d 737

**CASTLEMAN et al. v. SCUDDER, Real Estate Com'r.**

**Civ. 7369; Sac. 73820.**

District Court of Appeal, Third District, California.

Oct. 9, 1947.

**1. Constitutional law 🔑81, 117**

The Legislature cannot, under the guise of the police power, enact a measure which deprives one of a right bound to be respected and protected by the state or a measure which impairs the obligation of contract. Const. art. 1, § 16.

**2. Constitutional law 🔑117**

The Legislature, in the exercise of its police power, may regulate the conduct of business, and such regulation superimposes into all contracts the higher authority of the state which must be presumed to be known by all, and every contract is made in subordination of that authority and must yield to that control.

**3. Constitutional law 🔑117**

In order to fix obligations as between parties, the reservation of essential attributes of sovereign power is read into contracts as a fundamental principle of law as well as existing laws.

**4. Brokers 🔑1**

Business opportunity brokers, having qualified as licensees in a business already regulated under the police power, thereby accepted such licenses subject to the possibility of further regulatory legislation upon the same subject matter. Business and Professions Code, § 10301(f); Const. art. 1, § 16.

**5. Constitutional law 🔑117**

The Legislature has power to restrict or prohibit trade practices which upon reasonable grounds it determines are predatory, vicious, unfair, and anti-social, if the measures taken are reasonable and appropriate to a legitimate end, regardless of whether such legislation has the result of modifying or revoking contracts already in effect. Const. art. 1, § 16.

**6. Brokers 🔑3**

Under statute authorizing revocation of licenses of business opportunity brokers, real estate commissioner was authorized to revoke licenses of brokers who, after effective date of statute, claimed commissions under agreements executed before effective date of statute and which agreements were to run for 30 days and thereafter until 3 days after receipt by broker of written notice terminating agency, since termination clause of agreements did not comply with statute for failure to contain a definite termination date. Business and Professions Code, § 10301(f); Const. art. 1, § 16.

**7. Brokers 🔑1**

The statute authorizing revocation of license of business opportunity brokers for the practice of claiming a commission under an exclusive agency agreement which does not contain a definite termination date is a proper regulatory measure and, as such, applies to agency agreements executed before the effective date of statute. Business and Professions Code, § 10301(f); Const. art. 1, § 16.

**8. Mandamus 🔑187(4)**

Questions which were not raised at hearing before real estate commissioner or in trial court on mandamus proceeding could not be raised for the first time before District Court of Appeal.

◆

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Mandamus by Nat Castleman and Solomon Ellis Kaplan against Hubert B. Scudder, Real Estate Commissioner of the State of California, to compel respondent to restore petitioners' licenses as business opportunity brokers. From a judgment entered pursuant to an order sustaining without leave to amend respondent's demurrer to petitioners' petition, petitioners appeal.

Affirmed.

Marshall Abbott and Kenneth K. Scott, both of Los Angeles, for appellants.

Fred N. Howser, Atty. Gen., and Lee B. Stanton, Deputy Atty. Gen., for respondent

PEEK, Justice.

This is an appeal from a judgment entered pursuant to an order of the trial court sustaining, without leave to amend, respondent's demurrer to appellants' petition for a writ of mandamus.

By their petition appellants sought to compel respondent to restore to them their licenses as business opportunity brokers which had been revoked by respondent after a hearing pursuant to an accusation filed by a deputy real estate commissioner. Said accusation charged petitioners with engaging in the practice of making claims for broker's commissions based upon authorizations to sell which did not bear a definite termination date, in violation of section 10301(f) of the Business and Professions Code of the State of California, the pertinent portions of which provided as follows:

"The commissioner may, upon his own motion, and shall, upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a business opportunity licensee, within this State, and he may temporarily suspend or permanently revoke a business opportunity license at any time if the licensee, within the immediately preceding three years, while a business opportunity licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following: * * *

"(f) The practice of claiming or demanding a fee, compensation or commission under any exclusive agreement authorizing or employing a licensee to sell, buy or exchange a business, business opportunity, or interest therein, or the good will of an existing business, for compensation or commission where such agreement does not contain a definite, specified date of final and complete termination."

The transcript of the hearing before the commissioner discloses that petitioners stipulated that prior to September 15, 1945, the effective date of said act, exclusive listing agreements were signed with certain named persons and delivered to petitioners; that subsequent to said date actions at law were instituted against such persons and that all of said agency agreements contained the clause: "This agency shall continue 30 days from date hereof and thereafter until three days have elapsed after receipt of written notice from the Owner, terminating this agency, sent by registered mail, or delivered in person to said agent."

Petitioners' contentions at the original hearing were that when the listing agreements were executed there was no law in this state requiring a termination date in any broker's agency contract inasmuch as the statute in question had not yet become effective; that therefore said section came within the prohibition of section 16, article I of the Constitution of this state providing that the legislature cannot enact any law impairing the obligation of contract. Additionally petitioners argued that to apply the statute under the facts of this case would be to give it retroactive application thereby impairing vested rights of petitioners which had accrued under such listing agreements. Comparable allegations were made in the mandamus proceeding but were rejected by the trial court. Such contentions are again argued on appeal.

At the outset it should be noted that respondent did not accuse petitioners of committing any illegal act prior to the effective date of the statute nor does he now maintain that the mere holding of an exclusive listing agreement without a definite specified date of final and complete termination is ground for revoking a license but he does contend (and it is so alleged in his accusation) that subsequent to the effective date of said section the *practice* of demanding or receiving a fee under agreements which contain no definite termination date is ground for revocation of a license under said section.

[1-4] We are completely in agreement with appellants' statement of the general rule that the legislature cannot under the guise of the police power of the state enact a measure which deprives one of a right bound to be respected and protected by the state or which impairs the obligation of contract. 5 Cal.Jur. 748, and cases there cited. But it is equally well settled that the

legislature in a proper case in the exercise of its police power may regulate the conduct of business (Ex parte Hadacheck, 165 Cal. 416, 132 P. 584, L.R.A.1916B, 1248) and thus into all contracts is superimposed the higher authority of the state which must be presumed to be known by all, and every contract is made in subordination of that authority and must yield to that control. Mott v. Cline, 200 Cal. 434, 253 P. 718. In other words, not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a fundamental principle of law. Home Building etc. v. Blaisdell et al., 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413, 88 A.L.R. 1481. Furthermore petitioners having qualified as licensees in a business already regulated under the police power of the state, they therby accepted such licenses subject to the possibility of further regulatory legislation upon the same subject matter. Veix v. Sixth Ward etc., 310 U.S. 32, 60 S.Ct. 792, 84 L.Ed. 1061.

[5] Therefore as there can be no question of the power of the legislature to "restrict or prohibit trade practices which upon reasonable grounds it determines are predatory, vicious, unfair and anti-social" (Wholesale Tobacco etc., Inc., v. National Candy etc. Co., 11 Cal.2d 634, 658, 82 P.2d 317, 118 A.L.R. 486), the fundamental query to be determined is not whether a contract is affected incidentally or directly by the statute but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end. If this be true as regards the legislation here in question, and we conclude it is, then it does not matter whether such legislation has the result of modifying or revoking contracts already in effect. Stephenson v. Binford, 287 U.S. 251, 53 S.Ct. 181, 77 L.Ed. 288, 87 A.L.R. 721; State, etc., Bureau v. Pomona, etc., Ass'n, 37 Cal.App.2d Supp. 765, 98 P.2d 829. This rule is consistent with the growing appreciation on the part of the legislature and the courts of public needs, the interrelation of individual activities, and the complexity of our economic interests; all of which have inevitably led to an increased use of the organization of society in protecting the very bases of individual opportunity. Home Building etc. v. Blaisdell, supra; Max Factor & Co. v. Kunsman, 5 Cal.2d 446, 55 P.2d 177.

[6, 7] Petitioners' further contention that in any event the clause in the above mentioned contracts attacked by the commissioner "contains a very definite method of a final and complete termination of the agency" and therefore does not come within the statute, is likewise without merit. The statute does not refer to a *method* of computation of the termination date upon the happening of some future event, but rather to the failure to set forth a definite specified *date* of final and complete termination. The contracts in question were printed on small cards with the figures "30" typed in. The thirty days constituted a minimum period during which the owner could not terminate the agency, and in no event would the agency terminate except upon the owner's compliance with the conditions of notice contained in the phrase which follows: "and thereafter until three days have elapsed after receipt of written notice * * *." By its particular wording section 10301(f) can be construed only to denote a definite date of termination specifically set forth in a contract at the time of its execution by the owner. An interpretation such as is contended for by petitioners if adopted would only perpetuate the very indefinite feature which the legislature has said is contrary to the general public welfare.

[8] The remaining questions set forth in appellants' briefs were neither raised before the commission nor in the trial court, and are such as may not be raised for the first time on appeal.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

81 Cal.App.2d 695

## BUSH v. BUSH.

Civ. 3469.

District Court of Appeal, Fourth District, California.

Oct. 6, 1947.

**1. Divorce ⚷312**

Conflicts in evidence being settled in trial court, testimony of divorced husband and his witnesses in conflict with that of divorced wife on her application for modification of divorce decree by changing parties' minor child's custody from husband to wife must be accepted as true on appeal from order denying change.

**2. Divorce ⚷312**

A statement in opinion of District Court of Appeal, on affirmance of divorce decree awarding parties' minor child's custody to husband, that any change of custody should be governed by whether wife changed her attitude toward her responsibilities and her manner of living, did not entitle her to award of child's custody after changing her mode of life, as such change did not deprive trial court of right and duty to determine question of custody with child's welfare as controlling factor.

**3. Divorce ⚷296**

The statute providing that, "other things being equal", custody of child of tender years should be given to mother, rather than father, thereof, does not give mother absolute right to such a child's custody, but leaves large measure of discretion with trial court. Civil Code, § 138, subd. 2.

**4. Divorce ⚷303(1), 312**

An application for modification of award of custody of divorced spouses' minor child to one of them is addressed to trial court's sound legal discretion, which will not be disturbed on appeal unless record clearly shows abuse of such discretion.

**5. Divorce ⚷303(3)**

Evidence showed no abuse of discretion in refusing to modify divorce decree by changing award of parties' minor child's custody from father to mother thereof.

Appeal from Superior Court, Orange County; Raymond Thompson, Judge.

Action by Ronald A. Bush against Pauline Bush for divorce. From an order refusing to modify a decree granting plaintiff a divorce and awarding him the custody of the parties' minor son by changing the child's custody to defendant, she appeals.

Affirmed.

P. E. Durkee, of Los Angeles, for appellant.

Rutan & Tucker, of Santa Ana, for respondent.

MARKS, Justice.

This is an appeal from an order refusing to modify a decree of divorce by changing the custody of the minor child of the parties from its father to its mother.

The original decree dated November 20, 1944, awarded custody of Ronald Mitchell Bush to plaintiff, his father, with the right of reasonable visitation by defendant, the mother, and the right to have him over week ends when it would not interfere with his "health, welfare or training." This decree was affirmed on appeal (Bush v. Bush, 72 Cal.App.2d 487, 164 P.2d 774, 777), where numerous pertinent facts are recited. It was then found that defendant was not a fit and proper person to have control of the boy. The case on appeal was decided on January 8, 1946, and the remittitur went down 60 days later. On April 11, 1946, defendant secured an order to show cause why custody of the child should not be changed, which was based on her affidavit.

Ronald would reach the age of five years in July, 1946. For several years he had been in the home of his father who lived with his parents in Santa Ana in Orange County. He was cared for by his father and his paternal grandparents. The record indicates that his life there seemed normal, that he was well cared for and that he possessed the usual frailties found in a boy of his age. He showed much affection for his father, his mother and his grandparents all of whom entertained a deep affection for him.

Mrs. Bush lived with her unmarried brother in Redondo, both of them being employed. She worked in an office five days a week from nine o'clock in the morning to five o'clock in the afternoon. There was an excellent private school about one-half mile from the office where she worked. If given custody of Ronald she proposed to leave him at this school on her way to work and pick him up on her return home. If she were away from home on any evening or on Saturday or Sunday she proposed to hire someone to care for Ronald during her absence. She was willing to pay the costs of sending him to this school over any amount the court ordered plaintiff to pay, or all of the expense if plaintiff were required to pay nothing. If plaintiff retained custody of Ronald he proposed to send him to school in Santa Ana when he reached school age.

[1] Defendant's chief causes of complaint are three: (1) That Ronald's table manners were poor; (2) that he was not sufficiently disciplined; (3) that on numerous occasions she drove from Redondo to Santa Ana to get Ronald for week ends but found no one at home and had not been notified of their absence. While she testified to these facts there was other evidence contradicting her. In accordance with the time honored rule that conflicts in the evidence are settled in the trial court, we must accept plaintiff's version and that of his witnesses as true.

Plaintiff testified that only on five occasions in about two years was Ronald away from the Santa Ana home over week ends; that on each occasion he or his mother either did or attempted to inform defendant of the proposed trip.

The evidence leaves the distinct impression that both parties are somewhat to blame for this situation which could not help but aggravate defendant. Apparently they were dealing at arm's length with each other. While they are no longer husband and wife, they still are father and mother of Ronald and a little cooperation between them as parents should remove this cause of friction.

[2] Defendant bases her cause on this appeal principally on one sentence in the opinion rendered in the former appeal (Bush v. Bush, supra) which we have emphasized in the following quotation of the final paragraph of the opinion which is as follows:

"The situation here, while an unfortunate one, was a practical one which the court had to meet. The father had been keeping the child at the home of his mother, who was 51 years old and who, as the appellant herself testified, was taking perfect care of the child. While it may be true, as the appellant argues, that there is no evidence to show that she was actually immoral or vicious it does appear that she was entirely responsible for breaking up what seems to have been an unusually good home. It seems to be the old story where a young woman not only desires to live her own life, but claims an inherent right to live it at the expense of others. While this mother may not be inherently bad it appears, beyond question, that she tired of her home life and of the work of caring for the baby and that she not only sought outside activity, including some degree of night life, but that she preferred to go around with a man other than her husband, carrying on a relationship with him which was decidedly improper and one which, if persisted in, could have no result other than to break up this home. During the interval between the separation and the trial of the action she continued this outside relationship, and there is not the slightest evidence in the record that she was either changing her conduct or had in any degree changed her attitude toward her responsibilities in life. Under these circumstances and in the absence of any such change in her attitude, or in the conditions under which she was living, it cannot be held, as a matter of law, that the court abused its discretion in awarding custody of the child to the respondent, at least for the time being. That is a matter which not only must necessarily be in the sound discretion of the court, but it is one which is subject to change at any time when conditions warrant. *However, any change with respect to the custody of this child should properly rest upon and be governed by whether or not the appellant changes her attitude toward her responsibilities and her manner of living.*"

Defendant seems to conclude that this one sentence should be construed to mean that if she changes her attitude and mode of life she would be entitled to the custody of Ronald. The opinion does not so hold and cannot be so construed. Of course she would have to change her attitude and mode of life from that shown by the evidence in the divorce case to even have her application for custody of Ronald given the slightest consideration as she was found unfit to have his custody at that time and the evidence supported that finding.

Evidently she has changed her mode of life but that does not deprive the trial court of the right and duty of determining the question of custody with the welfare of the child as the controlling factor.

[3] One of the rules governing us here is set forth in Phillips v. Phillips, 48 Cal. App.2d 404, 119 P.2d 736, 738, as follows:

"Section 138, subdivision (2), of the Civil Code, * * * reads as follows:

"'As between parents adversely claiming the custody, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father.'

"This section does not give the mother the *absolute right* to the custody of a child of tender years. The qualifying clause, 'but other things being equal', still leaves a large measure of discretion with the trial court. If the court finds that other things are *not* equal, as it evidently did here, and there is any substantial evidence to support such a finding, our inquiry is at an end."

[4] In Foster v. Foster, 8 Cal.2d 719, 68 P.2d 719, 724, it was said:

"An application for a modification of an award of custody is addressed to the sound legal discretion of the trial court, and its discretion will not be disturbed on appeal unless the record presents a clear case of an abuse of that discretion. Bancroft v. Bancroft, 178 Cal. 352, 173 P. 582; Dickerson v. Dickerson, 108 Cal. 351, 352, 41 P. 475; Baldwin v. Baldwin, 111 Cal.App. 148, 295 P. 93."

[5] As the trial court exercised its discretion in continuing the award of the custody of Ronald to his father, and as there is nothing in the record to indicate any abuse of that discretion, we cannot reverse the order under attack here.

The order is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

81 Cal.App.2d 742

## MAROLDA et al. v. LA PINER et al.

Civ. 3471.

District Court of Appeal, Fourth District, California.

Oct. 9, 1947.

**1. Appeal and error 🔑187(2, 3)**

Defendants who made no objections as to misjoinder or nonjoinder of parties by demurrer or on motion to set aside temporary injunction, could not complain thereof on appeal from order granting temporary injunction. Code Civ.Proc. § 382.

**2. Waters and water courses 🔑107(3)**

In action brought by plaintiffs individually and as representatives of all home owners and consumers of water in certain tracts to restrain defendants from depriving plaintiffs of water service from certain wells located on defendant's property, where complaint reciting that plaintiffs were in same class, and character of rights to be enforced was common to all of plaintiffs, was uncontroverted, trial court had jurisdiction to order temporary injunction as to the class claimed to be represented by plaintiffs. Code Civ.Proc. §§ 367, 378, 382, 434.

**3. Waters and water courses 🔑107(3)**

Plaintiffs' pleadings and affidavits establishing that plaintiffs claimed by prescription some right to have use of waters on defendants' land and to have them pumped to plaintiffs' premises from wells located on defendants' land on ground that plaintiffs and their predecessors in interest had continuously done so for over 20 years, were sufficient to support issuance of a temporary injunction restraining defendants from depriving plaintiffs of water service from such wells to preserve the status quo until its final determination. Code Civ.Proc. § 527.

◆

Appeal from Superior Court, San Bernardino County; Martin J. Coughlin, Judge.

Action by Margaret Marolda and another, individually and as the representatives of home owners and consumers of water in certain tract against F. L. La Piner and others to restrain defendants from discontinuing and depriving plaintiffs of water service from a certain well located on defendants' property. From a temporary restraining order, defendants appeal.

Affirmed.

Barry Sullivan, of Los Angeles, and Gordon Leslie Cooper, of Monrovia, for appellants.

Charles D. Warner, of Chino, for respondents.

GRIFFIN, Justice.

Plaintiffs, individually and as representatives of the home-owners and consumers of water in a certain tract No. 2037 in San Bernardino County, brought this action to restrain defendants from discontinuing and depriving them of water service from a certain well or wells located on defendants' property.

The verified complaint alleges that the original owners of lots in said tract had the use of water from the wells of defendants and subsequent owners have been furnished water by defendants, or their predecessors, and have had continued use of said water from said wells for more than 20 years; that plaintiffs and their predecessors furnished pipe to said well at the time of installation and it was laid across their properties at their expense; that defendants, doing business as the Carbon Canyon Mineral Springs & Hotel, on August 14, 1946, served notice on all owners and occupants of homes in that tract that they would not supply them with water after October 1, 1946. It is then alleged that plaintiffs and others whom they represent are entitled to water service from defendants on the same basis as they have been furnished water in the past. Plaintiffs sought a temporary order enjoining defendants from discontinuing such water service during the pendency of this action.

Upon this complaint and the affidavits of plaintiffs, alleging in more detail the facts related, the trial court issued the temporary injunction upon the deposit by plaintiffs of a bond for $200 to protect defendants from loss. The minute entry granting the injunction ordered that the water users pay for water furnished in an amount to be fixed by the court. A demurrer to the complaint was filed as well as a motion to dissolve the temporary restraining order. The demurrer was overruled and 10 days given to answer. Defendants appealed from the temporary restraining order.

Under point one defendants contend that the court had no jurisdiction pertaining to the rights of other owners in the tract, without alleging a contractual relationship and without setting forth their rights, citing sections 367, 378 and 434 of the Code of Civil Procedure. The complaint recites that plaintiffs and all of the homeowners and consumers are in the same class, and the character of the rights to be enforced herein is common to plaintiffs and other homeowners and consumers in the tract; that there are common questions of law and fact affecting their rights, and a common relief is sought; that plaintiffs bring this action for themselves, and also in behalf of all of said owners and consumers.

[1, 2] Section 382 of the Code of Civil Procedure provides that "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of

all." No objection as to misjoinder or nonjoinder of parties was made by demurrer or on the motion to set aside the temporary injunction. This same question was considered adversely to defendants in Jellen v. O'Brien, 89 Cal.App. 505, 264 P. 1115, and Russ v. Tuttle, 158 Cal. 226, 231, 110 P. 813. The uncontroverted allegations of the complaint were sufficient, under section 382 of the Code of Civil Procedure, to confer jurisdiction on the court to order the temporary injunction as to the class claimed to be represented by plaintiffs.

It is next claimed that the complaint and affidavits do not state facts sufficient to constitute a cause of action or to support the issuance of a temporary injunction. It is not entirely clear from the complaint and affidavits what particular claim of right plaintiffs are relying on, with reference to the continued use of water from wells located on defendants' land.

In McCrary v. Beaudry, 67 Cal. 120, 7 P. 264, 266, relied on by plaintiffs, the facts alleged showed that the appellant there "was in the exercise of a franchise which he could not exercise except by authority of and in the manner prescribed by law, and that the law enjoined on him the duty, resulting from that trust, of furnishing respondent with water." The pleadings here do not make it clear whether or not plaintiffs are relying upon any duty of defendants, resulting from any trust, to furnish plaintiffs further water from their wells. From a portion of the complaint that was stricken, by stipulation, it might be so indicated. That paragraph recited that the original owners of the tract sold those water rights with the lots purchased in the tract. The reason for striking this paragraph is not apparent to us.

[3] An examination of the pleadings and the affidavits, giving them a most charitable construction, indicates that plaintiffs are claiming, by prescription, some right to have the use of said waters and to have them pumped to plaintiffs' premises from wells located on defendants' land by virtue of the fact that they and their predecessors in interest have continuously done so for over a period of 20 years. Whether plaintiffs, at the trial, can support this allegation, is not the question to be here determined. Plaintiffs, apparently, have had access to and have been furnished with water from this common source for some period of years, and this water has been dedicated, apparently, to this public use for this period. We do not deem it improper for the trial judge to issue a temporary restraining order restraining defendants from discontinuing water service to the homes and property of plaintiffs during the pendency of this suit. At the time of trial plaintiffs' rights, if any, may be determined. (Sec. 527, Code Civ.Proc.) The clear purpose of the restraining order is to hold the subject of litigation in status quo until its final determination. (Stewart v. Superior Court, 100 Cal. 543, 35 P. 156, 563; Dewey v. Superior Court, 81 Cal. 64, 68, 22 P. 333; Tulare Irrigation District v. Superior Court, 197 Cal. 649, 242 P. 725; Remillard Brick Co. v. Dandini, 47 Cal. App.2d 63, 117 P.2d 432.

Order affirmed.

BARNARD, P. J., and MARKS, J., concur.

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## LOEB v. LOEB.*

Civ. 15329.

District Court of Appeal, Second District, Division 3, California.

Oct. 8, 1947.

As Modified Oct. 17, 1947.

Rehearing Granted Nov. 6, 1947.

**1. Divorce 🔑214**

While the better practice is to grant temporary support pendente lite only after application, notice and hearing, trial court had jurisdiction to make such an award on its own motion on former wife's petition for allowance of suit money in her action for division of community property and permanent support. Civ.Code, § 137.

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* Subsequent opinion 190 P.2d 246.

**2. Divorce 🔑211, 212, 223, 224**

Court's discretion in awarding temporary support is governed by the same considerations as those controlling its discretion in awarding suit money and the proper basis for both awards is the necessity therefor. Civ.Code, § 137.

**3. Divorce 🔑211, 214(4), 223, 226**

Pendente lite allowance of temporary alimony and suit money is discretionary with trial court and not a matter of absolute right, but court has no jurisdiction to make such allowances except upon a finding of necessity therefor. Civ.Code, § 137.

**4. Divorce 🔑213, 225**

Wife should not be allowed temporary alimony pendente lite and suit money if she possesses independent means sufficient to live in her accustomed manner pending disposition of action and litigate properly her side of the controversy, but she is not required to impair the capital of her separate estate. Civ.Code, § 137.

**5. Divorce 🔑213, 225**

Allowance of temporary alimony and suit money to former wife in action for division of community property and permanent support was abuse of discretion because no necessity therefor was shown. Civ.Code, § 137.

**6. Divorce 🔑211, 223**

Trial court must be informed in detail as to wife's resources as well as her needs before it can exercise discretion in the matter of pendente lite allowances of temporary alimony and suit money, since such discretion should not be exercised arbitrarily. Civ.Code, § 137.

◆

Appeal from Superior Court, Los Angeles County; Benjamin G. Jones, Judge.

Proceeding by Bessie Brenner Loeb against Edwin J. Loeb for a division of their community property and for permanent support. From an order awarding plaintiff temporary alimony pendente lite and suit money, defendant appeals.

Order reversed.

Lewinson & Armstrong and Herman F. Selvin, all of Los Angeles, for appellant.

Guy T. Graves, of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

This is an appeal by Edwin J. Loeb from an order awarding his former wife, Bessie Brenner Loeb, $500 per month temporary alimony and $1,500 suit money (including counsel fees) on account, in her action against him for a division of their community property and for permanent support. Jurisdiction over these two matters was expressly reserved in both the interlocutory and final decrees of divorce. The latter decree was entered on March 1, 1937.

Section 137 of the Civil Code authorizes pendente lite allowances for support and suit money in the following terms: "When an action for divorce is pending, the court may, in its discretion, require the husband or wife, as the case may be, to pay as alimony any money necessary to enable the wife, or husband, to support herself and her children, or to support himself and his children, as the case may be, or to prosecute or defend the action." The two children of the Loebs are adults and their support is not involved.

Appellant seeks a reversal of the order awarding respondent pendente lite allowances for her support and for suit money on three grounds: (1) The award of temporary support went beyond the issues presented and was therefore in excess of the court's power; (2) the showing of necessity required for both awards was not made; (3) section 142 of the Civil Code prohibits the awards. Before discussing the validity of appellant's several contentions it may be noted that the reasonableness in amount of the awards is not questioned and that appellant's ability to pay them is likewise conceded.

In her petition initiating these proceedings respondent prayed for, among other things, an allowance of suit money, and for "such other and further relief" as the court might deem equitable and proper. The matter was thereafter heard upon an order for appellant to show cause why he should not be required to pay reasonable suit money. Throughout the hearing counsel for both parties and the trial judge indicated on various occasions that the sole issue being tried was suit money. Nevertheless the trial judge included in his order, sua sponte, an award of temporary support. Appellant challenges this award as being beyond the power of the court because no application therefor was made and because appellant had no notice at any time that the issue of temporary support was involved.

[1, 2] It is to be noted that the applicable portion of section 137 which we have quoted in full contains no requirement of either application or notice. There is dicta in the decisions of our courts that an award of temporary support may be made ex parte. See Mudd v. Mudd, 98 Cal. 320, 321, 33 P. 14; Arnold v. Arnold, 215 Cal. 613, 614, 12 P.2d 435; Reed v. Reed, 40 Cal.App. 102, 104, 180 P. 43. The meager authority elsewhere on the point at issue is divided. (See Note, 152 A.L.R. 445, 457.) While it undoubtedly is the better practice to grant temporary support only after application, notice, and hearing, we do not think that the trial court here, in departing from that practice, committed reversible error. The considerations governing the court's discretion in awarding temporary support are identical with those controlling its discretion in awarding suit money. (17 Am.Jur. 452; Nelson, Divorce and Annulment (2d Ed. 1945), sec. 12.06.) The language of our statutory authority, section 137, is also identical as to the proper basis for both awards, namely, necessity. It follows that when appellant made his defense against an award of suit money, he thereby made his defense against an award of temporary support. As a consequence he suffered no substantial prejudice from the court's failure to inform him that the court considered the question of temporary support to be before it as well. We conclude that under the circumstances of this case the trial court possessed the power to make on its own motion an award of temporary support. Cf. Willey v. Willey, 51 Cal.App. 124, 126, 127, 196 P. 101.

[3, 4] A proper evaluation of the merit of appellant's second contention, that a sufficient showing of necessity for pendente lite allowances of temporary alimony and suit money was not made, calls for a general statement of the law governing such allowances and of the facts relied upon by respondent. These allowances are not a matter of absolute right. They may be granted in the sound discretion of the trial court, but section 137 does not empower the court to award temporary alimony and suit money except upon a finding of necessity. The manifest purpose of these allowances to a wife is to enable her to live in her accustomed manner pending the disposition of the action and to provide her with whatever is needed by her to litigate properly her side of the controversy. (Mudd v. Mudd, supra, 98 Cal. 320, 322, 33 P. 114; Busch v. Busch, 99 Cal.App. 198, 202, 278 P. 456; Locke Paddon v. Locke Paddon, 194 Cal. 73, 81, 227 P. 715. If she possesses independent means sufficient for these purposes the allowances should not be granted. Mudd v. Mudd, supra. However, she is not required first to impair the capital of her separate estate. Farrar v. Farrar, 45 Cal.App. 584, 586, 188 P. 289. These principles of California law accord with the law prevailing generally elsewhere. Westphal v. Westphal, 122 Cal. App. 379, 385, 10 P.2d 119; Notes, 15 A.L.R. 781, 35 A.L.R. 1099; 27 C.J.S., Divorce, §§ 205, 208, 222, pages 889, 897, 924, 925; Keezer, Marriage & Divorce (3d Ed. 1946), secs. 590, 591, 604.) Thus the general rule is that the propriety of pendente lite allowances to a wife turns upon the sufficiency of her showing of need for them.

[5] Respondent has no dependents. From her testimony and her federal income tax returns introduced in evidence, the following facts appear. During the six months immediately preceding the hearing, respondent's living expenses as itemized by her averaged $460 a month, aside from income tax payments. This included a generous allowance of $100 a month for gifts, traveling, and entertainment. Respondent's estimated federal income tax amount-

ed to an additional $200 a month, and her state income tax on the basis of her 1944 tax did not run to more than $5 a month. This would give respondent total living expenses at the time of the hearing of $665 a month. However, beginning in 1945 her federal income taxes were paid by her property managers instead of by herself. Her income at this time amounted to about $795 a month. She earned $16 a month as a Christian Science practitioner and received roughly $98 a month in dividends and interest as shown by her 1944 federal income tax return. On the basis of the income shown on that return from her family holdings during the period following her mother's death in May, 1944, her income from that source alone amounted to approximately $680 a month. Thus, according to respondent's own evidence, her monthly income exceeded her maximum monthly expenses by almost $130. In view of the existence of this margin of income over outgo, respondent plainly had no need of temporary support.

Assuming, however, that respondent's federal income tax liability was borne ultimately by herself, the above figures of income and outgo conceivably might furnish a proper basis for an award of suit money if the income shown constituted respondent's entire available income. The record shows that it does not. Prior to her mother's death in May, 1944, respondent's family holdings were held in trust. Under the terms of the trust respondent owned a ⅛th interest in the corpus and received ½ of the net income accruing from such interest, the other ½ being added to her interest in the corpus. According to respondent's testimony as corroborated by her 1944 federal income tax return, she received in trust income in the neighborhood of $300 a month. But she understood that she could have drawn an additional $200 a month and in fact did draw $5,000 of this additional income for the purchase of war bonds. Upon her mother's death in May, 1944, the trust terminated and respondent's interest in the corpus increased from ⅛th to ¼th. She also became entitled to all of the income from her interest instead of ½ thereof and thus the income available to her from her family holdings more than quadrupled, however, her withdrawals did not increase proportionately, but only from $300 to $680 per month. Obviously the amount of income available to respondent at the time of the hearing was substantially in excess of that which she disclosed.

Respondent likewise did not disclose the amount or complete composition of her separate estate. She admitted that her interest in her family holdings was worth about $200,000, and those holdings were shown to be somewhat undervalued. She failed to reveal the value of other property, consisting of her interest in her mother's estate, the appraised value of which is in excess of $115,000. Respondent did divulge that she possessed over $15,000 in liquid assets consisting of war bonds of a maturity value of $20,000 and a savings bank account of $2,200 which had been reduced from a 1941 figure of $9,000 largely by war bond purchases.

[6] As previously stated, the grant or denial of pendente lite allowances of temporary alimony and suit money rests in the sound discretion of the trial court. However, that discretion should not be exercised arbitrarily. Sweeley v. Sweeley, 28 Cal.2d 389, 394, 170 P.2d 469; Turner v. Turner, 80 Cal. 141, 144, 22 P. 72; Smith v. Smith, 147 Cal. 143, 145, 81 P. 411. The wife seeking these awards must establish her necessity for them. Such necessity may be proved only by showing that her need for proper support and the expenses of the litigation exceed her available resources. This means that the trial judge must be informed in detail not only as to her needs (Tremper v. Tremper, 39 Cal.App. 62, 66, 177 P. 868), but also as to her resources. Cf. Kenney v. Kenney, 220 Cal. 134, 138, 30 P.2d 398; Busch v. Busch, supra, 99 Cal.App. 198, 201, 278 P. 456. Here the trial court was uninformed of respondent's total available resources. Manifestly the court could not exercise a judicial discretion without knowledge of the material facts.

The argument that these awards are justified by the necessity for avoiding impairment of the capital of respondent's separate estate is unsupported by the evidence. A review of the California decisions enunciating the rule of no impairment will illustrate the inapplicability of the rule to the factual situation of the instant case. In Kowalsky v. Kowalsky, 145 Cal. 394, 396, 78 P. 877, the wife's entire separate estate consisted of only $700 in corporate stocks, and she was without other means of support. In Farrar v. Farrar, supra, 45 Cal.App. 584, 586, 188 P. 289, the wife's separate income was $2.50 a month. In Whiting v. Whiting, 62 Cal.App. 157, 160, 216 P. 92, the wife owned $4,300 in non-income-producing property and her entire other income consisted of her weekly salary of $16.50. In Busch v. Busch, supra, 99 Cal.App. 198, 200, 278 P. 456, the wife's income from her property was shown to be about $8 a year. In Westphal v. Westphal, supra, 122 Cal.App. 379, 386, 10 P.2d 119, the wife's annual income from her separate property of oil stock worth about $15,000 did not exceed $500. The contrast between these factual situations and the one we have here is extreme. Respondent, who has no dependents, possesses a separate estate of a value considerably in excess of $200,000 and a separate income substantially in excess of $9,000 a year. Her maximum annual living expenses amount to less than $8,000 a year. In addition she possessed at the time of the hearing over $15,000 in liquid resources which were accumulated income. Plainly she was in no need of temporary support, and the expenses of litigation were well within her available resources. Cf. Wilder v. Wilder, 214 Cal. 783, 785, 7 P.2d 1032; Baldwin v. Baldwin, 28 Cal.2d 406, 418, 170 P.2d 670. She was in a position to hire and compensate competent legal counsel and otherwise to finance this litigation. In this connection it is interesting to note that she never asked for temporary support and that her original petition, although praying for suit money, contained no allegation of her financial necessity therefor. To paraphrase somewhat the language of the court in Henderson v. Henderson, 1939, 104 Colo. 325, 90 P.2d 968, 971, the trial court apparently proceeded on the theory that since appellant was wealthier than respondent, he should support her during her suit and finance it. That is not the law.

As previously stated, the power granted the court by section 137 is in line with the prevailing authority existing in other jurisdictions, in that it is intended to be exercised only in cases of necessity. After diligent search we have found no case in the United States in which an order for temporary support or suit money has been made in favor of a wife whose financial resources even remotely approached those of the respondent. The order in question presents no appeal to our sense of equity and justice which tempts us to place a construction upon section 137 which would minimize its strict limitations and be out of harmony with principles which are well settled throughout the states. However, the views we express upon the matters before us should not be understood as applying to the powers of the court under section 139, Civil Code, to grant permanent support, or as indicating that would be a proper judgment in the instant case.

Appellant's third and final contention is that section 142 of the Civil Code compels the reversal of these allowances. The last sentence of section 142, as added in 1943, reads as follows: "Where there are no children, and either party has a separate estate sufficient for his or her proper support, no allowance shall be made from the separate estate of the other party." Appellant contends that this mandatory provision applies, since the children of the parties are adults, respondent has a separate estate sufficient for her support, and there is no community property by reason of the insolvency of the community of appellant and respondent both on March 1, 1937, the date of the final decree of their divorce, and as of the time of the hearing. Respondent disputes the factual basis of the argument and also appellant's legal conclusions.

Apparently section 142 does apply to awards of temporary alimony in situations meeting the conditions of the provision, but it would not seem to apply in any event to an award of suit money. Baldwin v. Baldwin, supra, 28 Cal.2d 406, 413, 416, 170 P.2d 670. We find it unnecessary to pass upon the merit of this final contention of appellant as to the applicability of the section to the facts taken as established by appellant or those urged by respondent. Our previously stated conclusion that the order constituted an abuse of the discretion entrusted to the trial court by section 137 requires a reversal.

The order awarding respondent pendente lite allowances of temporary alimony and suit money is reversed.

WOOD, J., and KINCAID, J. pro tem., concur.

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81 Cal.App.2d 866

**PEOPLE v. RICHARDSON et al.**

**Cr. 4144.**

**District Court of Appeal, Second District, Division 1, California.**

**Oct. 17, 1947.**

**As Corrected Oct. 22, 1947.**

**1. Kidnapping 🔑5**
**Robbery 🔑24(3)**

Evidence identifying defendants sustained convictions for kidnapping for purpose of robbery and for robbery.

**2. Criminal law 🔑566**

Positive identification of an accused is not necessary, and a witness is not required to testify to the exclusion of doubt as to identification.

**3. Criminal law 🔑1037(2), 1044, 1171(1)**

Defendants were not entitled to reversal of convictions on ground that district attorney was guilty of misconduct in questioning one of the defendants' witnesses with reference to a prior conviction which was only a conviction for a misdemeanor, where there was no motion to strike and no request for an instruction or admonition, and no prejudice was shown.

◆

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Clarence Richardson, Robert Coleman, and Clinton Coleman were convicted of kidnapping for purpose of robbery, and of robbery, and from the judgments and order denying a motion for new trial they appeal.

Judgments and order affirmed.

Phil H. Curry, of Los Angeles, for appellants.

Fred N. Howser, Atty. Gen., and William James, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Charged in count one of the information with the offense of kidnapping for the purpose of robbery and in count two with the offense of robbery, defendants, who were adjudged guilty by a jury, appeal from the judgments that followed and from an order denying a motion for a new trial.

The appeal herein is based on:

"I. Insufficiency of the evidence to support the judgments of conviction.

"II. Prejudicial misconduct on the part of the district attorney at the trial of the case.

"III. Prejudicial error committed by the trial court in denying the defendants' motions for a new trial."

Appellants' argument relating to the sufficiency of the evidence is based largely on the failure of the victim to identify the defendants "positively." The victim testified, referring to the defendants, "these men resemble the men very much that held me up"; "the one on the end, he looks like the fellow that first ran to the car" and, referring to the other defendants, "they resemble the men. They had hats on and bandages around their mouths; it was kind of hard to definitely say, but they look like the men." "Q. Would you say that they are men who had approximately the same complexion, color? A. Yes, about the same complexion and about the same size."

Carl Q. Tinker, the victim of the robbery, was the owner of a drug store and on Christmas Eve had closed the store about midnight. Mr. Tinker testified in part as follows:

"I closed the store and went to get in my car, and I entered the car on the left-hand side and as I got into the car I heard someone running across the street, and I thought it might be someone after me, so

I tried to close the door, but they ran to the door and pulled it open and said, 'Let me in the car,' and seemed to have a gun or something in their hand; and I was trying to get out of the car and they got in behind me, pulled—it is a two-door Ford sedan—and they pushed the seat up and got in behind me. Then my foot was outside, so he said, 'Get back in the car,' so he tried to shut the door. I said, 'I can't shut the door because my foot is outside,' so I got my foot back in the car and shut the door. Then, about that time I noticed two more men coming along the sidewalk on the other side of the car, and he said, 'Open that door, let the men in,' but I didn't open it, but he reached over and opened the door and let the other two men in. One got in the back and the other one set in the front seat with me. * * * Well, the fellow that was sitting next to me, he said, 'We want that money.' And then—I beg your pardon. Before he said that, he said, 'We want your gun,' they asked me for a gun. I told them I didn't have a gun, so they seemed surprised I didn't have a gun, and one said, 'Look in the glove compartment,' They looked in that for a gun. * * * Then, after they looked and didn't see a gun, they said, 'Now, we want the money'; and so I told them I didn't have much money with me; and he said, 'Well, we want the money that you have'; and he said, 'Where is the money if you haven't got it? I said, 'Well, someone picked it up. I was expecting something like this might happen. I wouldn't keep a lot of money.' They said, 'Oh, yes, you have, and we are going to get it.' About that time the one in the back behind me stuck the gun to my neck and I could feel the gun pressing against my neck, and he said, 'If you don't do what we tell you to do, you are not going to live to see Christmas.' * * * One of the men said, 'If a police officer comes up to this car you better tell a story or else we'll get you.' I said, 'What did you want me to tell him?' He said, 'You tell him a story all right to get us out of it or else we will let you have the lead before they get us.' So I told him, I says, 'I will do what you want me to do,' and I started to get out of the car. They said, 'No, don't you get out; you do what we tell you to do.' So they held me there about 40 minutes, I imagine, in the car, and so I began to pray they wouldn't harm me about that time, and the little fellow set next to me, he says, 'Let's get this over. I'm getting nervous'; and so they continued to sit there and they watched, looking back in the back. When I turned around, the two in back said, 'Don't turn around,' but I turned around anyway and they turned their head so I couldn't see them, looked out of the back of the car; so I looked forward again, kept looking forward because they told me not to turn around again. So finally the taller one of the trio, he got out of the car and told me to stay in the car, and he walked up toward the entrance to my store. Then they told me to get out. * * * They had remained in the car and told me to get out. I got out on the right side of the car next to the store, and they told me to wait and they got out behind me, and they also cautioned me before leaving the car if I called for help or anything, or made any signals to anybody passing, they would shoot me; so I walked on to the store, to the entrance—the other one was waiting up there—and I was walking somewhat fast. They said, 'Don't walk so fast,' the two with me, behind me, made that statement. When I got to the entrance to the store, they said, 'Now, don't let that burglar alarm ring, be sure and cut it off'; so I proceeded—I turned the burglar alarm off, and by that time I heard somebody coming down the street and so—well, I stalled a little about getting into the store, thinking it might be somebody knew me and they would help me; so when the man got to the corner they said, 'Hurry up and get in, get in the store.' I said, 'If you will leave me alone I will get in, but you make me nervous and I can't find the right key.' So the man stood there and said, 'How are you Doc?' I said, 'I'm all right,' just like that, there wasn't nothing else for me to say but that, the men were behind me; so I got into the store and they told me to go and get the money, the rest of the money. In the meantime they had taken the money I had on my person in the car and searched me for more money. * * *

"Two of the men I saw had guns. So the smaller one of the trio and the darker one followed me into the back room, which was the prescription room, told me that is where I had the money. So they told me to get the money, so I went back to the prescription room to get the money. It was dark and he made me turn the light on, the smaller one right behind me, and I turned the light on; and I had placed part of the money down in the cupboard, I hadn't checked the money, just put it down there, and as I took it out of the register and when I went to reach for it he jumped at me with the gun like he was going to shoot me.

"Q. By Mr. Hudson: He pointed the gun at you? A. Yes, the gun. I got the money out and gave it to them. They took that. They said, 'Now, we want the rest of it.' I says, 'That is all I have.' They demanded the rest of it again, so I reached in the drawer and pulled out some more bills I had there."

The victim was held in the car for about forty minutes by defendants, then forced to open the drug store and, inside the store, was forced to produce what money was on hand. At least two of the defendants were armed; the light was turned on in the store. Defendants also stole a radio and a toilet set as well as other articles. The radio and toilet set were given as a present to a Mrs. Allen the next day following the robbery by defendant Richardson.

The defendants were arrested on suspicion shortly after the robbery. The three were in a car belonging to one of the defendants; three revolvers were found in the car. An investigation followed which resulted in the charges herein considered.

[1, 2] In the light of the foregoing, appellants' argument actually is concerned with the weight of the evidence rather than its sufficiency and in that regard it is well settled that such questions are for the jury's determination; as a matter of law, the evidence was sufficient. It should be noted in this connection that positive identification is not necessary; a witness is not required to testify to the exclusion of a doubt.

[3] Appellants' contention that the District Attorney was guilty of misconduct relates to a question of one of the defendants' witnesses with reference to a prior conviction which revealed that such conviction was only a misdemeanor. There was no motion to strike nor was there any request for an instruction or admonition. The error does not appear to have resulted in any prejudice in the circumstances.

Finally, it is argued that the denial of defendants' motion for a new trial was error because the trial judge as a thirteenth juror should have held the evidence to be insufficient and granted the motion. In the circumstances there is no merit to such argument.

There are no prejudicial errors revealed by the record. The judgments and order are affirmed.

YORK, P. J., and WHITE, J., concur.

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81 Cal.App.2d 686

**JOHNSON v. JOHNSON.**

**Civ. 13392.**

District Court of Appeal, First District, Division 2, California.

Oct. 6, 1947.

**1. Divorce 🔑184(5)**

Where order setting aside final divorce decree was supported by the evidence, District Court of Appeal could not interfere with trial court's discretion.

**2. Judgment 🔑375**

Where a judgment is taken against a defendant in violation of an agreement between parties, there is in effect an extrinsic fraud, which will support an order vacating the judgment.

**3. Divorce 🔑165(3)**

Where husband, whose wife filed a divorce action against him while he was in the armed forces, signed, at wife's request, a waiver of his rights under the Soldiers' and Sailors' Civil Relief Act and a property settlement agreement, whereby wife agreed to restore to husband $2,000 which was half of amount withdrawn by her from their joint bank account, but wife failed to carry out agreement, trial court, in its discretion, properly set aside final divorce decree for wife though in the meantime she had remarried and was expecting a child. Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A. Appendix § 501 et seq.

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Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action for divorce by Norma Johnson against B. L. Johnson, wherein the plaintiff obtained a final decree of divorce by default. From an order setting aside the final decree, the plaintiff appeals.

Order affirmed.

Booth B. Goodman, of San Francisco, for appellant.

Felton L. Watson, of Oakland, for respondent.

DOOLING, Justice.

The plaintiff appeals from an order setting aside a final decree of divorce. The evidence in support of the motion to set aside the final decree establishes that appellant filed an action for divorce from respondent in San Francisco while respondent was in the armed forces of the United States. There was submitted to respondent for his signature a waiver of his rights under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A.Appendix, § 501 et seq., and a property settlement agreement. Appellant had previously withdrawn from a joint bank account of the spouses the sum of $4000. One of the terms of the proposed property settlement was the promise by appellant "to restore" to respondent $2000 "as his full share and portion of said monies." On January 15, 1945, at a time when the waiver and property settlement agreement had not been signed by respondent, appellant addressed a letter to respondent the body of which reads:

"I received your letter and considered your request. I agree that the $2,000.00 mentioned in the property settlement agreement shall be paid within one year after the granting of the interlocutory decree of divorce. That will make the money payable before the divorce is final.

"I will also give you my automobile if you will properly execute the appearance and agreement and return to my attorney immediately.

"When these papers are received, as above stated, I will send the endorsed pink slip to you."

Upon receipt of this letter the waiver and agreement were signed by respondent and on February 20, 1945, appellant obtained an interlocutory decree of divorce by default, the decree reciting the written waiver by defendant of "all of the provisions of the Soldiers' and Sailors' Relief Act of 1940."

On June 15, 1946, a final decree of divorce nunc pro tunc as of February 22, 1946, was granted on appellant's application. Appellant has paid respondent no part of the $2000.

[1] We cannot interfere with the discretion of the trial court. Its order setting aside the final decree is supported by the evidence. The court was entitled to find that the execution of the waiver and property agreement by respondent and his failure to appear in the divorce action were induced by the appellant's promise to pay him the $2000 within one year after the granting of the interlocutory decree, which time was expressly stated in appellant's letter to him to be "before the divorce is final." The gist of the promise is contained in the quoted words, and the trial court was justified in treating the promise as one that the payment should precede the entry of any final decree.

[2] Where a judgment is taken against a defendant in violation of an agreement between the parties, it amounts to an extrinsic fraud upon the defendant which will support an order vacating the judgment. Waybright v. Anderson, 200 Cal. 374, 253 P. 148; Bonfilio v. Ganger, 60 Cal.App.2d 405, 140 P.2d 861; Sobzhak v. Rivera, 126 Cal.App. 217, 14 P.2d 533; McKeever v. Superior Court, 85 Cal.App. 381, 259 P. 373; MacGillivray v. Owen, 30 Cal.App. 763, 159 P. 452; 14 Cal.Jur., Judgments, sec. 93, p. 1032.

[3] The fact that appellant was remarried and expecting a child cannot affect the result. She induced the respondent to execute the property agreement, waive his rights under the Soldiers' and Sailors' Relief Act and suffer a default by her promise that she would pay him $2000 "before the divorce is final," and then had the final decree entered in violation of her agreement. "While it is regrettable that defendant had remarried in the interim, this fact, standing alone, cannot serve to deprive plaintiff of the relief to which (s)he is entitled. Moreover, this fact was before the court below and was undoubtedly weighed by it in determining the cause. It is unfortunate that one of two apparently innocent persons must suffer by reason of defendant's fraud." Nelson v. Nelson, 7 Cal.2d 449, 452, 60 P.2d 982, 983; Rhea v. Millsap, 68 Cal.App.2d 449, 455, 156 P.2d 941.

The order appealed from is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

81 Cal.App.2d 729

## ANDRADE v. CASTEEL.

Civ. 13522.

District Court of Appeal, First District, Division 2, California.

Oct. 9, 1947.

**1. Landlord and tenant 🔑92(1)**
**Vendor and purchaser 🔑228(1)**

An option to purchase contained in lease is a "covenant running with the land", and a subsequent purchaser taking with notice of the option takes subject to right of the option holder to complete his purchase.

See Words and Phrases, Permanent Edition, for all other definitions of "Covenant Running With the Land".

**2. Evidence 🔑84**

Where donee under gift deed had knowledge of pre-existing lease and option to purchase, and donee had knowledge that substantial improvements were made by lessee in contemplation of his exercise of option to buy, donee would be presumed to have consented to the improvements in anticipation of lessee's exercise of the option.

**3. Estoppel 🔑74(1)**

Where donee under unrecorded gift deed permitted grantor's widow to deal with land as sole owner in executing renewal of lease containing option to purchase and lessee had no knowledge of unrecorded gift deed, lessee would be permitted to exercise option as against donee after death of grantor's widow.

**4. Estoppel 🔑74(1)**

Where true owner of realty permits another to appear as owner of the property or as having full power of disposition over it, an innocent third party who is thus led into dealing with apparent owner will be protected by equity against claims of true owner whose conduct made the fraud possible.

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Action by Raymond Andrade against L. F. Casteel to quiet title to real property under a deed of gift, wherein defendant claimed under a lease and option to purchase which he offered to complete and made tender of the purchase price. From a judgment for defendant, the plaintiff appeals.

Affirmed.

C. B. Wooster, of San Jose, for appellant.

Rankin, Oneal, Luckhardt, Center & Hall, of San Jose, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to quiet title to real property under a deed of gift; defendant claimed under a lease and option to purchase which he offered to complete and made tender of the purchase price. The defendant had judgment and plaintiff has appealed on an agreed statement.

On July 1, 1936, Manuel Silva, as owner, leased the land to defendant for a term of five years with option to purchase for $1000. In 1937 Silva and his wife executed a deed of gift to their minor grandson, plaintiff herein. Manuel Silva died April 3, 1938, and on April 7 a deed from Manuel to his wife Frances was recorded. In April, 1941, Frances Silva renewed the lease to plaintiff for a term of three years under the same terms as the original lease of 1936. Defendant occupied the premises with his family of a wife and five children and expended $1000 in the construction of roads, buildings, and other permanent improvements.

After the death of Frances Silva in 1944, defendant tendered the full purchase price according to the terms of the lease, but the offer was refused on behalf of the estate and of the donee under the gift deed.

The plaintiff was a minor at the time the gift deed was executed and was in the military service until the spring of 1946 when he reached his majority just before his discharge. It is stipulated that at the time the gift deed was executed he knew that defendant was in actual possession under the lease and knew its terms and particularly the terms of the option to purchase. On the other hand defendant had no knowledge of the gift deed until after the death of Mrs. Silva in 1944.

Appellant argues that the gift deed vested title in him upon delivery; that thereafter grantors held no more than a life estate; that all rights of defendant under the lease terminated on the death of Mrs. Silva. Wilkerson v. Seib, 20 Cal.2d 556, 127 P.2d 904, and similar cases are cited with which no quarrel is suggested.

Respondent rests his case on Section 1107 of the Civil Code, which has little if any bearing on the question involved. It would seem to follow from the agreed facts that, if respondent took the second lease and option without knowledge of the gift deed the equities would require an affirmance of the judgment. On the other hand if he should be denied the right to purchase, the equities would require that, before the title was cleared in the plaintiff, the defendant should be reimbursed for the improvements which he made upon the premises, since these were made with the knowledge and consent of the owner, were made under contemplation of purchase, and were permanent improvements on the premises. With due regard for these equities the trial court decreed that the option was still in force and that defendant should have a deed upon his payment to plaintiff of the option price of $1000.

[1] The judgment finds support in Smith v. Bangham, 156 Cal. 359, 363, 104 P. 689, 28 L.R.A.,N.S., 522; Copple v. Aigeltinger, 167 Cal. 706, 710, 140 P. 1073; Chapman v. Great Western Gypsum Co., 216 Cal. 420, 425, 14 P.2d 758, 85 A.L.R. 917. The principle of these cases is that an option to purchase contained in a lease is a covenant running with the land and that a subsequent purchaser taking with notice of the option takes subject to the right of the option holder to complete his purchase.

[2] Here the donee under the gift deed had knowledge of the preexisting lease and option; he had knowledge that respondent was in possession under the lease and option, and that substantial improvements were made by the lessee in contemplation of his exercise of the option to buy. Under these circumstances he must be presumed to have consented to the improvements in anticipation of respondent's exercise of the option.

[3, 4] Respondent's lack of knowledge of the unrecorded deed is conceded. It was no fault of his that Mrs. Silva was permitted to deal with the land as sole and undisputed owner. Under section 3543 of the Civil Code the appellant by "whose negligence" the trouble arose must be the sufferer. This principle is approved in Butler v. Woodburn, 19 Cal.2d 420, 425, 122 P.2d 17, 20, where the court said: "Where, as here, the true owner permits another to appear as the owner of the property or as having full power of disposition over it, it is established that an innocent third party who is thus led into dealing with the apparent owner will be protected by a court of equity against the claims of the true owner whose conduct made the fraud possible."

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

81 Cal.App.2d 727

### WOOD v. WOOD.

Civ. 13458.

District Court of Appeal, First District, Division 2, California.

Oct. 9, 1947.

**1. Divorce** ⚿184(10)

A finding of fact made by trial court in divorce action upon substantial and competent evidence is binding upon reviewing court.

**2. Evidence** ⚿426

Evidence may be admitted to establish that realty is community property, even though title has been acquired under deed executed in form that ordinarily creates in the grantee a common-law estate with incidents unlike those under the law of community property.

**3. Evidence** ⚿426

Land may be shown to be community property even though it is granted to one spouse alone as his or her property in fee simple.

**4. Evidence** ⚿426, 461(4)

Evidence may be admitted to establish that husband and wife intended to take property as community property even though they accepted deed drawn to them as tenants in common or as joint tenants.

**5. Husband and wife** ⚿263

In divorce action, evidence was admissible to establish that, though husband and wife held home property under deed drawn to them as joint tenants, they intended to take property as community property.

**6. Divorce** ⚿249(3)

Trial court, having found on substantial and competent evidence that husband and wife intended to take home property as community property, though deed was drawn to them as joint tenants, properly awarded such property to wife as part of the community.

◆

Appeal from Superior Court, Alameda County; Ezra Decoto, Judge.

Action for divorce by Theresa Nittler Wood against Jackson L. Wood. From a judgment granting plaintiff a divorce and awarding to her the home property as a part of the community, defendant appeals.

Judgment affirmed.

Edward E. Craig, of Berkeley, for appellant.

Stanley R. Sterne, of Oakland, for respondent.

NOURSE, Presiding Justice.

In an action for divorce on the grounds of cruelty the wife prevailed and had a judgment awarding the home property to her as a part of the community. A short time before the marriage the husband took title to the property making a down payment and paid monthly installments both before and after the marriage. About two years later the parties had marital difficulties and then the appellant transferred the property to his wife as her separate property. The wife commenced an action for divorce which was dismissed and the parties returned to live together. About this time the respondent made a deed to the property transferring it from herself to appellant and respondent as joint tenants. On the trial of this action the respondent testified that it was her intention and understanding that the effect of the deed was to give the property the status of community property and that though the deed contained the words creating a joint tenancy she did not know what that expression meant or that it was any different than community property.

The trial court found in accordance with this evidence that nothwithstanding the words in the deed the parties intended to create a community interest only and therefore awarded the entire property to respondent.

[1-6] On this appeal no attack is made upon this evidence or this finding of fact. The sole ground of appeal is that since under a joint tenancy the interests of husband and wife are separate property the trial court committed error in awarding all this property to the wife. This proposition the respondent concedes but she goes further and argues that when the interests of

husband and wife are in litigation the court is not bound by the language of the deed of conveyance but it may take evidence to discover the intentions of the parties as to their respective rights. The recent case of Tomaier v. Tomaier, 23 Cal.2d 754, 757, 146 P.2d 905, 906, states all the rules of law applicable to this appeal. It would serve no purpose to give a recital of the oral testimony as its sufficiency is not questioned and it would serve no purpose to discuss or cite authorities for the accepted rule that when the trial court has made a finding of fact on substantial and competent evidence such finding is binding upon the reviewing court. It is sufficient to cite at some length from the Tomaier case since the quotation following covers the only debatable question on this appeal.

"It is the general rule that evidence may be admitted to establish that real property is community property, even though title has been acquired under a deed executed in a form that ordinarily creates in the grantee a common law estate with incidents unlike those under the law of community property. Thus land may be shown to be community property even though it is granted to one spouse alone as his or her property in fee simple. Jaegel v. Johnson, 148 Cal. 695, 84 P. 175; Hammond v. McCollough, 159 Cal. 639, 115 P. 216; Hibernia Sav. & Loan Soc. v. DeRyana, 210 Cal. 532, 292 P. 632; In re Estate of Cronvall, 220 Cal. 503, 31 P.2d 372.

"Again, it may be shown that husband and wife intended to take property as community property even though they accepted a deed drawn to them as tenants in common. Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477; Steere v. Barnet, 54 Cal.App. 589, 202 P. 166. It has in fact been held unequivocally that evidence is admissible to show that husband and wife who took property as joint tenants actually intended it to be community property. Hulse v. Lawson, 212 Cal. 614, 299 P. 525; Jansen v. Jansen, 127 Cal.App. 294, 15 P.2d 777; see Minnich v. Minnich, 127 Cal.App. 1, 8, 15 P.2d 804; Horsman v. Maden, 48 Cal.App.2d 635, 640, 120 P.2d 92. Such rulings are designed to prevent the use of common law forms of conveyance to alter the community character of real property contrary to the intention of the parties."

Judgment affirmed.

GOODELL, and DOOLING, JJ., concur.

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## In re GOLDER'S ESTATE.

## GOLDER v. GOLDER.*

Civ. 13455.

District Court of Appeal, First District,
Division 2, California.

Oct. 9, 1947.

Hearing Granted Dec. 8, 1947.

**1. Wills 🔑72**

Where a married man while in military training nearly two years before going overseas, where he died in action, wrote his mother a letter with postscript stating that he had a surprise for her and hoped it worked out, that that was all he could tell her, and that he wanted his savings and stock to go to her, if he did not come back from war without mentioning his other property or his minor child, court properly denied probate of postscript as will on ground that it was not testamentary, but merely expressed writer's intention to make will. Probate Code, § 90.

**2. Appeal and error 🔑1008(3)**

Primarily, interpretation of written document is for trial court, but reviewing court is not bound by trial court's interpretation unless based on extrinsic evidence in which there is some conflict.

**3. Wills 🔑72**

Where question of testamentary intent arises from document offered for probate as will, proponent must satisfactorily show that decedent intended, by the very paper itself, to dispose of his property.

**4. Wills 🔑386**

Where paper offered for probate as will, the evidence, and applicable inferences satisfactorily show that paper was not intended as final disposition of testator's property, trial court's finding that paper was not testamentary cannot be attacked, on appeal from judgment denying probate thereof, except by showing of error or that finding was arbitrary or unreasonable.

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* Subsequent opinion 193 P.2d 465.

◆

Appeal from Superior Court, Alameda County; Ezra W. Decoto, Judge.

Proceeding by Margaret B. Golder for probate of the purported will of William Henry Golder, deceased, contested by Alyse V. Golder. From an order denying probate, proponent appeals.

Affirmed.

Leander L. James, of San Francisco, for appellant.

J. Elwood Andresen, of Oakland, for respondent.

NOURSE, Presiding Justice.

The proponent of a purported will appeals from the order denying probate.

The decedent died in action in the Bay of Biscay August 1, 1943. He left a mother, the proponent, a wife, the contestant, and a minor daughter, who was eight years of age at the time of her father's death. In December, 1941, when decedent was contemplating being sent overseas, he wrote a letter to his mother to which was added a postscript reading:

"P.S. I have a surprise coming for you and hope it works out. This is all I can tell you. My insurance is made out to Alyse so should I get in this war and not come back I want my savings & stocks to go to you. Keep in touch with Alyse.–1516 Lehigh Ave., Phila. Pa."

The body of the letter was written, dated and signed in ink. The postscript was in lead pencil. It was not dated nor signed, and no proof was taken as to when it was written.

[1] The appeal presents the single question whether the trial court erred in denying admission of the postscript as a last will and testament. This question depends wholly on the application of the inferences to be drawn from all the circumstances.

In finding that the paper was non-testamentary the trial court had these facts supporting that inference—the postscript states: "I have a surprise * * * hope it works out." "This is all I can tell you." What more was there to tell if this was a last will? And what was it that he hoped would work out, unless he intended to make a will before he got into the war? The letter was written while he was in training. He did not go overseas until nearly two years later. No further mention of the letter was made.

The decedent and respondent had been married about ten years before the letter was written. Whatever property decedent had acquired was presumably community. Half of that would go to the wife notwithstanding a will. The minor child was not mentioned in the paper. She would take one-half of his estate as a pretermitted heir under section 90 of the Probate Code. The deceased left other property, real and personal, not mentioned in the paper.

Under all these circumstances it was reasonable to infer that the postscript was not intended to be testamentary, but that the writer merely expressed the intention to make a will at some future time, in so far as he was legally entitled to do so, and that he did not intend by this postscript to deprive his wife or his daughter of their legal rights under the Probate Code.

[2-4] Primarily, the interpretation of a written document is committed to the trial court, but the reviewing court is not bound by that interpretation unless it has been based upon extrinsic evidence in which there is some conflict. Estate of Wunderle, 30 Cal.2d 274, 181 P.2d 874, citing cases. But, where the question of testamentary intent arises from the document offered "it must satisfactorily appear" that the decedent intended "by the very paper itself, to make a disposition of his property." Idem., 30 Cal.2d at page 280, 181 P.2d at page 878, and cases there cited. Thus, if it "satisfactorily" appears to the trial court on viewing the paper, the evidence, and the applicable inferences that

the paper was not intended as a final disposition of the property, its finding that the paper is not testamentary cannot be attacked on appeal except by a showing of error, or that it is arbitrary or unreasonable.

Order affirmed. Respondent to have her costs.

GOODELL and DOOLING, JJ., concur.

**PETERSON et al. v. GENERAL GEOPHYSICAL CO. et al.**

**Civ. 7293.**

District Court of Appeal, Third District, California.

Oct. 1, 1947.

Rehearing Denied Oct. 30, 1947.

Hearing Granted Nov. 24, 1947.

Appeal Dismissed Dec. 8, 1947.

**1. Removal of causes** 🔑**36**

The fraudulent joinder of resident defendant will not defeat right of nonresident party to remove case to federal court by filing of sufficient bond and petition setting forth facts which show such fraudulent joinder. Jud.Code, § 28, 28 U.S.C.A. § 71.

**2. Removal of causes** 🔑**36**

Where plaintiff has right to join resident and nonresident defendants, fraud cannot be predicated upon a mere showing that joinder was made for purpose of preventing removal to federal court, since plaintiff's motive is immaterial if a right of joinder exists. Jud.Code, § 28, 28 U.S.C.A. § 71.

**3. Removal of causes** 🔑**86(1)**

A nonresident defendant's petition for removal to federal court for fraudulent joinder of resident defendant must allege facts showing fraudulent joinder, and denial that complaint states cause of action against resident defendant coupled with general allegation of fraud is insufficient, but allegations that plaintiff knowingly made false statements of fact to state fictitious joint cause of action against resident defendant to defeat nonresident defendant's right of removal are sufficient. Jud.Code, § 28, 28 U.S.C.A. § 71.

**4. Removal of causes** 🔑**89(2), 95**

Where sufficient allegations of fraudulent joinder of resident defendant are made in nonresident defendant's petition for removal to federal court, issue of fact is raised which may be determined only by federal court, and, federal court's determination thereon, the question of jurisdiction is conclusive against state court until reversed on appeal. Jud.Code, § 28, 28 U.S.C.A. § 71.

**5. Removal of causes** 🔑**89(1)**

The filing of bond and petition for removal to federal court does not ipso facto divest state court of jurisdiction but presents question of law whether, assuming truth of facts alleged in removal petition, the case is one which may properly be removed, and state court should determine such question for itself, and, if in fact the cause is not removable, a transfer to federal court does not divest state court of jurisdiction and proceedings of state court are valid. Jud.Code, § 28, 28 U.S.C.A. § 71.

**6. Removal of causes** 🔑**89(2)**

The general rule is against holding of fraudulent joinder of resident defendant, and, where allegation of such joinder is made on basis that no cause of action is stated against resident defendant, any doubt should be resolved in favor of retention of cause in state court and against removal to federal court. Jud.Code, § 28, 28 U.S.C.A. § 71.

**7. Removal of causes** 🔑**89(2)**

The nature of plaintiff's cause of action against resident and nonresident defendants on theory of law upon which he relies is what he in his pleadings has reasonably and in good faith declared it to be, and, where the remedy sought is in doubt, he has the right to have the question passed upon by the state court. Jud.Code, § 28, 28 U.S.C.A. § 71.

**8. Removal of causes** 🔑**86(1)**

Allegation, in petition for removal to federal court for fraudulent joinder of resident defendant, that resident defendant is in fact a nominal or unnecessary party, is a conclusion of the pleader. Jud.Code, § 28, 28 U.S.C.A. § 71.

**9. Removal of causes 🔑89(2)**

In determining whether cause of action has been stated against resident defendant whom nonresident defendant asserts has been fraudulently joined to prevent removal to federal court, court will not inquire whether objection to complaint might be raised on special demurrer. Jud.Code, § 28, 28 U.S.C.A. § 71.

**10. Removal of causes 🔑89(2)**

The truth of facts alleged in petition for removal to federal court for fraudulent joinder of resident defendant with nonresident defendant was assumed. Jud.Code, § 28, 28 U.S.C.A. § 71.

**11. Removal of causes 🔑89(2)**

In action on grounds of absolute liability and of negligence for death of rancher who was killed when his horse became frightened during blasting operation on adjoining land, refusal to permit removal of cause to federal court for alleged fraudulent joinder as defendants of adjoining landowner and foreign corporation conducting blasting operation was not error, where foreign corporation's removal petition denying agency relationship between landowner and corporation, and charging that allegations of complaint with respect to agency were willfully made with knowledge of their falsity, raised a question of law only which should be litigated in state court. Jud.Code, § 28, 28 U.S.C.A. § 71.

**12. Judgment 🔑678(1)**

A party against whom plea of res judicata is asserted must have been a party or in privity with a party to the prior adjudication.

**13. Judgment 🔑829(3)**

Federal court decision remanding case to state court for lack of facts establishing removable cause is res judicata in subsequent case involving the same parties and pleadings based upon the same facts. Jud. Code, § 28, 28 U.S.C.A. § 71.

**14. Judgment 🔑829(3)**

Under rule that party against whom plea of res judicata is asserted must have been a party or in privity with a party to prior adjudication, federal court decision remanding injured person's action for damages to state court was res judicata on issue of removability in action by injured person's widow and children for damages for injured person's death subsequent to the first action. Jud.Code, § 28, 28 U.S.C.A. § 71.

**15. Explosives 🔑12**

In action for death of rancher killed when his horses became frightened during blasting operation on adjoining land, question whether blasting was negligently done was for jury.

**16. Appeal and error 🔑1002, 1011(1)**

Where evidence is in conflict, appellate court will not substitute its judgment for that of jury or trial judge.

**17. Explosives 🔑12**

In action for death of rancher killed when his horses became frightened by dynamite explosion on adjoining land, evidence was sufficient to show that defendants were negligent in that use of dynamite to dig small holes needed in seismographic surveys and resulting in loud report were not in conformity with the usual and customary practice of persons making such surveys.

**18. Explosives 🔑12**

An ordinarily prudent person setting off dynamite charge in farming area populated with farm animals should forsee that loud and unusual noise would likely frighten animals on nearby property, and hence causing of such noise without warning is negligence with respect to person who is in position of peril and whose presence is known or should be anticipated by dynamiter.

**19. Explosives 🔑12**

A person whose negligent act in exploding dynamite on adjoining land frightened horses was liable for death of rancher who was thrown to ground when horses which rancher was driving started suddenly, notwithstanding that direct cause of injury was due to action of horses rather than physical force of explosion.

**20. Negligence 🔑56(1)**

A primary cause may be proximate cause of injury though it operates through successive agencies to effect the final result.

**21. Appeal and error** ⚷901

The District Court of Appeal is not required to search record for authorities to find a basis upon which to reverse judgment as to appealing defendant.

**22. Master and servant** ⚷310

A surveyor who worked for company making seismographic surveys, and who arranged with landowner for permission to conduct survey and who was responsible for general carrying out of survey and who controlled conduct of survey, was liable for death resulting from negligence occurring in course of survey.

**23. Trial** ⚷241

In action on grounds of absolute liability and of negligence for death of rancher allegedly resulting from blasting operation, the reading to jury of statute providing that one must use his own rights as not to infringe upon rights of another, and a paraphrase of such statute, was not error as permitting jury to find for plaintiffs in absence of negligence, where jury were explicitly and repeatedly instructed to the contrary. Civ.Code, § 3514.

**24. Jury** ⚷139

The trial court could not excuse juror on exercise of peremptory challenge by one of defendants unless all defendants joined in the challenge. Code Civ.Proc. § 601.

**25. Jury** ⚷139

The statute providing that, where there are several parties on either side, they must join in the challenge before it can be made, is mandatory. Code Civ.Proc. § 601.

**26. Jury** ⚷83(1)

A litigant is not entitled to have juror excused except upon a showing that litigant is prejudiced or otherwise incompetent or disqualified to act as a juror.

**27. Jury** ⚷99(2)

A desire to sit as a juror or an interest in a particular case is not indicative of a pre-existing opinion upon merits of cause of action.

**28. Jury** ⚷79(3)

A litigant is not entitled to have case tried before any particular juror.

**29. Appeal and error** ⚷882(1)

Any irregularity which occurred by defendant's challenge of juror in her presence and subsequent refusal of codefendant to join therein was brought about by defendant's own acts with foreknowledge of consequences which would ensue, and consequently defendant could not complain of such irregularity on appeal. Code Civ. Proc. § 601.

**30. Appeal and error** ⚷882(1)

An appellant cannot complain of any error or prejudicial situation in which he is placed by his own conduct.

**31. Evidence** ⚷123(11)

In action for death of deceased allegedly resulting from explosion, statement of defendant's employee 30 minutes after explosion that deceased's wife was not to worry and that defendant would take care of everything was not inadmissable as being made too long after explosion. Code Civ.Proc. § 2055.

**32. Evidence** ⚷123(3)

Spontaneous declarations of an agent are admissible against principal where made under stress of an exciting cause, though not precisely concurrent in point of time with the occurrence to which the declaration relates.

**33. Evidence** ⚷123(3)

Evidence of spontaneous declarations of agent of party to action made under stress of an exciting cause may be introduced by testimony of third persons hearing declarations, as exception to hearsay rule.

**34. Evidence** ⚷123(11)

The contention that statement of defendant's employee, 30 minutes after explosion causing death of deceased, that deceased's wife was not to worry and that defendant would take care of everything, was only a general assumption of liability on behalf of defendant and did not relate to factual circumstances of accident, went to weight of evidence rather than to admissibility.

**35. Evidence** ⚷123(11)

In action for death of deceased who was killed when his horses ran away about time of explosion on adjoining land, against defendant asserting that horses started to run away before explosion, statement of defendant's employee, 30 minutes after explosion that deceased's wife was not to worry and that defendant would take care of everything, was admissible to show employee's belief as to cause of action and as a declaration against interest made by agent within res gestae during course of employment.

**36. Appeal and error ⟹930(1)**

A jury composed of rational persons will be assumed to have given to statement having but slight probative value the weight to which such statement was entitled.

**37. Appeal and error ⟹1050(1)**
**Explosives ⟹12**

In action for death of deceased whose horses were frightened by explosion and ran away, evidence of amount of powder in shotgun shell as compared to quarter-pound explosives used by defendants introduced by plaintiffs to rebut defendants' contention that sound of explosion was comparable to that of shotgun, was not irrelevant or prejudical.

**38. Evidence ⟹194**

Real evidence consisting of samples of soil in field in which explosion occurred is admissible if of same condition or quality of soil at place at which explosion occurred.

**39. Evidence ⟹194**

In action for death of deceased allegedly caused by explosion in field, admission of soil samples, which were introduced to show condition of earth in field was such that use of explosives was not necessary to dig small holes needed in making seismographic surveys, was not error, where similarity was established between soil samples and soil at place of explosion.

**40. Appeal and error ⟹1050(1)**

In wrongful death action, admission of hospital and physician's bills for care of deceased after accident and prior to death in support of allegations of special damages contained in complaint was not reversible error. Code Civ. Proc. §§ 378, 427.

**41. Trial ⟹295(1)**

Instructions must be read together for the purpose of ascertaining whether or not as a whole they properly conveyed to jury the law of the case.

**42. Trial ⟹285**

The language of a particular instruction cannot be strained so as to present a meaning other than the jury must reasonably have attached to it.

**43. Trial ⟹295(6)**

In action for death of deceased whose horses were allegedly frightened by explosion caused by defendants, instruction as to whether negligent acts of defendants "caused" frightening of horses was not prejudicial error, where jury was so fully instructed on law relative to proximate cause that no rational interpretation of instruction could be made other than that use of verb "caused" meant "proximately caused". Const. art. 6, § 4½.

**44. Appeal and error ⟹1032(3)**

An appellate court is not required to reverse judgment for questionable error in giving of isolated instruction in absence of showing that miscarriage of justice has thereby resulted. Const. art. 6, § 4½.

**45. Trial ⟹251(8)**

The refusal to give instruction on unavoidable accident was not error where case was tried and submitted on theory that each party was negligent.

**46. Trial ⟹242, 251(1), 260(1)**

The refusal to give instructions which were either cumulative of instructions given, misleading, or were outside issues of case was not error.

**47. Death ⟹88**

A surviving wife and children suing for death of husband and father were entitled to some award for loss of comfort and society of husband and father in addition to element of loss of support for wife and the special damages.

**48. Appeal and error ⟹1004(3)**
**Damages ⟹208(1)**

All of the considerations which go into determination of proper amount of damages are for jury in first instance and for trial judge on motion for new trial.

**49. Appeal and error** ⚿1004(1)

An award of damages cannot be disturbed by appellate court except where at first blush the amount clearly shows itself to be result of passion or prejudice.

**50. Appeal and error** ⚿1004(1)

The mere fact that appellate court might have awarded a smaller damage verdict is insufficient to warrant reversal.

**51. Appeal and error** ⚿989

The appellate court may consider that amounts of similar size have been awarded in other wrongful death actions in determining reasonableness of award.

**52. Damages** ⚿127

The substantial decrease of purchasing power of dollar may be considered in determining reasonableness of award of damages.

**53. Death** ⚿99(4)

$40,000 for death of 64-year-old man, who had life expectancy of 11.67 years and who was in robust health and who actually engaged in operation of farm which produced annual income of $6,000, and whose wife was of same age and had similar life expectancy, and whose two children were age 34 and age 39, was not excessive.

THOMPSON, J., dissenting.

◆

Appeal from Superior Court, Merced County; R. R. Sischo, Judge.

Action by Claurine C. Peterson and others against General Geophysical Company, a corporation, M. H. Lyle, and others, to recover damages for the death of George Peterson. From the judgment, the named defendants appeal.

Affirmed.

Conley, Conley & Conley, of Fresno, and Hugh K. Landram, of Merced, for appellants.

C. Ray Robinson, Samuel V. Cornell, and Margaret A. Flynn, all of Merced, for respondent.

PEEK, Justice.

The plaintiffs, who are the surviving wife and children of one George Peterson, commenced this action to recover damages for his death alleged to have resulted from the exploding of a dynamite cartridge by the defendants. From a judgment for $40,000 entered against them pursuant to the verdict of a jury the defendants, General Geophysical Company and M. H. Lyle, have appealed. The defendant H. W. Davis was not served with process, and on motion for a non-suit at the conclusion of the plaintiffs' evidence, the suit against the Ohio Oil Company and Catherine Giannone was dismissed.

The action arose out of the following facts: The defendant General Geophysical Company is a foreign corporation engaged in the making of seismographic surveys. At the time of the accident it was conducting such a survey as an independent contractor for the Ohio Oil Company on property owned by the defendant Catherine Giannone and with her gratuitous permission and consent. Such work involves the setting off of explosive charges at the bottom of holes drilled in the earth to a depth of 50 to 80 feet, and by means of instruments, measuring the reflection of the resulting vibrations. By interpreting the record of these vibrations the structure and nature of the subsurface stratum may be determined. In the operation of drilling the holes in the present case two small excavations about two or three feet in diameter by two feet deep called "slush pits" were made near the drilling rig for the purpose of holding and receiving water pumped over the cutting edge of the bit during the drilling to keep it from becoming clogged with dirt and debris.

These two slush pits were made by setting off an explosive charge at or near the surface of the earth, the noise of which caused a team of horses, then being driven by decedent to become frightened and to start suddenly, thereby throwing him to the ground with such force as to cause his fatal injury.

The complaint sets forth two counts or causes of action: The first is based upon a theory of absolute liability for damages resulting from the blasting, the second is based on an allegation of negligence. A separate answer was filed by Catherine Giannone and a consolidated answer was filed by the defendants General Geophysical Company, Ohio Oil Company and M. H. Lyle. At the same time a petition for removal of the cause to the federal court was filed by the corporate defendants and M. H. Lyle on the grounds of the diversity of citizenship of the defendants; that a separable controversy existed, and that the resident defendant Catherine Giannone had been joined fraudulently, which petition was denied.

As grounds for reversal the appellants contend that the trial court erred in refusing to transfer the cause to the United States District Court; that the verdict and the judgment are not supported by the evidence for the reason there was no proof of negligence on the part of the defendants or either of them; that the court erred in refusing to grant a non-suit as to the first cause of action in the complaint, which was based on a theory of absolute liability regardless of negligence, and in submitting the case to the jury on that theory; that the court erred in refusing to excuse a juror who was challenged on the ground of her prejudice; that the court erred in receiving and excluding evidence, in giving and refusing to give instructions to the jury; and that the amount of damages awarded is excessive.

On the first point the appellants argue that upon the filing of the petition and bond for removal, the jurisdiction of the state court ceased and its subsequent proceedings in the case are void. With this contention we cannot agree.

[1, 2] There is abundant authority to support the proposition that the fraudulent joinder of a resident defendant will not defeat the right of a non-resident party to remove the case to the federal court by the filing of a sufficient bond and petition setting forth facts which show such fraudulent joinder. See for example, Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 42 S.Ct. 35, 66 L.Ed. 144; Wecker v. National Enameling & Stamping Co., 204 U.S. 176, 27 S.Ct. 184, 51 L.Ed. 430, 9 Ann.Cas. 757; numerous cases are collected in 54 C.J. at p. 282 and in Title 28, U.S.C.A. § 71, note 360. Where, however, the plaintiff has a right to join such resident defendant, fraud or sham cannot be predicated upon a mere showing that the joinder was made for the purpose of preventing removal. If a right of joinder exists, the plaintiff's motive is immaterial. Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183, 52 S.Ct. 84, 76 L.Ed. 233, 77 A.L.R. 904; McAllister v. Chesapeake & O. R. Co., 243 U.S. 302, 37 S.Ct. 274, 61 L.Ed. 735; Chicago, R. I. & P. R. Co. v. Whiteaker, 239 U.S. 421, 36 S.Ct. 152, 60 L.Ed. 360; Chicago, R. I. & P. R. Co. v. Schwyhart, 227 U.S. 184, 33 S.Ct. 250, 57 L.Ed. 473; Illinois Central R. Co. v. Sheegog, 215 U.S. 308, 30 S.Ct. 101, 54 L.Ed. 208.

[3] Likewise the rule is well settled that in order to effect a removal of the cause to the federal court on this ground the petition must set forth facts which rightly engender such conclusion and compel a finding of fraudulent joinder. A denial of the allegations of the complaint upon which the liability of the resident is rested, or a denial that the complaint states a cause of action against the resident defendant, coupled with a general allegation of fraud is insufficient. Wilson v. Republic Iron & Steel Co., supra; Chesapeake & Ohio Ry. Co. v. Cockrell, 232 U.S. 146, 34 S.Ct. 278, 58 L.Ed. 544; Chicago, R. I. & P. R. Co. v. Dowell, 299 U.S. 102, 33 S.Ct. 684, 57 L.Ed. 1090; McNulty v. Atlas Portland Cement Co., Mo.App. 1923, 249 S.W. 730; West Kentucky Coal Co. v. Key, 178 Ky. 220, 198 S.W. 724. The allegations to be sufficient must consist of a showing that the plaintiff has knowingly made false statements of fact in his complaint in order to state a fictitous joint cause of action against a resident defendant for the purpose of defeating the petitioner's right of removal, or that the plaintiff has joined a resident defendant against whom no cause of action is alleged or could be alleged jointly with a non-resident defendant, and against whom the plaintiff could have no reasonable belief as to his liability. Wecker v. Nation-

al Enameling & Stamping Co., supra; Morris v. E. I. Du Pont De Nemours & Co., 8 Cir., 68 F.2d 788; Richardson v. Southern Idaho Water Power Co., D.C. Idaho, 209 F. 949; Cella, Adler & Tiles v. Brown, 8 Cir., 144 F. 742; Gustafson v. Chicago, R. I. & P. R. Co., C.C., 128 F. 85.

[4, 5] Where such allegations are made in the petition for removal, an issue of fact is raised which may be determined only by the federal court (Chesapeake & Ohio R. Co. v. Cockrell, supra; Stone v. South Carolina, 117 U.S. 430, 6 S.Ct. 799, 29 L.Ed. 962; Queensboro National Bank v. Kelly, D.C., 15 F.2d 395), and after its determination thereon the question of jurisdiction is conclusive against the state court until reversed on appeal. Chesapeake & O. R. Co. v. McCabe, 213 U.S. 207, 29 S.Ct. 430, 53 L.Ed. 765. However, it is well settled that the filing of a bond and petition for removal does not ipso facto divest the state court of jurisdiction. The filing of the petition presents a question of law whether or not, assuming the truth of the facts alleged in the petition for removal, the case is one which may properly be removed, and the question is one which the state court may and should determine for itself. Burlington, C. R. & N. R. Co. v. Dunn, 122 U.S. 513, 7 S.Ct. 1262, 30 L.Ed. 1159; Central Sav. Bank v. Lake, 201 Cal. 438, 257 P. 521. If in fact the cause is not removable a transfer to the federal court does not divest the state court of jurisdiction, and its proceedings at all times are valid. Yankaus v. Feltenstein, 244 U.S. 127, 37 S.Ct. 567, 61 L.Ed. 1036; Metropolitan Casualty Ins. Co. v. Stevens, 312 U.S. 563, 61 S.Ct. 715, 85 L.Ed. 1044.

[6, 7] The general rule is against a holding of fraudulent joinder and where the allegation of such joinder is made on the basis that no cause of action is stated against a resident defendant, any doubt should be resolved in favor of the retention of the cause in the state court. Albi v. Street & Smith Publications, 9 Cir., 140 F.2d 310; Dudley v. Community Public Service Co., 5 Cir., 108 F.2d 119. In the latter case the court states, 108 F.2d at page 123: "Though for lack of an exact precedent there may be doubt whether [resident defendant] is legally liable, that would not render his joinder fraudulent. Morris v. E. I. Du Pont [De Nemours &] Co., 8 Cir., 68 F.2d 788; Wells v. Missouri Pac. R. Co., 8 Cir., 87 F.2d 579." The nature of plaintiff's cause of action and the theory of law upon which she relies is what he in his pleadings has reasonably and in good faith declared it to be, and where the remedy sought is in doubt, he has the right to have the question passed upon by the state court. Richardson v. Southern Idaho Water Power Co., supra.

Here plaintiffs' complaint is in two counts. The first is based upon the theory of absolute liability for damages resulting from the explosion of a dynamite charge irrespective of negligence. The charging allegation in it being "that at said time and place, defendants herein, on property adjacent to plaintiffs' said ranch, which said property was owned, occupied and being used by defendant Catherine Giannone, did cause to be set off and explode a charge of dynamite, * * *" which proximately

The second cause of action is based upon the same facts but alleges that the blasting was done in a negligent and careless manner. Additionally the second count alleges that the "defendants, and each of them, acting through their agents and servants, M. H. Lyle and H. W. Davis, and others whose names are unknown to the plaintiffs, did carelessly, negligently and recklessly cause to be set off and explode an excessive charge of dynamite * * *."

[8] Bearing in mind the nature of plaintiffs' complaint, the allegations in support thereof and the previously stated rules relative to the removal of causes, it would appear, after a reading of the petition for removal, that the order of the trial court denying the same must be sustained. Illustrative of the insufficiency of the allegations of the petition as a whole to warrant a removal is the charge that the defendant Giannone "is in fact a nominal or unnecessary party" which statement is merely a conclusion of the pleader and wholly ineffectual. Mayer v. Denver, T. & Ft. W. R. Co., C.C.. 41 F. 723. The remainder of the

pertinent portions of the petition which are subject to comparable infirmities may be summarized as follows:

After generally alleging that the controversy is solely between citizens of different states, the petitioners refer to plaintiffs' second, or negligence, cause of action and allege that the act of setting off the explosive was done by the General Geophysical Company as an independent contractor pursuant to the request of the Ohio Oil Company, that said General Geophysical Company was neither an agent, servant or employee of the defendant Catherine Giannone, that she exercised no control over the work which they were doing, that the plaintiffs knew such facts and joined her as a party defendant fraudulently and for the purpose of defeating the defendants' right of removal to the federal court, and conclude with the express admission that the acts were done on property owned by the defendant Catherine Giannone as alleged in the complaint, and with her permission and consent although she received no compensation for the right to conduct the survey. Stated otherwise, the petition is but an answer to plaintiffs' complaint denying any agency relationship between the resident and non-resident defendants, additionally charging that the allegations of the complaint with respect to agency were wilfully made with knowledge of their falsity, and that therefore said complaint fails to state a cause of action against the resident defendant. As such the petition falls squarely within the rule as expressed in Chesapeake & O. R. Co. v. Cockrell, supra, and is wholly insufficient to effect a removal to the federal court.

[9] Although she may have received no compensation for the permission given to the company, Mrs. Giannone may have had considerable interest in the survey for the the purpose of discovering oil on her land. And, while it may be doubtful that under such circumstances the owner of land would be liable for damage resulting from miscarriage of a dangerous activity carried on by others on the premises with the mere gratuitous consent of the owner, or that the activity under the facts was such as would bring it within the rule of absolute liability without negligence, such lack of settled legal right should not deprive the plaintiffs of the opportunity to litigate the question in the state court, where there is at least a colorable right and the question is one of state law. Nor will the court in determining whether a probable cause of action has been stated against the resident defendant, inquire whether objection to the complaint might be raised on a special demurrer. Chicago, R. I. & P. R. Co. v. Schwyhart, supra; Richardson v. Southern Idaho Water Power Co., supra. In McGarvey v. Butte Miner Co., D.C., 199 F. 671, 672, the court in granting a motion to remand stated:

"Where the law is locally unsettled, it is the right of plaintiff to adopt and fairly urge that view thereof that best serves his interests, to join defendants accordingly, and, if the case be not otherwise removable, to secure a trial and determination of the disputed issues, fact and law, upon his theory and in the forum of his choice, the state court. * * * The exercise of the right aforesaid is consistent with good faith, for law is not settled by a litigant's belief or contention, but by the court's determination. This determination is for the trial, and not on remand.

"On remand, the issue is not what is the law of the case, but is the joinder fraudulent? And the fraud to be alleged and proven to make out fraudulent joinder is essentially that in any case—in general, willful or negligent misstatement of fact."

[10, 11] Assuming the truth of the facts alleged in the petition for removal and that the plaintiffs knew of the absence of any agency relationship between defendant Catherine Giannone and the non-resident defendants, it does not follow that the plaintiffs' cause of action against the resident defendant on the theory of absolute liability is so wholly devoid of any reasonable basis as to compel a conclusion that the joinder was fraudulent. The defendants by merely alleging willful misstatement of fact as to agency, under the second cause of action, and failure to state a cause of action against Catherine Giannone have failed to raise a decisive issue of fact for the determination of the federal court. Therefore

having raised one of law only, there was no error on the part of the trial court in refusing to grant the removal and in retaining the case for trial. Sarah Good Hosiery Mills v. Carolina, C. & O. Ry., 216 N.C. 474, 5 S.E.2d 324, 126 A.L.R. 1499; Hurst v. Southern Ry. Co., 162 N.C. 368, 78 S.E. 434.

On the hearing of the petition for removal in the present case the proceedings for transfer of a previous case brought by George Peterson before his death against these same defendants, and based upon the same facts alleged in the present complaint, were received in evidence. In that case the petition for transfer was granted but the federal court, on motion of the plaintiff, remanded the case to the state court, stating:

"Two causes of action in tort are jointly alleged in the complaint in each case against both resident and non-resident defendants. Both causes of action pleaded in the respective complaints are, we believe, supportable upon principles of decisions of the California Appellate Courts. Green v. General Petroleum Corporation, 205 Cal. 328, 270 P. 952, 60 A.L.R. 475; McKenna v. Pacific Electric Ry. Co., 104 Cal.App. 538, 286 P. 445.

"No separable controversy appears from the record, and where, as here, there is joint liability alleged, the plaintiff has a right to enforce it in an appropriate state forum, and thereby prevent removal by a non-resident defendant who prefers the Federal Court. Chicago, B. & Q. R. Co. v. Willard, 220 U.S. 413, 31 S.Ct. 460, 55 L. Ed. 521; Chicago, R. I. & P. R. Co. v. Schwyhart, 227 U.S. 184, 33 S.Ct. 250, 57 L.Ed. 473; Young v. Standard Oil Co., D. C.Cal., 35 F.2d 551.

"But even if there were room for doubt as to the good faith of plaintiff in joining the resident defendant in the actions under consideration, the causes respectively should be retained in the State Court. Albi v. Street & Smith Publications Inc., et al, 9 Cir., 140 F.2d 310. See, also Morris v. E. I. Du Pont De Nemours & Co., 8 Cir., 68 F.2d 788, 789."

[12] The plaintiffs urge the decision therein as res judicata or estoppel by judgment on the issue of removability in the present case. Respondents in opposition to this contention take the position that the former decision cannot be res judicata herein for the reason that the parties are different, the former case having been one commenced by George Peterson, now deceased, to recover damages for personal injuries, whereas the present suit is an action for wrongful death brought by the heirs of George Peterson. The decision in Bernhard v. Bank of America, 19 Cal.2d 807, 122 P.2d 892, 895, is contrary to appellant's position on this point. The necessary elements of a valid plea of res judicata are there set forth in a concise and thorough statement of the law. Under the authority of that case, it is only necessary that "the party against whom the plea is asserted [was] a party or in privity with a party to the prior adjudication."

The rule thus established by the Supreme Court is in accord with the trend of decisions discarding the mutuality rule as a necessary element of a plea of res judicata. See the dissenting opinion of Clark, J., in Riordan v. Ferguson, 2 Cir., 147 F.2d 983; Coca-Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 172 A. 260; Lanning v. Erie R. Co., 265 App.Div. 576, 40 N.Y.S.2d 404, affirmed, 291 N.Y. 688, 52 N.E.2d 587; 57 Harvard Law Rev. 98.

[13] That the decision of a federal court remanding a case to the state court for lack of facts establishing a removable cause is res judicata in a subsequent case involving the same parties and pleadings based upon the same facts was decided in State v. Superior Court for Kitsap County, 194 Wash. 7, 76 P.2d 990.

[14] Inasmuch as the appellants were parties to the prior action and therein raised the issue of the removability of the cause to the federal court, which issue was decided against them on the ground that a reasonable basis existed for the joining of Catherine Giannone as a party defendant, such facts are sufficient to satisfy the requirement of privity in support of the plea of res judicata or estoppel by judgment.

The second point raised by appellants as a ground for reversal is that there is no proof of negligence on the part of the defendants, the contention being that the use of the explosives in the preparation of the slush pits was done with due care and in conformity with the usual and customary practice in the business.

[15, 16] The question of whether or not the blasting was negligently done was for the jury and where the evidence is in conflict an appellate court will not substitute its judgment for that of the jury or the trial judge. Wills v. J. J. Newberry Co., 43 Cal.App.2d 595, 111 P.2d 346; Wattson v. Dillon, 6 Cal.2d 33, 56 P.2d 220.

[17] There is sufficient evidence in the record before this court to support the position of the respondents that the reason for using the explosive charge to dig these two small holes was the defendants' desire to hasten the completion of the survey before irrigation was started on the land; that the use of such drastic methods was unnecessary and that the pits could have been made easily with ordinary digging tools. The blast occurred in an old alfalfa field used for pasture and which had been leveled and irrigated. An agent of the Geophysical Company testified that out of some four or five hundred slush pits dug in this area only three or four had been made by blasting, and that the common practice was to use a pick and shovel. The jury was warranted in concluding that the method used and the resulting loud report were not a necessary accompaniment of the defendants' work.

[18-20] The dynamite charge, according to the defendant Lyle, was set off in what he observed to be a farming area and which he presumed was populated with farm animals. It would seem that under these circumstances a jury might well infer that an ordinarily prudent person would foresee that a loud and unusual noise in an area where farm animals were used would be likely to frighten the animals on nearby property. Under such circumstances causing of an unnecessary noise without warning is negligent with respect to those who are in a position of peril and whose presence is known or should be anticipated by the actor. The fact that the direct cause of the injury was due to the action of the horse rather than the physical force of the explosion does not prevent the imposition of liability upon the one whose negligent act in turn produced the frightened condition of the animal. A primary cause may be the proximate cause of an injury though it operates through successive agencies to effect the final result. Merrill v. Los Angeles Gas & Electric Co., 158 Cal. 499, 111 P. 534, 139 Am.St.Rep. 134, 31 L.R.A.,N.S., 559; Dowd v. Atlas Taxicab & Auto Service Co., 69 Cal.App. 9, 230 P. 958; Terry v. Peterson, 97 Cal.App. 160, 275 P. 484. Accordingly, cases have arisen in other jurisdictions wherein liability has been imposed for injuries occurring in a like manner as in the present situation. Klein v. Phelps Lumber Co., 75 Wash. 500, 135 P. 226; Bassett v. Moberly Paving Brick Co., 219 Mo.App. 81, 268 S.W. 645; Missouri Iron & Metal Co. v. Cartwright, Tex.Civ. App., 207 S.W. 397; City of Joliet v. Seward, 86 Ill. 402, 29 Am.Rep. 35.

[21, 22] The appellant Lyle states that "no case, under any theory, was made out against [him], and a reversal must follow as to him irrespective of any other point in the case." There is no citation of authority in the short paragraph of the brief containing this bald statement and no reference to the transcript. It is not the duty of this court to search the record or the authorities to find a basis upon which to reverse the judgment as to this defendant. However, in the transcript of the evidence taken at the trial of the case, there are sufficient facts from which the jury could reasonably conclude that the defendant Lyle, as surveyor of the party and the person who arranged with the landowners for permission to conduct the survey, was responsible for the general carrying out of the operation and controlled the conduct of the work.

The appellants further contend that their liability, if any, must be based on proof of negligence, and that the case should not have been submitted to the jury on the theory of absolute liability allowing them to find for the plaintiffs in the absence of any negligence. Although the pleadings set forth a cause of action based on a theory of strict liability for the damage resulting from the blasting, under the instructions the case was not submitted to the jury on this theory but solely on the issue of negligence. The jury was instructed that in order to return a verdict for the plaintiffs it must find that the defendants were negligent and that such negligence was the proximate cause of the accident which resulted in the death of Mr. Peterson. Instructions on the theory of absolute liability were requested by the plaintiffs but were refused on the ground that they were misleading. The only instruction given of which the appellants complain as permitting the jury to find for the plaintiffs in the absence of negligence, is as follows:

"Section 3514 of the Civil Code of the State of California provides: 'One must so use his own rights as not to infringe upon the rights of another.' One who carries on blasting operations must do so in such a manner as not to infringe upon the rights of another."

[23] It is difficult to see how the mere reading of this code section and a paraphase of it could have been taken by the jury as permitting them to find for the plaintiffs in the absence of negligence when they were explicitly and repeatedly instructed to the contrary. There are no words of direction but merely an observation on the duty of all persons to respect the rights of others, a principle embodied in our statutory law.

Inasmuch as the verdict and the judgment are supported by the evidence upon the theory of negligence, and since this was the only theory upon which the case was submitted to the jury, it is unnecessary to pass upon the applicability of the doctrine of absolute liability as applied to the liability of these defendants.

The appellants next assign as error the trial court's refusal to excuse a juror, Marie Summers, which it is claimed resulted in the denial of a fair trial. During the time of the voir dire examination counsel for the defendant Giannone, and counsel for defendant General Geophysical Company, discussed the propriety of exercising a peremptory challenge as to this juror and it was agreed among them that she should be excused. Thereafter, it appears that Mrs. Summers expressed a desire to remain on the jury, which statement was communicated to Mr. Germino, counsel for defendant Giannone, by a party or parties unknown. Mr. Germino then told the other counsel that he would not join in a peremptory challenge against her, but that if the juror was excused he would remain silent unless asked if he desired to join in the challenge. Counsel were thus fully aware that they would not be able to excuse this juror if the question of joining in the challenge were raised. When counsel later excused Mrs. Summers, Mr. Germino, upon inquiry of the court, refused to join.

It is claimed by the appellants that this situation created a prejudice in the mind of the juror against counsel who had expressed a desire to remove her from the jury panel against her wishes, and that the communication by the juror of her desire to remain on the jury indicated prejudice.

[24, 25] It is clear that the court could not excuse the juror on the exercise of a peremptory challenge by one of defendants unless all defendants joined in the challenge. C.C.P. section 601. The language of the section is mandatory that "where there are several parties on either side, they must join in the challenge before it can be made." Switzler v. Atchison, T. & S. F. Ry. Co., 104 Cal.App. 138, 285 P. 918.

[26-28] The appellants were not entitled to have Mrs. Summers excused except upon a showing that she was prejudiced, or otherwise incompetent or disqualified to act as a juror. Nothing in the record gives color to a suspicion that Mrs. Summers was prejudiced or had expressed any prejudice with respect to the parties. She merely stated to some person, unknown, that she wished to be on the jury. Why she desired to be on the jury in this particular case is not shown. A desire to sit as a juror, or an interest in a particular case, is in no way indicative of a pre-existing opinion upon the merits of the cause of action. The appellants were not entitled to have the case tried before any particular jurors. 15 Cal.Jur. 324, and cases there cited.

[29, 30] Any irregularity which occurred by the challenge of this juror in her presence and the subsequent refusal of the other defendant to join therein was brought

about by the appellants' own acts with foreknowledge of the consequences which would ensue. The appellants cannot complain of any error or prejudicial situation in which they were placed by their own conduct. Jentick v. Pacific Gas & Electric Co., 18 Cal.2d 117, 114 P.2d 343; Reinders v. Olsen, 60 Cal.App. 764, 214 P. 268; Dougherty v. Ellingson, 97 Cal.App. 87, 275 P. 456.

Further error is alleged in the trial court's admission of evidence, the first of which consisted of testimony by H. W. Davis, an employee of defendant General Geophysical Company and others concerning statements made by the said H. W. Davis immediately after the accident and before the ambulance had arrived to pick up the decedent. The lapse of time between the accident and the making of the statements was approximately thirty minutes. The witness Davis, called under section 2055 of the Code of Civil Procedure, was a party to the action although not served with process, and was by the answer of defendant General Geophysical Company, admittedly their agent and employee. The statements testified to consisted of words addressed to Mrs. Peterson to the effect that she was not to worry; that the company would take care of everything.

[31, 32] The contention that the statement was made too long after the explosion to be admissible is without merit. There is evidence that Mr. Davis, upon hearing of the injury to Mr. Peterson, immediately went over to the scene of the accident and there made the statement in question. It is now settled in this state that spontaneous declarations of an agent are admissible against the principal where made under stress of an exciting cause, and that the element of time is no longer as material as under the former rule. Showalter v. Western Pacific Railroad Co., 16 Cal.2d 460, 106 P.2d 895; Lane v. Pacific Greyhound Lines, 26 Cal.2d 575, 160 P.2d 21. In the Showalter case the court stated at page 467 of 16 Cal.2d, at page 899 of 106 P.2d:

> "The cases cited hereinabove to the contrary, holding the view that the admissibility of such statements is dependent on proximity of time to the principal event or on the continuation of the occurrence to which they relate, are as a consequence hereby overruled."

[33-36] Evidence of such statements may be introduced by the testimony of third persons who heard the statements, and is an exception to the hearsay rule. Lane v. Pacific Greyhound Lines, supra. The contention of appellants that the statement was only a general assumption of liability on behalf of the company and did not relate to factual circumstances of the accident, goes to the weight of the evidence rather than to the admissibility. The defendants at the trial took the position that the injury to the decedent was not caused by the explosion but that the team of horses had started to run away before the explosion. The statement of the agent was therefore admissible for the purpose of showing his belief as to the cause of the accident, and as a declaration against interest made by an agent within the res gestae during the course of his employment. If the statement had but slight probative value it must be assumed that the jury composed of rational persons gave to it the weight to which it was entitled.

[37] The trial court also admitted, over the objection of appellants, evidence relative to the amount of powder in a shotgun shell. Witnesses for the defendants testified that the noise produced by the simultaneous explosion of the two quarter pound charges was about the same as that of a shotgun. There was also direct testimony by residents in the area that the noise was such as had never been heard in the area before and was mistaken for a bomb. To rebut the contention that the sound was comparable to that of a shotgun, the plaintiffs introduced in evidence the amount of powder in a shell as compared to the quarter pound explosives for the purpose of showing the comparative strength of the various powders. The conclusions and inferences to be drawn were left to the jury. The appellants cite no authority in support of their contention that the evidence was irrelevant as applied to the facts of this case, and it is difficult to see how the appellants were prejudiced by the introduction of the exhibit for the purpose stated.

[38, 39] Soil samples also were introduced to show the condition of the earth in the field where the explosion took place and for the purpose of showing the lack of necessity for using such methods to dig the slush pits. The samples were taken from a point approximately forty or fifty feet from the point where the pits were dug, but the witness who identified the samples which he had taken stated that he observed the soil to be the same as that where the slush pits were blasted. The reason given for taking the samples at a distance from the slush pits was that the witness did not at that time know exactly where the holes had been blasted. The affidavit of Mario Ferro on motion for a new trial supports this fact of similarity, wherein it is stated that "I find that the soil in these exhibits corresponds exactly to and is entirely similar to that which I now find at the very place where this explosion occurred." It is of course true as stated by the appellants that in order for real evidence of the nature of that introduced here to be admissible it must be shown that the condition or quality of the other thing is the same. Story v. Nidiffer, 146 Cal. 549, 80 P. 692; Palladine v. Imperial Valley Farm Lands Ass'n, 65 Cal.App. 727, 225 P. 291; Brown v. Lemon Cove Ditch Co., 36 Cal.App. 94, 171 P. 705. However it clearly appears from the record that such similarity was established and that no error was committed in allowing the samples to be introduced.

[40] Error also is alleged to have resulted from the court's admission in evidence of hospital and doctor bills for the care of the decedent after the accident and prior to his death. The question of whether or not medical expenses incurred in an effort to save the life of the decedent may be recovered as an element of damages in an action for wrongful death appears to be unsettled in this state. There is dictum in three cases to the effect that such expenses are not recoverable. Salmon v. Rathjens, 152 Cal. 290, 92 P. 733; Fitzgerald v. Quinn, 131 Cal.App. 457, 21 P.2d 656; Nitta v. Haslam, 138 Cal.App. 736, 33 P.2d 678. However, in the case of Cleary v. City R. Co., 76 Cal. 240, 18 P. 269, the parents were allowed to recover items of medical expenses as damages in an action for the wrongful death of their minor child. The distinction to be made may be that such items are recoverable where the plaintiff or some of the plaintiffs are liable for the payment of such expenses, but the court in Nitta v. Haslam, supra, failed to make such a distinction. In that case one of the parties plaintiff was the surviving husband of the decedent. Medical expenses were pleaded as special damages. The appellate court held that although not recoverable in an action for wrongful death the surviving spouse might maintain a separate action for them, and that the issues of law and fact involved in such an action would be the same as in the action for wrongful death, having arisen out of the same transaction, and could be joined therewith under section 378 of the Code of Civil Procedure. It was held that the allegation of such damages therefore constituted the statement of a separate cause of action, which should have been separately stated under the provisions of section 427 of the Code of Civil Procedure, but since there had been no special demurrer or motion to strike, the question of misjoinder or failure to separately state the two causes of action could not be raised for the first time on appeal, and the inclusion of such items in the judgment was proper. The situation presented in the instant case is on all fours with that in Nitta v. Haslam, supra, and on the authority of that decision the holding here must be that there was no reversible error in admitting evidence of medical and hospital expenses in support of the allegations of special damages contained in the complaint.

It is further sought by appellants to show error in giving and refusing instructions by the trial court. The following given instruction is alleged to have been erroneous and prejudicial:

"I charge you that if you find that the death of George Peterson was caused by the frightening of his horses without any fault or negligence on his part and you find that the defendants by negligent acts caused the frightening of said animals, then the proximate cause of the fatal injuries to said George Peterson was the negligent acts of defendants which so frightened the horses and your verdict must be for the plaintiffs."

The unsoundness of the instruction is claimed to exist in that the jury was instructed that if one of the causes of the decedent's death was the frightening of his horses and if some negligent act of the defendants was one of the causes of the frightening of the animals then they must find for the plaintiffs.

[41-44] All of the instructions must be read together for the purpose of ascertaining whether or not as a whole they properly conveyed to the jury the law of the case. Graham v. Griffin, 66 Cal.App.2d 116, 151 P.2d 879; Westover v. City of Los Angeles, 20 Cal.2d 635, 128 P.2d 350. The language of a particular instruction cannot be strained so as to present a meaning other than the jury must reasonably have attached to it. In the present case the jury was fully instructed on the law relative to proximate cause and no rational interpretation of the above quoted instruction could be made other than that the use of the verb "caused" meant "proximately caused." An appellate court is not required to reverse a judgment for a questionable error in the giving of an isolated instruction in the absence of a showing that the miscarriage of justice has thereby resulted. Cal.Const. Art. VI, sec. 4½; Shuey v. Asbury, 5 Cal. 2d 712, 55 P.2d 1160; Church v. Payne, 36 Cal.App.2d 382, 97 P.2d 819; Haney v. Takakura, 2 Cal.App.2d 1, 37 P.2d 170, 38 P.2d 160.

[45] The trial court refused to give instructions offered by the appellants on unavoidable accident. The case was tried and submitted to the jury on the theory that each party was negligent. The question of unavoidable accident was outside the issues and an instruction thereon would only have been confusing to the jury and of no possible aid to them. It would be obvious to them that if they should find that the accident occurred without the fault of either party, there would be no liability, and there could be no error in refusing to give them a formal statement of such a self-evident truth. Stein v. United Railroads, 159 Cal. 368, 113 P. 663; Fraser v. Stellinger, 52 Cal.App.2d 564, 126 P.2d 653.

[46] It is unnecessary to set forth all of the instructions which were offered by the appellants and refused. They were either cumulative of instructions given, misleading, or were, like that on unavoidable accident, outside the issues of the case. There was no error in refusing such instructions.

Finally, appellants contend that the damages awarded were excessive, and that the jury in returning a verdict for $40,000.00, must necessarily have been swayed by passion or prejudice.

[47-50] At the time of his death George Peterson was sixty-four years of age and had a life expectancy of 11.67 years. He was in robust health, and actively engaged in the operation of his farm which was producing an annual income of $6,000. His wife was of the same age and had a similar life expectancy. The two children of the decedent were adults of the ages of 34 and 39. In addition to the element of loss of support for the wife and the special damages, the plaintiffs were entitled to some award for the loss of comfort and society of their husband and father. The amount to be allotted to such portion of the damages sustained by the death of Mr. Peterson cannot be ascertained with any degree of mathematical certainty. All of the considerations which go into the determination of the proper amount of damages are for the jury in the first instance, and for the trial judge on a motion for a new trial. Appellate courts of this state have repeatedly held that an award cannot be disturbed except where at first blush the amount clearly shows itself to be the result of passion or prejudice. Purcell v. Goldberg, 34 Cal.App.2d 344, 93 P.2d 578; Williams v. Layne, 53 Cal.App.2d 81, 127 P.2d 582; Nitta v. Haslam, supra. The mere fact that an appellate court might have awarded a smaller verdict is insufficient to warrant a reversal. Bennett v. Hardy, 108 Cal.App. 473, 291 P. 903.

[51-53] Amounts of similar size have been awarded in actions for wrongful death (Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327; Weaver v. Shell

Co., 34 Cal.App.2d 713, 94 P.2d 364), a fact which an appellate court may consider in its determination of the reasonableness of the figure (Power v. California Street Cable R. Co., 52 Cal.App.2d 289, 126 P.2d 4), together with the fact that the purchasing power of the dollar has substantially decreased in recent years. Lasater v. Oakland Scavenger Co., 71 Cal.App.2d 217, 162 P.2d 486. With these considerations in mind it cannot be said as a matter of law that the verdict is so grossly excessive as to show passion or prejudice on the part of the jury.

The judgment appealed from is affirmed.

ADAMS, P. J., concurs.

THOMPSON, Justice (dissenting).

I dissent. I am convinced the trial court erred in denying defendants' petition to remove the cause to the United States District Court. The majority opinion supports the denial of that motion on the ground that the petition "raised one [question] *of law* only." I think the essential question was one of fact and not merely of law. The petition for removal was filed under Section 28 of the Federal Judicial Code, 28 U.S.C.A. § 71, on the ground that all defendants, except Catherine Giannone, were residents of states other than California, and that she was not a proper party defendant, and not liable for the injuries which resulted in the death of George Peterson. No answer or counter-affidavit was filed opposing that petition. The question of whether she was a proper party, or liable for the accident, depends upon a determination of the facts which appear in the petition and the complaint. No fact is alleged from which it may be determined, as a matter of law, or otherwise, that she was a proper party or liable for the results of the accident. The complaint alleges no fact from which it may be assumed she was a proper party, or liable therefor. The verified petition specifically alleges that she had no knowledge or control over the acts of the General Geophysical Company whose agents exploded the dynamite cap which ultimately caused the death of Mr. Peterson. It is alleged that she was merely the owner of the land upon which the explosion occurred, and that she had, without consideration, gratuitously permitted that company to explore the land for prospective presence of oil; that she did not participate therein and took no part in those proceedings; that she had no control or authority over the company or its agents, and was not present, and had no right to direct their operations, or to advise them, either as a principal, or agent, or otherwise; that the operations were conducted solely by said company as an independent contractor of the Ohio Oil Company, and that the said Catherine Giannone was made a party defendant to confer jurisdiction on the California state court and to defeat a transfer of the cause to the Federal court. Those facts should be accepted as true for the reason that no answer or counter-affidavit was filed to refute them.

Under the uncontradicted facts alleged in the petition, since all other defendants were residents of other states, a proper case for transfer to the Federal court appears to be conclusive. The authorities appear to be unanimous to the effect that when a cause for removal is alleged in the petition the trial court has no discretion to pass upon the facts, but must certify the record to the United States court, which has the sole province to determine the merits of the application. Evidently the trial court came to the conclusion that Catherine Giannone was not a proper party, for, after the presence of her name, as a party defendant, had served its purpose of retaining jurisdiction in the state court, on motion a nonsuit was granted in her favor.

It is true that in another case previously brought by George Peterson for injuries received as a result of that same explosion, on a similar petition for removal, the cause was transferred to the United States District Court, and subsequently remanded. But that was another suit between different parties, and is not res judicata of this petition. The procedure in that case was proper. It confirms the rule previously referred to, that the Federal court has the sole province of passing upon the facts involved in a petition for removal to that court. That is exactly what should have been done in the present case. The question of the Federal court's authority to remand the cause does not authorize the state court to deprive that court of exercising its province, by denying the motion.

When the proceedings on petition therefor disclose a removable case for diversity of residence of parties defendant all subsequent proceedings in the state court become void. Metropolitan Casualty Ins. Co. v. Stevens, 312 U.S. 563, 61 S.Ct. 715, 85 L.Ed. 1044. When the petition for removal is denied by the state court the applicant therefor may preserve his rights by excepting to the order, which entitles him to a review of its validity on appeal from a subsequent judgment against him, or he may perfect the record on removal and ask the Federal court to assume jurisdiction. Petitioner may elect either course of procedure. He does not waive his right of removal by participating in a subsequent trial in the state court. Metropolitan Casualty Ins. Co. v. Stevens, supra; 45 Am. Jur. p. 919, sec. 155. In this case the petitioners excepted to the order denying their motion for removal and now urge the error of that order on appeal from the judgment which was rendered against them.

Upon petition for removal of a cause from a state court to the United States court, the inquiry *on the part of the state court* is merely one of law to determine whether the record, on its face, discloses a removable cause. The state court is bound by the allegations of fact disclosed by the petition and record on that motion. The allegations of the petition must be accepted as true. The state court may not pass upon issues of fact involved therein. The questions of fact as to the actual residence of parties or alleged bad faith in making defendants parties to the suit to retain jurisdiction in the state court, are solely for the determination of the Federal court. General allegations of negligence contained in the complaint will not suffice to overcome specific allegations to the contrary contained in the petition for removal. Chesapeake & Ohio Ry. Co. v. Cockrell, 232 U.S. 146, 34 S.Ct. 278, 58 L.Ed. 544; Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 42 S.Ct. 35, 66 L.Ed. 144; State of Ohio ex rel. Seney v. Swift & Co., 6 Cir., 270 F. 141; Donovan v. Wells, Fargo & Co., 8 Cir., 169 F. 363, 22 L.R.A.,N.S., 1250; Harrington v. Great Northern Ry. Co., C.C., 169 F. 714; Lane Bros. Co. v. Rickard, 135 Ga. 650, 70 S.E. 565, Ann. Cas. 1912A, 234; 45 Am. Jur. 917–918, secs. 152–154; 54 C.J. 331, sec. 253; 28 U.S.C.A. § 71, and cases cited.

In 45 American Jurisprudence, at page 918, section 154, it is said in that regard:

"Issues of fact arising on an application for removal are to be decided by the Federal court to which the cause is removed. The state court must confine itself to the record, and must accept as true the allegations of the petition for removal; it cannot examine or determine fact issues arising thereon, whether they relate to the amount in controversy, the existence of a separable controversy, diversity of citizenship, fraudulent joinder, or other matters."

The foregoing text is supported by numerous authorities.

Likewise it is said in 54 Corpus Juris, at page 333, section 253:

"No issue of fact arising upon the petition for removal or the record as to the removability of the cause can be tried in the state court, but any such issue may be determined only by the federal courts to which the cause is sought to be removed."

In the last mentioned section it is further stated that:

"* * * Although it is only where the nonremovability of the cause *clearly appears on the face of the petition* that a state court is at liberty to deny a removal, and in determining that no removal has been effectuated the court acts at its peril as to the efficacy and validity of its subsequent proceedings. If, on the other hand, upon the face of the petition for removal and the record the cause appears to be removable, and a sufficient bond is filed, where that is requisite, it is the duty of the state court to recognize the removal and proceed no further." (Italics added.)

The mere recital in the complaint that the defendants caused the alleged acts of negligence to be performed, without specifying facts or acts of the resident defendant who is alleged in the petition to have been wrongfully made a party to defeat the jurisdiction of the United States court, will not rebut adequate and specific allegations of the petition which otherwise show a removable cause. Shaver v. Pacific Coast Condensed Milk Co., C.C., 185 F. 316; Reinartson v. Chicago Great Western Ry. Co., C.C., 174 F. 707; Chesapeake & Ohio Ry. Co. v. Cockrell, supra [232 U.S. 146, 34 S.Ct. 279]. The state court may not weigh the evidence. In the case last cited, suit was brought in a state court in Kentucky, against the railroad company and the engineer and fireman of a locomotive engine by the representative of the estate of a man who was struck by the engine and killed. In that case the complaint specifically alleged the particular acts and omissions of the engineer and fireman upon which plaintiff relied to show their joint liability. The residence of the railroad company was in Virginia. It filed a petition to remove the case to the United States court on the ground of diversity of residence. The petition for removal failed to affirmatively allege facts showing that the cause was removable. All that it alleged was that the specific acts of asserted negligence of the engineer and fireman which were stated in the complaint, were "false and untrue," and that they were fraudulently made parties defendant for the purpose of defeating the jurisdiction of the United States court. The trial court denied the petition for removal, and proceeded to try the cause on its merits, and rendered judgment against the railroad company. That judgment was affirmed by the reviewing court of Kentucky, which held that, "The questions of fact arising upon the petition were open to examination and determination in the state court." The Supreme Court of the United States said in that regard:

"In so holding the court of appeals fell into manifest error, for it is thoroughly settled that issues of fact arising upon a petition for removal are to be determined in the Federal court, and that the state court, for the purpose of determining for itself whether it will surrender jurisdiction, must accept as true the allegations of fact in such petition." (Citing many authorities.)

But the United States Supreme Court held that because the petition for removal failed to affirmatively allege any facts showing a removable case, the state court was justified in retaining jurisdiction, and the judgment was therefore affirmed. It said:

"In this case had the petition contained a sufficient showing of a fraudulent joinder, accompanied as it was by a proper bond, the state court would have been in duty bound to give effect to the petition and surrender jurisdiction, leaving any issue of fact arising upon the petition to the decision of the Federal court."

Based upon the foregoing authorities, I see no escape from the inevitable conclusion in this case that, since the petition for removal of the cause adequately and specifically alleges a case which is properly removable to the United States District Court on the ground of diversity of residence of essential defendants, the trial court erred in denying the petition and proceeding to trial on the merits.

But the respondents claim that the remanding of the former action became res judicata and estops the defendants in this suit from removing the cause to the Federal court. I think not. The two actions were entirely separate and distinct, although they were based on the same transaction. They were not between the same parties. Upon the death of George Peterson, the plaintiff in the first suit, that cause abated since it was a suit for personal injuries sustained as the result of alleged tort of the defendants. Norton v. City of Pomona, 5 Cal.2d 54, 62, 53 P.2d 952; Munchiando v. Bach, 203 Cal. 457, 264 P. 762; 1 Cal.Jur. 71, sec. 41; 1 C.J.S., Abatement and Revival, § 144, page 197; 1 Am. Jur. 71, sec. 84. Section 385 of the Code of Civil Procedure is not applicable to this case. That section merely provides that an action does not abate "if the cause of action survive or continue." In this case the cause could not survive or continue because it was based on tort and demands damages only for personal injuries sustained on account of alleged negligence. Moreover, there was no order of court permitting it to be continued in the names of the representatives of the deceased, as that section provides with respect to cases which may survive the death of a party. The prior action in which the cause was remanded to the state court was abandoned upon the death of plaintiff. It was not tried or determined on its merits. Regarding the application of the doctrine of res judicata, the Supreme Court said in Bernhard v. Bank of America, 19 Cal.2d 807, at page 813, 122 P.2d 892, at page 895:

> "In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" (Citing authorities.)

I conclude that the order remanding the prior suit of George Peterson to the state court is not res judicata of the right of defendants in this separate suit to remove the cause to the federal court. That order became functus officio when the prior cause terminated upon the death of the plaintiff. That case was never tried on its merits, nor were the parties to the two actions the same. For the same reason I am convinced the defendants were not barred from petitioning to remove the present action to the federal court on the ground of diversity of residence or the joining of a party defendant for the purpose of defeating the jurisdiction of the federal court.

The case of Pratt v. Vaughan, 2 Cal.App.2d 722, 38 P.2d 799, 800, upon which respondents rely, is not in conflict with what I have said on that issue. That was a suit for property damages, as distinguished from one for personal injuries sustained by the plaintiff, growing out of an automobile collision. Plaintiff brought suit in the municipal court for damages to his automobile, which was tried by that court and determined on its merits against plaintiff. That judgment became final. Thereafter the same plaintiff brought suit in the Superior Court against the same defendant upon the same transaction for personal injuries growing out of that automobile collision. The answer denied the allegations of the complaint and affirmatively pleaded the estoppel of the former judgment as res judicata. On trial the Superior Court determined that the prior final judgment of the municipal court "conclusively settled the rights of the parties thereto," and rendered judgment for the defendant. On appeal that judgment was affirmed. In that case there was no question regarding the abatement of the former action on account of the death of plaintiff. The former suit was tried and determined on its merits. The court merely held that plaintiff having brought suit for property damages growing out of an automobile collision, and having failed to ask for damages for personal injuries on that account, was barred from maintaining a subsequent suit for personal injuries on the well-established doctrine that the determination of the necessary elements of negligence and contributory negligence by a final judgment on the merits involving the same transaction bars the plaintiff from again litigating those issues. Koehler v. Holt Mfg. Co., 146 Cal. 335, 80 P. 73.

In the cases of Clarke v. Mathewson, 12 Pet. 164, 37 U.S. 164, 9 L.Ed. 1041, and Dunn v. Clarke, 8 Pet. 1, 33 U.S. 1, 8 L.Ed. 845, both of which were suits in equity and not based on torts, it was held that since the suits did not abate upon the deaths of parties litigant and the representatives of the decedents were duly substituted in the same actions, the federal courts were authorized by federal statute to try and determine the issues contained therein. In Clarke v. Mathewson, supra, it is said:

> "The death of either party pending the suit does not, *where the cause of action survives,* amount to a determination of the suit. It might in suits at common law, upon the mere principles of that law, have produced an abatement of the suit, which would have destroyed it. *But in courts of equity,* an abatement of the suit by the death of a party has always been held to have a different effect; for such abatement amounts to a mere suspension, and not to a determination of the suit. It may

again be put in motion by a bill of revivor, and the proceedings being revived, the cause proceeds to its regular determination as an original bill. The bill of revivor is not the commencement of a new suit, but is the mere continuation of the old suit." (Italics added.)

The cases last cited are distinguishable from the present action on that ground. The causes were revived and continued by substitution of the representatives of the estates of deceased parties as required by statute. In the present case the former cause abated upon death of the plaintiff. Since that suit was founded on tort for personal injuries received as the result of alleged negligence, it could not survive the death of the plaintiff. An entirely new cause of action was commenced. The order remanding the previous case to the state court therefore did not preclude the defendants from making a motion on petition for removal of this cause.

I am therefore impelled to hold that the trial court erred in denying defendants' motion for removal.

81 Cal.App.2d 655

## PEOPLE v. EDWARDS.

Cr. 4125.

District Court of Appeal, Second District, Division 2, California.

Sept. 30, 1947.

Rehearing Denied Oct. 7, 1947.

Hearing Denied Oct. 27, 1947.

**1. Criminal law** 🔑1130(3)

A statement of points relied upon by appellant, and appearing in the middle portion of his brief, was not a "preface" and did not meet requirement of rule that a brief should be prefaced by topical index of its contents. Rules on Appeal, rule 15.

See Words and Phrases, Permanent Edition, for all other definitions of "Preface".

**2. Criminal law** 🔑775(1)

In robbery prosecution of husband and wife, refusal of their requested alibi instructions which used the singular noun "defendant" twice and which employed pronouns in the feminine gender, was not error as to the husband, since instruction would have been taken by jury as singling out the wife as the beneficiary of the alibi to the detriment of the husband.

**3. Criminal law** 🔑824(4)

A trial court is under no duty to give an instruction in respect to an alibi, unless a request therefor has been made by the defendant.

**4. Criminal law** 🔑824(4)

The rule that in a criminal case the court must instruct the jury, of the court's own motion, with respect to "general principles" of law pertinent to the case, even though the party does not present such instruction in writing, does not require a court to instruct on special matters such as the defense of alibi, since that defense is not a "general principle" of law.

**5. Criminal law** 🔑792(3)

Giving of instruction that all persons concerned in commission of a crime, whether they directly commit the offense or knowingly and with criminal intent aid and abet in its commission, shall be punished as principals, and are equally guilty, was not error, where police officers testified that defendant confessed to them that a third person entered house that was burglarized, and then admitted defendant through the front door, and that they removed certain property from the house. Pen.Code. § 971.

**6. Criminal law** 🔑798(1), 1173(2)

Defendant's requested instruction respecting individual opinion of each juror was proper and should have been given, but its refusal was not reversible error.

**7. Criminal law** 🔑877

In prosecution of husband and wife for burglary on five counts, wherein there was testimony of police officers that husband had confessed to them with respect to one of the counts, verdicts acquitting the wife and convicting the husband were not inconsistent.

**8. Criminal law ⚷877**

Where there is the slightest difference in the evidence as between two persons jointly tried, the trier of facts may weigh the evidence and make allowance for such difference, and when that is done, and one is acquitted and the other convicted, the fact that the evidence involved the acquitted person to some extent, will not require the exoneration of the other.

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Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Clair V. Edwards was convicted of burglary, and from the judgment of conviction and order denying his motion for a new trial, he appeals.

Judgment and order affirmed.

Horace Appel and Warner I. Praul, both of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Ward Sullivan, Deputy Atty. Gen., for respondent.

WILSON, Justice.

[1] Appellant and his wife, Margaret Edwards, were charged with the crime of burglary in five counts. Trial was had befor a jury which returned a verdict acquitting Mrs. Edwards and convicting appellant on all counts. Appellant has appealed from the judgment of conviction and from the order denying his motion for a new trial.*

The evidence shows that each of the five dwellings referred to in the information had been entered during the absence of the owner and that various articles of wearing apparel, furs, jewelry, perfume and other personal property had been removed. One of the prosecuting witnesses identified appellant as a man whom he had seen two or four weeks prior to the night of the burglary walking along the side of the witness' house then down the street and into a vacant lot. Articles belonging to each of the prosecuting witnesses were found in appellant's home when he was arrested and were identified by the respective owners. Several suits of clothing belonging to one of the prosecuting witnesses were found in appellant's home. When the witness asked where the rest of the stolen suits were appellant made no response. Two police officers testified that on the evening of the arrest appellant stated to them that a friend, whose name appellant did not mention, had asked him if he, appellant, would like to make some easy money; that after a short conversation they went to one of the houses, the other person went to the back door, came through the house and admitted appellant through the front door; that they took suits of clothes, furs, and other property.

Appellant attempted to account for his possession of the stolen property by stating that (1) he had purchased some of the clothing, perfume and other articles from a boy named Tony whose last name was unknown to appellant, and an automatic pistol from a cab driver, (2) had won a wrist watch in a dice game, and by other equally timeworn explanations.

Appellant endeavored to establish an alibi for each of the offenses by testimony of himself and of others to the effect that upon the occasion of each of the several burglaries he was at a point far distant from the scene of the crime.

Appellant relies for a reversal upon alleged errors of the court in giving and refusing to give instructions to the jury and upon the contention that the verdict convicting him is inconsistent with the acquittal of his codefendant.

[2] 1. Appellant contends that the court erred in refusing to give the following instruction requested by defendants. "*Alibi When Charge Is That Defendant Actively Participated* When one who was not at the place where a crime was committed at the time of its commission is later charged with

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* Appellant's brief fails to comply with Rule 15 of the Rules on Appeal that became effective on July 1, 1943 (22 Cal.2d 1, 12) in that it is not "prefaced by a topical index of its contents." The statement of the points relied on by appellant appearing in the middle portion of the brief is not a preface and does not meet the requirement of the rule.

having been present and having committed or taken part in committing such crime, *her* absence from the scene of the crime, if proved, is a complete defense that we call an alibi.

"The *defendant,* Margaret Edwards, in this case has introduced evidence tending to prove that *she* was not present at the time and place of the commission of the alleged offense, for which *she* is here on trial. If, after a consideration of all the evidence, you have a reasonable doubt whether or not the *defendant* was present at the time the crime was committed, *she* is entitled to an acquittal." (Emphasis added.)

The emphasis above indicated does not appear in the instruction as requested but the words are italicized here for the purpose of illustrating what we are about to say. It will be observed that the proposed instruction refers to defendant Margaret Edwards alone, that the singular noun "defendant" is twice used, and that all pronouns are of the feminine gender and singular number—"she" and "her." A similar instruction was not requested on behalf of appellant alone or on behalf of the defendants jointly.

If the court had given the instruction the fact that it refers to Margaret Edwards alone could have been and no doubt would have been taken by the jury as singling her out as the beneficiary of the alibi to the detriment of appellant and would have emphasized in the minds of the jurors that they should ignore the evidence concerning the alibi presented on behalf of appellant.

[3] Moreover, it is not the duty of a trial court to give an instruction in respect to an alibi unless a request therefor has been made by the defendant. (People v. Whitson, 25 Cal.2d 593, 603, 154 P.2d 867 and cases there cited; People v. Keilly, 54 Cal.App.2d 764, 767, 129 P.2d 939; People v. Dunlop, 79 Cal.App.2d 207, 179 P.2d 658.)

The cases cited by appellant (People v. Visconti, 31 Cal.App. 169, 170, 160 P. 410, 411; People v. Winters, 125 Cal. 325, 329, 57 P. 1067; People v. Quinn, 111 Cal.App. 614, 620, 295 P. 1042; People v. Wilson, 100 Cal.App. 428, 430, 280 P. 169; People v. Garrett, 93 Cal.App. 77, 78, 268 P. 1071) to the effect that it is error to refuse an instruction on the subject of alibi are those in which such an instruction had been expressly requested by the defendant. In the Winters case the court gave one instruction on the matter of alibi and refused another requested by the defendant because it omitted the qualification of reasonable doubt.

[4] Appellant relies further on People v. Best, 13 Cal.App.2d 606, 57 P.2d 168, to the effect that in a criminal case it is incumbent on the court to instruct the jury of its own motion relating to the "general principles" of law pertinent to the case even though the party does not present such instruction in writing. This rule does not require the court to instruct on special matters such as the defense of alibi since it is not treated as a "general principle" of law. (People v. Whitson, supra.)

[5] 2. Appellant's next point is that the court erred in giving the following instruction: "Principle And Accessory. The Court instructs the jury, that it is the law of this State, that all persons concerned in the commission of a crime, whether they directly committed the act constituting the offense or knowingly and with criminal intent aided and abetted in its commission, shall be prosecuted, tried and punished as principals, and are equally guilty."

It is contended that the instruction is not applicable to the evidence since appellant and his wife were charged with burglary by their own acts of breaking into the dwellings referred to in the information and there was no claim by the prosecution and no evidence that appellant aided and abetted another person. The evidence of the police officers that appellant made a confession to them on the day of his arrest, stating that an unnamed person asked him if he wanted to make some easy money, drove him to one of the houses, entered the back door and admitted appellant through the front door and that appellant and the unnamed person removed clothing and other personal property from the house is sufficient to justify the giving of the instruction since appellant's confessed acts make him an aider and abetter of the unknown person in committing the burglary. In People v. Duran, 57 Cal.App.2d 363, 134 P.2d 305, an instruction was given on the law of conspiracy. There was no charge of conspiracy against the defendant, but there was evidence of a conspiracy in that the defendant and other persons were acting together to the end of accomplishing the same purpose. By reason of such evidence the court held (57 Cal.App.2d at page 371, 134 P.2d at page 309) that the instruction was proper.

Since the distinction between an accessory before the fact and a principle has been abrogated (Penal Code, sec. 971) appellant would have been guilty of the crime of burglary whether he himself entered the house and took the property or merely aided and abetted the unnamed person in so doing. For both reasons the court did not err in giving the instruction.

[6] 3. Appellant contends that the court erred in refusing to give the following instruction requested by defendants: "Individual Opinion Required. The People and the defendants all are entitled to the individual opinion of each juror. It is the duty of each of you, after considering all the evidence in the case, to determine, if possible, the question of the guilt or innocence of the defendants. When you have reached a conclusion in that respect, you should not change it merely because one or more or all of your fellow jurors may have come to a different conclusion. However, each juror should freely and fairly discuss with his fellow jurors the evidence and the deductions to be drawn therefrom. If, after doing so, any juror should be satisfied that a conclusion first reached by him was wrong, he unhesitatingly should abandon that original opinion and render his verdict according to his final decision."

Appellant concedes that the refusal to give this instruction standing alone does not constitute prejudicial error but argues that the refusal to give it constituted error when coupled with other alleged errors. To this contention there are two answers: (1) The errors of which appellant complains we find to be without foundation. (2) In People v. Grahle, 67 Cal.App. 183, 193, 227 P. 227, 230, the court stated that such an instruction was proper and should be given but that the refusal to give it "does not constitute such error as will for that reason alone justify the reversal of the case." (See also citations in Grahle case.)

[7] 4. Appellant's last point upon which he bases his claim for reversal is that since appellant and his wife were jointly charged with the commission of the five offenses described in the information the verdicts convicting appellant and acquitting his wife are inconsistent and for that reason the judgment should be reversed. We have referred to the evidence that personal property belonging to each of the five victims of the several burglaries was found in the home of appellant and his wife, and to the confession of appellant that he himself entered one of the homes accompanied by the unnamed person and not by his wife. If the jury believed that statement they may have believed that appellant's wife did not accompany him when any of the other burglaries were committed. Giving consideration to the entire evidence we find nothing inconsistent between the two verdicts.

The case of People v. Doxie, 34 Cal.App.2d 511, 93 P.2d 1068, cited by appellant, does not support his argument. That case did not involve the prosecution of two persons. One person was charged with two offenses, was found guilty of one and not guilty of the other. The court held that while inconsistent verdicts cannot be allowed to stand, the elements of the two offenses described in the information were not identical and that the verdicts were not inconsistent.

[8] When there is the slightest difference in the evidence as between two persons jointly tried the trier of facts may weigh the evidence and make allowance for such difference, and when that is done and one is acquitted and the other convicted the fact that the evidence involves the acquitted person to some extent will not require the exoneration of the other. (People v. Talbot, 220 Cal. 3, 17, 28 P.2d 1057; People v. Villaruz, 16 Cal.App.2d 492, 493, 60 P.2d 886; People v. Wilson, 8 Cal.App.2d 200, 202, 47 P.2d 349.)

The judgment and the order denying appellant's motion for a new trial are affirmed.

McCOMB, J., concurs.

MOORE, P. J., deeming himself disqualified, takes no part in this decision.

81 Cal.App.2d 703

## In re TONNESON'S ESTATE.

## TONNESON v. TONNESON.

Civ. 3475.

District Court of Appeal, Fourth District, California.

Oct. 7, 1947.

Hearing Denied Dec. 4, 1947.

**1. Wills ⟹111(2)**

The purpose of statute requiring testator's name to be subscribed at the end of the will is to show on the face of the will that the testamentary purpose is a completed act, and to lessen the opportunity for fraudulent interpolations between the written matter and the signature. Probate Code, § 50.

**2. Wills ⟹111(2)**

In determining whether a will has been subscribed at the end in accordance with statute, the intention of the Legislature is the controlling element and not the intent in the mind of the testator. Probate Code, § 50.

**3. Wills ⟹111(2)**

The statutory requirement that testator's name be subscribed "at the end thereof" does not require the name to be in immediate juxtaposition with the concluding words of the instrument, but that it must be so near thereto as to afford a reasonable inference that testator thereby intended to indicate an authentication of the instrument as a completed expression of his testamentary purposes. Probate Code, § 50.

See Words and Phrases, Permanent Edition, for all other definitions of "At the End Thereof".

**4. Wills ⟹111(2)**

The test to determine whether a testator has subscribed his name at the end of a will is to take the document as it left his hands, and then, disregarding the signatures of the witnesses, and all evidence aliunde, to see whether it is apparent that his name was placed where it appears for the purpose of execution. Probate Code, § 50.

**5. Wills ⟹111(2)**

To comply with statute requiring name of testator to be subscribed at end of will, name must be subscribed after termination of testamentary provisions, and, where it is so placed, the mere extent of space between such termination does not affect compliance with the statute if the document, on its face, disregarding signatures of witnesses and all evidence aliunde, fairly indicates that name was so placed by testator as a subscription, and for the purpose of execution. Probate Code, § 50.

**6. Wills ⟹111(2)**

Where decedent's signature in the attestation clause was in script in the regular manner and was placed after all testamentary provisions had been set forth and in close proximity to the end of the body of the will, a substantial compliance with the statute requiring a will to be signed "at the end thereof" appeared though the signature was placed on the third partial blank line of the attestation clause instead of the first where it should have been. Probate Code, § 50.

**7. Wills ⟹318(3)**

In will contest where the jury rendered a special verdict that deceased subscribed his name at the end of the purported will and the judge inserted that finding in his judgment and order admitting the will to probate, sufficient adoption of the jury finding by the court was shown.

◆

Appeal from Superior Court, San Bernardino County; Stanley Mussell, Judge.

Petition by Arne Peder Tonneson for probate of the will of Olaf T. Tonneson, sometimes known as O. T. Tonneson, deceased, contested by Irene M. Tonneson. From a judgment and order admitting will to probate, contestant appeals.

Judgment and order affirmed.

Wilson & Wilson, of San Bernardino, for appellant.

Novack & Haberkorn, of San Bernardino, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment and order admitting a will to probate. The appeal is based upon the contention that the instrument in question was not subscribed at the end thereof by the testator within the meaning of, and as required by, section 50 of the Probate Code.

The will in question was executed by the testator in connection with his initiation into the Scottish Rite. The instrument is on a printed form and consists of but one page. In the body of the will, by filling in appropriate blanks, the deceased stated his name, residence and age, gave certain property to his wife and brother, naming them, nominated his brother as executor, and filled in the date in the testimonium clause. It is conceded that all writing inserted in the printed form is in ink and placed there by the deceased, with the exception of the signatures of the two witnesses and the word "Rialto" inserted as the address of one of them. With the exception of the dates in the testimonium and attestation clauses and of the deceased's signature in the attestation clause, all of the written matter inserted by the deceased in this printed form is written with letters printed in pen and ink rather than in script. A part of the dates referred to and deceased's signature in the attestation clause are written in script in the usual manner.

At the end of the body of the will, and following the testimonium clause, is a blank partial line intended for the signature of the testator, being in the usual place for that purpose at the right side of the page. Immediately below this is the attestation clause, in the usual form. The right half of the first line of the attestation clause is a blank line intended for the date (which the testator inserted there). The second line of this clause contains, at the right, a longer blank partial line, intended for the name of the person who has signed, published and declared the instrument to be his will. It was on this line that the testator placed his signature. These three blank partial lines are close together, follow one another, and are at the right side of the instrument immediately below and at the end of the body of the will. The two witnesses signed below the attestation clause, on blank lines provided for that purpose.

The appellant's main contention is that the end of this instrument is above the attestation clause, that the deceased's signature appearing in that clause is a part thereof and not a subscription to the instrument which precedes that clause, and that section 50 of the Probate Code was not complied with. She relies on Sears v. Sears, 77 Ohio St. 104, 82 N.E. 1067, 17 L.R.A.,N.S., 353, 11 Ann.Cas. 1008; an Ohio case, In re Churchill's Estate, 260 Pa. 94, 103 A. 533, a Pennsylvania case, and Estate of Seaman, 146 Cal. 455, 80 P. 700, 106 Am.St.Rep. 53, 2 Ann.Cas. 726. While the first two of these cases support appellant's contention there are cases from other states supporting a contrary view. In re Drake's Will, 192 A. 428, 15 N.J. Misc. 484, In re Noon's Will, 31 Misc. 420, 65 N.Y.S. 568; In re Eyett's Will, 124 Misc. 523, 209 N.Y.S. 251. In each of these cases it was held that the signature of the testator which appeared in the attestation clause was a sufficient compliance with the requirement for subscription at the end of the will. Also in Younger v. Duffie, 94 N.Y. 535, 46 Am.Rep. 156; McCue v. Turner, 252 Ky. 849, 68 S.W.2d 415, and In re Young's Will, 153 Wis. 337, 141 N.W. 226, it was held to be a sufficient compliance with this requirement where the signature of the testator followed instead of preceded the attestation clause.

[1-5] The precise question here presented has not been decided in this state, except in Estate of Harter, 6 Coffey Prob. Dec. 293. In Estate of Seaman, 146 Cal. 455, 80 P. 700, 702, 106 Am.St.Rep. 53, 2 Ann. Cas. 726, relied on by the appellant, the facts were quite different from those here appearing. In that case the court pointed out that the purpose of requiring the testator's name to be subscribed at the end of the will is to show on the face of the will that the testamentary purpose is a completed act, and to lessen the opportunity for fraudulent interpolations between the written matter and the signature. It is also pointed out that the intention of the legislature in making this requirement, and not the intent in the mind of the testator, is the controlling element. It was there held that the signature of the testator on

the back of the document and completely removed from the pages containing the testamentary provisions and the attestation clause was not sufficient under the statute. However, in speaking of the requirement with which we are here concerned the court said: "This provision does not, however, of necessity, require that it shall be in immediate juxtaposition with the concluding words of the instrument, but that it shall be so near thereto as to afford a reasonable inference that the testator thereby intended to indicate an authentication of the instrument as a completed expression of his testamentary purposes." In a concurring opinion, Chief Justice Beatty said: "The true test to determine whether a decedent has subscribed his name at the end of a will is to take the document as it left his hand, and then, disregarding the signatures of the witnesses, and all evidence aliunde, to see whether it is apparent that his name was placed where it appears for the purpose of execution." In another concurring opinion Judge Angellotti said: "To comply with the statute, the name must, of course, be subscribed after the termination of the testamentary provisions; and, where it is so placed, the mere extent of space between such termination and the subscription ought not to affect the question as to whether the statute has been complied with, if the document, on its face, disregarding the signatures of the witnesses and all evidence aliunde, fairly indicates that the name was so placed by the testator as a subscription, and for the purpose of execution. The extent of space is, of course, material upon the question as to what the document does indicate upon its face."

[6] Applying these rules and tests to the instrument here in question we think the conclusion reached by the jury and trial judge must be sustained. Disregarding the evidence which, without conflict, is that the testator signed his name in this attestation clause with the intention and announced purpose of executing his will, that result sufficiently appears on the face of the instrument. All other writing placed by the deceased in the blanks on this printed form, including his name in the first line, was done by using printed letters rather than script, but his signature in the attestation clause was in script in the regular manner. This signature was placed after all testamentary provisions had been set forth and in close proximity to the end of the body of the will. While it is in the attestation clause it is very near the end of the body of the will and in a place which might well be considered by a layman as the proper place for his signature in executing a will. In the printed form there were three blank partial lines close together. The first was intended for the signature to the will, the second for the date it was witnessed, and the third referred directly to the person who was executing the will. The deceased, a layman, placed his signature on this third partial blank line instead of the first where it should have been. The relation of the place where this signature appears to the rest of the document and the fact that the deceased at this place inserted his regular signature instead of writing his name in printed letters, as he did on the first line of the will, indicate an intention to authenticate the instrument as a completed expression of his testamentary purpose.

Moreover, the attestation clause stated that the foregoing instrument, which immediately precedes it, was signed, published as and declared to be his last will by the deceased in the presence of the witnesses who, at his request and in his presence, subscribed their names as witnesses. The only signature of the deceased which appears anywhere in the document is this signature near the beginning of the attestation clause. It is a reasonable inference that this signature is the one to which the witnesses referred and attested, and that it was placed there for the purpose of executing that instrument as a will. In our opinion, a substantial compliance with this statute sufficiently appears in this case to support the judgment and order appealed from.

[7] The appellant further contends that the question as to whether an instrument has been subscribed at the end thereof involves a question of law and not one of fact, that this matter should not have been

[illegible] the clear purport of judgment and other [illegible] finding on the question of fact. This was the one of the questions submitted to the jury, which rendered a special verdict to the effect that the [illegible] understood the same to be one of the [illegible]. The judge [illegible] in the judgment and [illegible] was a [illegible] of the finding of the jury. [illegible] v. [illegible] 2 Cal. [illegible]

The judgment and order appealed from are affirmed.

[illegible] and [illegible], JJ., concur.

[illegible] et al. v. [illegible] et al.

Civ. [illegible]

District Court of Appeal, Second District, Division 1, California.

[illegible]

Rehearing Denied [illegible].

1. Appeal and error [illegible]

Where there is conflict in evidence, judgment of trial court is conclusive.

2. [illegible]

Where there was no service of process in justice court action and all steps taken in such action were without plaintiffs' knowledge, proceedings in justice court resulting in sale of plaintiffs' realty to satisfy justice court default judgment against plaintiffs were invalid as matter of law and realty was properly restored to plaintiffs.

Appeal from Superior Court, Los Angeles County; [illegible], Judge.

Quiet title action by [illegible] and [illegible] Young, husband and wife, against E. M. Young and [illegible] Young, also known as [illegible] Young, husband and wife, and J. [illegible] Loss, also known as Joseph [illegible] Loss and Mary [illegible] Loss, also known as [illegible]. J. [illegible] Loss and Mary [illegible] Loss filed a cross-complaint against the plaintiffs. From the judgment the defendants appeal.

Affirmed.

Roy C. Kaiser, of Los Angeles, for defendants and appellants.

Roy A. Lunn, of Los Angeles, for defendants, cross-complainants and appellants.

John M. [illegible], of Los Angeles, for plaintiffs, cross-defendants and respondents.

[illegible], Justice.

This is an appeal from the judgment in a quiet title action.

Respondents, plaintiffs below, brought the within action against appellants, defendants and cross-defendants, to quiet title to certain improved real estate alleged to be of the value of $[illegible] to $[illegible] and which returned a "substantial monthly income by way of rentals".

The record reveals that plaintiffs were indebted to the [illegible] Lumber Company in the sum of $[illegible]; that said lumber company was adjudged a bankrupt; that during the administration of the bankrupt estate, defendant E. M. Young became the owner of the above mentioned claim of $[illegible]; that later said E. M. Young filed a suit in the Justice's Court against respondents as defendants which resulted in a judgment by default. An execution issued and a levy on the property involved in the within action was followed by a sale to said E. M. Young to satisfy said Justice Court judgment. Young later deeded said property to defendants Loss for an alleged consideration of $[illegible].

Briefly, the complaint in the action [illegible] alleges the quiet title action in the usual form. Other causes of action allege in more or less detail the steps and proceedings in the Justice Court hereinbefore referred to. It was also alleged in substance that neither of the plaintiffs herein who were defendants in the Justice Court received any notice of the action or [illegible]

Justice's Court in any particular. It is also alleged that respondents first learned of said Justice Court lawsuit when defendant Joseph Lees, one of the appellants herein, demanded rent from the tenants occupying the property, whereupon respondents, "took action by employing an attorney to take such legal action as would be required to protect their interests."

The trial court found for respondents, plaintiffs below.

Appellants contend, first, that the judgment should have been for defendants because,

"A. Judgment Cannot Be Collaterally Attacked.

"B. To Set Aside Judgment in Court of Equity It Is Necessary To Allege and Show Meritorious Defense.

"C. A Complaint for Relief Against a Judgment on Ground of Alleged Fraud in Its Procurement Which Shows No Facts Constituting a Defense to Merits of Original Action, Does Not State a Cause of Action.

"D. The Objection That Complaint Does Not State Facts Sufficient to Constitute a Cause of Action Is Not Waived by Failing to Demur and May Be Urged Upon Appeal.

"E. An Execution Sale of Land Will Not Be Set Aside Although No Personal Notice of Sale Was Given Judgment Debtor.

"F. Justice Court of Inglewood Township Is a Class A Court.

"G. The Judgment of the Justice Court Was Not Only Regular on Its Face but It Was Just." and

"H. Marshal's Sale Valid."

It should be noted at the outset that there was no demurrer to the complaint and, assuming that certain necessary allegations were lacking in the complaint, they nevertheless were included in the answers to the cross-complaints, not only in the form of denials but in the form of affirmative allegations as well. The pleadings on the whole are in accord with the findings.

[1, 2] It is evident from a review of the record that the court believed the plaintiffs with regard to the contention that there had been no service of process in the Justice Court action and that all of the steps taken in said court had been without plaintiffs' knowledge. It is true that there was a conflict in the evidence but it is well settled that in such circumstances the judgment of the trial court is conclusive. The findings of fact as above noted manifestly invalidated the proceedings in the Justice's Court as a matter of law, and the judgment herein appealed from, which resulted in a restoration of the property to plaintiffs, was proper.

There being no errors in the record, the judgment is affirmed.

YORK P. J., and WHITE J., concur.

Hearing denied; EDMONDS and SPENCE, JJ., dissenting.

81 Cal.App.2d 769

## PEOPLE v. EGAN.

Cr. 1754.

District Court of Appeal, First District, Division 1, California.

Oct. 10, 1947.

Hearing Denied Nov. 6, 1947.

**1. Criminal law 🔑1193**

A remittitur may be recalled only where the judgment sought to be recalled was secured by fraud or imposition on the court.

**2. Criminal law 🔑1110(5), 1131(7)**

A motion to set aside order dismissing appeal from judgment of murder conviction and from order denying motion for new trial and for relief from default in failing to secure a proper record on appeal on ground that movant's attorney had been negligent and failed to perfect appeal and that because movant was emotionally upset after conviction movant failed to order appeal conducted in proper manner would be denied where movant had knowledge of the failure and of the emotional condition and had waited 14 or 15 years before filing motion. Rules for Supreme Court and District Courts of Appeal, rule 2, § 7.

**3. Courts ⚷85(3)**

The new rules on appeal would not be applied retroactively so as to relieve one from a default which had required dismissal of appeal under old rules requiring appellant in a criminal case within 5 days after giving notice of appeal to file statement with clerk setting forth grounds of appeal and designating portions of transcript required. Rules for Supreme Court and District Courts of Appeal, rule 2, § 7.

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Frank J. Egan was convicted of murder in the first degree and he moves to set aside order dismissing his appeal from judgment of conviction and denying motion for a new trial and for relief from his default in failing to prepare a proper record on appeal.

Motions denied.

Elizabeth Cassidy, of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Frank Egan, having been convicted of murder in the first degree, and his appeal from the judgment of conviction and from the order denying his motion for a new trial having been dismissed, now moves this court to set aside the order of dismissal and for relief from his default in failing to prepare a proper record on appeal. There is no merit in either motion.

The chronological history of this case is as follows:

September 14, 1932: Frank Egan and Albert Tinnin, having been tried jointly and found guilty of first degree murder, were sentenced to life imprisonment. Both separately appealed, having been represented by separate counsel on the trial. Egan's notice of appeal was filed the day of sentence.

June 30, 1933: The attorney general filed a notice of motion to dismiss the appeal of Egan on the grounds that no steps had been taken to have a record prepared, and, further, that Egan had failed to comply with Rule II, § 7, of the then Rules for Supreme Court and District Courts of Appeal. That rule required an appellant in a criminal case, within five days after giving notice of appeal, to file with the clerk a statement setting forth the grounds of the appeal, and designating the portions of the transcript desired. The rule expressly provided: "If such application is not filed within said time, the appeal shall be dismissed." 18 Cal.2d 5. Admittedly no such statement was or ever has been filed, and admittedly no steps were ever taken to have a record prepared on Egan's appeal, although at one time Egan's counsel requested that the transcript on Tinnin's appeal be used on his appeal.

July 24, 1933: Motion of attorney general to dismiss called by this court and continued to August 28, 1933.

August 28, 1933: There was filed in this court an affidavit of Frank Egan dated July 14, 1933, and addressed to the Supreme Court, in which Egan averred that following his conviction his mind became deranged and for several months he was mentally incompetent "and by reason thereof he failed to conduct his appeal or order the same to be done for him in a proper manner." He prayed that he be relieved from any default or from any violation of the rules. On this same day the motion to dismiss was argued and submitted.

November 28, 1933: This court filed its opinion granting the motion and dismissing the appeal. People v. Egan, 135 Cal.App. 479, 27 P.2d 412. The opinion states that the appeal had to be dismissed because of the failure to comply with the requirements of Rule II, § 7, and holds that the provisions of that rule are mandatory, citing six cases which so hold. No petition for a rehearing or petition for hearing in the Supreme Court was filed.

December 29, 1933: This court issued its remittitur to the county clerk in Egan's appeal.

September 12, 1945: There was filed in the Superior Court of San Francisco, on a motion by Egan to annul, vacate and set aside his conviction, the affidavit of Vincent Hallinan, who had been Egan's attorney on the murder trial, averring that on September 14, 1932, he gave notice of appeal on behalf of Egan and was instructed by Egan to perfect the appeal; that within the time provided in Rule II, § 7, he caused to be prepared a proper statement as to the grounds for the appeal and designated therein the portions of the record desired; that he "directed a trusted clerk from affiant's office to file the same." The name of the "trusted clerk" is not disclosed, and no affidavit is filed on his behalf. It is further averred that in reliance on the belief that the clerk would file the statement, affiant absented himself from San Francisco for two weeks; that he did not become aware of the fact that the trusted clerk had not filed the statement until affiant had prepared, and was about to file, his opening brief on the appeal; that affiant attempted to file his opening brief but was prevented from doing so.

August 15, 1947: Egan filed his present motion to set aside the dismissal and for relief from his default. The motion is supported by the Egan and Hallinan affidavits above mentioned and by a new affidavit of Egan, in which the chronological facts are set forth in detail.

It should be mentioned that petitioner has sought in various ways to challenge his conviction. In 1938 Egan petitioned the Supreme Court for a writ of habeas corpus on the ground that he had been convicted on perjured testimony. This petition was denied without opinion. In 1942 he again petitioned the Supreme Court for habeas corpus, again alleging that he was convicted on perjured testimony and also asserting that he had been unlawfully deprived of the assistance of counsel during the trial. These issues were fully considered by the court and denied. In re Egan, 24 Cal.2d 323, 149 P.2d 693, certiorari denied by the United States Supreme Court, Egan v. California, 323 U.S. 785, 65 S.Ct. 272, 89 L.Ed. 626.

In 1945 Egan moved the Superior Court to set aside the indictment and judgment, and, upon denial of his motions, appealed to the District Court of Appeal. The proceeding was treated as an application for a writ of error coram nobis. The appellate court dismissed the first motion and affirmed the denial of the other, mainly on the grounds that coram nobis could not be used to review matters that could have been reviewed on an appeal. People v. Egan, 73 Cal.App.2d 894, 167 P.2d 766. A petition for hearing was denied by the Supreme Court.

It should also be mentioned that Egan's codefendant Tinnin appealed and the judgment of conviction and order denying his motion for a new trial were affirmed. People v. Tinnin, 136 Cal.App. 301, 28 P.2d 951.

[1, 2] By this present motion Egan is attempting, some 15 years after his conviction, and some 14 years after this court dismissed his appeal, to secure what is, in legal effect, a rehearing of this court's decision dismissing his appeal or to secure the recall of the remittitur. This relief is asked although he failed to petition for a rehearing of this court's opinion and failed to petition the Supreme Court for a hearing. This unusual relief is asked for not because of any newly discovered facts, not because Egan was prevented from perfecting his appeal because of any acts on the part of prosecuting or other county or state officials, and not because of any fraud on the part of any one, but because, so it is averred, he was emotionally upset after his conviction, and his attorney negligently failed to file the required statement of grounds for the appeal. This mental condition and negligence on the part of his attorney, and the alleged reasons for it, have been known to Egan for some 14 years. No case has been, or could be, cited where such relief has ever been granted on such untenable grounds. If it be assumed that this court has the power to grant such relief, if relief were granted in this case relief would have to be granted in every case where the defendant or his counsel negligently failed to appeal, and then years later sought to perfect his appeal, after witnesses have died or disappeared, or the facts forgotten. While the right of appeal is a most substantial one, and while the courts should be and are zealous to protect that right when the appellant acts seasonably to protect his interests, it would make a mockery of the proper administration of justice if a convicted felon could sit back for 14 or 15 years and then seek to have the pro-

priety of his conviction reviewed on the ground, forsooth, that his attorney was negligent some 14 or 15 years before and admittedly failed to perfect the appeal. The statutes and rules reasonably regulating the right of appeal might just as well be repealed if any such rule were to be adopted. A remittitur may be recalled only where the judgment sought to be recalled was secured by fraud or imposition on the court. Isenberg v. Sherman, 214 Cal. 722, 7 P.2d 1006.

There are other reasons why the motion must be denied. Cases too numerous to mention have repeatedly held that compliance with Rule II, § 7, was mandatory. This rule was strictly applied. See People v. Ramirez, 26 Cal.App.2d 715, 80 P.2d 151; People v. Schroeder, 112 Cal.App. 550, 297 P. 105; People v. Lewis, 219 Cal. 410, 27 P.2d 73. The rule was followed by the Supreme Court in Gonzales v. Superior Court, 3 Cal.2d 260, 44 P.2d 320, in which it was likewise held that the curative provisions of § 473 of the Code of Civil Procedure were not applicable to criminal proceedings. The Gonzales case involved a factual situation where the equities called for relief from default if the court possessed the power to relieve, and where the application was seasonably made. Nevertheless relief was denied.

While it is true that the Supreme Court has, on occasion, granted relief where the statement required by Rule II, § 7, was not filed within the required time, such relief has only been granted under most unusual circumstances, where the request for such relief was seasonably made, and where a proper statement was prepared and tendered. Thus in People v. Megugorac, 12 Cal.2d 208, 82 P.2d 1108, the statement was filed within 10 days of filing the notice of appeal, and the reporter's transcript was filed a few days later. In the present case no statement has ever been tendered for filing. See People v. Gonzales, 8 Cal.App.2d 164, 47 P.2d 314.

In the present case if petitioner's affidavit filed in August of 1933 be considered as a petition for relief from default seasonably made, such affidavit was before the court when it passed on the motion to dismiss. Although not mentioned in the opinion it must be held that this court, in passing on the motion to dismiss, passed on and denied the request for relief from default. That decision has long since become final, and cannot be attacked at this late date. If petitioner was not satisfied with that decision he should have petitioned for a rehearing or for a hearing in the Supreme Court. This he did not see fit to do. Petitioner is faced with this dilemma—if the Egan affidavit was a petition, seasonably made, to be relieved from default, it was considered and found wanting by this court in 1933; if that affidavit be not so considered then petitioner's laches bars him from relief. In either event the relief must be denied.

Petitioner seems to place his greatest reliance in support of his motion on In re Byrnes, 26 Cal.2d 824, 161 P.2d 376. That was a petition for habeas corpus, after conviction under two indictments. The petitioner claimed he was prevented from appealing because in one case the transcript was not furnished him, while in the other the prison officials took the transcript from him. Petitioner was convicted in 1932, and, after the first trial, his counsel noticed an appeal within the required time, obtained an order for the preparation of a transcript, and then withdrew from the case. No transcript was completed in the form required for an appeal, but a copy of the testimony, in several parts as written up each day, was on file in the district attorney's office in Los Angeles at the time of his petition before the Supreme Court. Following the second conviction, Byrnes gave timely notice of appeal, but his request for a transcript was denied upon the ground that he had each day been furnished with a record of the proceedings. However, on Byrnes' statement that some portions of the testimony which he had received during the trial were lost, the district attorney supplied the missing volumes. While incarcerated, some of the transcripts were read by other prisoners and the jailor had a faint recollection of the petitioner reading a transcript. The petitioner was quite uncooperative while in jail and was removed from the cell block to the dungeon on several occasions. The practice apparently was to remove books and papers from the cell formerly occupied by the prisoner, keep them for a time, and then to destroy them. A search in January, 1944, failed to reveal the transcript and it might have been destroyed.

The Supreme Court, after reviewing these facts, and after referring to two federal cases, stated at page 828 of 26 Cal.2d, at page 378 of 161 P.2d:

"The conclusions reached in these cases rest upon fundamental principles of justice which compel a determination that one who has been prevented by officers of the state from presenting the record upon which his appeal, regularly taken, can be heard, should have an opportunity to do so."

"By the timely notices of appeal from the judgments of conviction under which Byrnes is now in custody, the District Court of Appeal acquired jurisdiction over the two actions, and as in the federal courts, lack of a record on appeal does not affect its jurisdiction."

It will be noted that in the Byrnes case the appeal was "regularly taken"—i. e., the notice of appeal and the required statement were filed as required by law. Relief was granted because petitioner had been prevented by officers of the state from presenting or securing his record on appeal. In this respect the case resembles People v. Slobodion, 30 Cal.2d 362, 181 P.2d 868, where relief was granted for the failure to file a notice of appeal within the statutory time where such failure was caused by the negligence of the prison officials. The case can have no application to the present proceeding where the required statement was not filed solely because of the negligence of the attorney for petitioner.

[3] Some mention is made by petitioner to the fact that the old rules applicable to appeals, including Rule II, § 7, were superseded on July 1, 1943, by the new Rules on Appeal, it apparently being petitioner's thought that, since the new rules do not contain a provision such as old Rule II, § 7, we should apply the new rules to this appeal taken in 1933, and so relieve him from what would now not be a default. To state the proposition is to refute it. Such retroactive application of the rules is not permissible.

The motion to set aside the order of dismissal and the motion for relief from default are denied.

WARD and BRAY, JJ., concur.

81 Cal.App.2d 804

**TARASCO v. MOYERS et al.**

**Civ. No. 7358.**

District Court of Appeal, Third District, California.

Oct. 15, 1947.

**1. New trial 🔑70**

In action for injuries sustained by passenger in collision between automobile stage and automobile driven by defendants' employee, trial court did not abuse its discretion in granting passenger a new trial on ground of insufficiency of evidence in so far as issue of employee's negligence was concerned in view of evidence that, without yielding right of way, employee drove onto highway from private roadway just ahead of approaching stage which was traveling at rapid rate of speed in plain view. Code Civ. Proc. § 1963, subd. 4; Vehicle Code, § 553.

**2. Automobiles 🔑242(1)**

Defendant employers were entitled to benefit of rebuttable presumption that their employee exercised ordinary care in driving automobile onto highway from a private roadway. Code Civ. Proc. § 1963, subd. 4.

**3. New trial 🔑70**

In action for injuries sustained by passenger in collision between automobile stage and automobile driven by defendant employers' farm hand, evidence that farm hand was using employers' gasoline in driving his own automobile at close of day's work from field to employer's headquarters, to which he was required to return tools and at which he resided free of charge, established that farm hand was performing duties of his employment so as to require granting of new trial in favor of passenger after verdict for defendants.

**4. Master and servant ⚷302(1)**

A servant is authorized to do anything which is fairly and reasonably regarded as incidental work specifically directed, or which is usually done in connection with such work.

**5. Automobiles ⚷242(6)**

In suit for injuries sustained by passenger in collision between automobile stage and automobile driven by defendants' employee, passenger had burden of proving existence of relationship of master and servant and that wrongful act of employee was performed within scope of employment.

**6. Appeal and error ⚷999(3), 1005(1)**

In action for injuries sustained by passenger in collision between automobile stage and automobile driven by defendants' employee, whether relationship of master and servant existed and whether employee's wrongful act was within scope of employment were questions for determination of jury or for decision of court on motion for new trial, where there was evidence of the employment and that acts complained of were within course of employment.

◆

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Suit by Delfina Tarasco against Thurmon Devine Moyers, operating under the firm and style name of Moyers Stages, the Christiana Farms Company, A. E. Christiana and others to recover for injuries sustained in a collision between an automobile stage and another automobile. From an order granting a new trial against the last two named defendants, those defendants appeal.

Order affirmed.

See, also, Cal.App., 180 P.2d 68.

W. M. Conley, Philip Conley and Matthew Conley, all of Fresno, for appellants.

C. Ray Robinson and Margaret A. Flynn, both of Merced, for respondent.

THOMPSON, Justice.

This is an appeal from an order granting a new trial against appellants on the ground of insufficiency of the evidence, after a verdict and judgment had been rendered in favor of all defendants, in a suit for damages for personal injuries sustained by plaintiff while she was riding as a passenger in an automobile stage which collided with a Ford sedan on the highway, which Ford machine was being operated by appellants' employee.

The appellants contend that the court abused its discretion in granting the new trial because of a lack of evidence of the relationship of master and servant between appellants and their employee at the time of the accident. The driver of the Ford sedan was employed by appellants as a farm hand to irrigate alfalfa on their ranch. After completing the irrigation for the day he was returning to headquarters on the same farm in his own automobile, with his working tools in his machine when the accident occurred. Appellants furnished him with gasoline for that purpose and supplied him with his residence at headquarters, free of rental, as a part of his compensation. He was required to drive from the field to headquarters down a private roadway to the highway and thence along the highway a short distance. The headquarters and residence were situated on the easterly portion of the farm about a quarter of a mile from the highway.

The evidence shows that the codefendant Thurmon Devine Moyers, under the name of Moyers Stages, owned and operated a passenger stage line, as a common carrier, on the public highway in Merced County. The appellants owned and operated a 1738 acre farm adjacent to the highway, upon a portion of which a field of alfalfa was growing. On the eastern portion of that same farm the appellants owned a building called the "headquarters." A ditch intervened between the alfalfa field and that building. To reach that building workmen in the alfalfa field were required to drive southerly along a private road to its intersection with the public highway, and thence easterly along the highway a short distance to the headquarters building. Dave Connell, a young married man, had been employed by the appellants as a farm hand for about four years prior to the accident, which occurred about 7:05 o'clock p. m. on May 13, 1945. He was hired by the day, which usually consisted of eleven hours' work from 8 a. m. to 7 p. m., with one hour off duty during the luncheon time. He owned and drove his own car to and from the field. The appellants furnished him five gallons of gasoline per week for use in the car for that purpose. On the day of the accident Connell finished irrigating the alfalfa about 7 p. m. He immediately left the field in his car, which contained his working tools. The tools were kept at the headquarters, where he resided. Regarding the custom of returning the tools to headquarters, and the furnishing of his residence at headquarters "free of cost", the following evidence of Mr. Goodman, the manager of the ranch, appears in the record:

"Mr. Hansen: * * * They kept the shovel and equipment and boots up there at the main headquarters? A. Dave kept his own equipment in his car.

"Q. And he would put it in the car and take it back there and bring it out? A. Yes, sir.

"Mr. Robinson: * * * You furnished him his house for his wife and self *for his employment?* A. That is right.

"Q. Free of charge? A. Yes.

"Mr. Conley: Q. This equipment, Mr. Goodman, as I understand it Mr. Connell kept his shovels and equipment in his car all the time? A. That is right."

Johnnie Bomboy, the driver of the Moyers stage, testified that he left Modesto at 6:30 o'clock p. m. on the day of the accident and drove easterly along the highway. When he reached the Christiana farm about 7:05 p. m. he was traveling at the rate of 50 miles per hour. The highway was level, straight and paved at that point. It was then daylight. The intersection of the highway and the private road was in plain view for some distance therefrom on both thoroughfares. There was no obstruction to prevent a clear view. Bomboy saw Connell, with whom he was personally acquainted, when his Ford car was distant some 50 feet or more from the intersection. Bomboy waved at him, but Connell did not reply. Bomboy said he did not know whether Connell saw him. Bomboy did not continue to watch Connell as he approached, but turned his head away. When he next saw Connell's machine, it was directly ahead of his stage. He promptly applied his brakes but was unable to avoid the collision. The stage struck the Ford machine with great force on its left side, demolishing the car and shoving it a distance of about 140 feet to the south side of the highway. Connell was instantly killed.

The plaintiff brought suit for damages, on the theory of concurrent negligence, against the stage company and its driver, and the Christiana Farms Company and A. E. Christiana, as the employers of Connell, on the assumption of imputed negligence. The cause was tried with a jury, which returned a verdict in favor of all defendants. A new trial was granted with respect to appellants, on the ground of lack of evidence to support the judgment, and denied as to the other defendants. This appeal was then perfected.

In determining the question of whether the court abused its discretion in granting the new trial as to the appellants, it is necessary to find whether there is substantial evidence in the record, or reasonable inferences to be drawn therefrom, that Connell was guilty of negligence which proximately contributed to the accident, and whether the acts which he was then performing were part of the services for which he was employed, so as to impute that negligence to appellants on the doctrine of respondeat superior or master and servant.

[1, 2] We are of the opinion the court did not abuse its discretion in granting the new trial. In support of the order, it seems reasonable to infer from the evidence that Connell was guilty of negligence which proximately contributed to the accident, and that his acts were performed in fulfillment of the duties required by his employ-

ment. Wih respect to the issue of negligence, the appellants are entitled to the benefit of the rebuttable presumption that Connell exercised ordinary care in driving onto the highway. Sec. 1963, subd. 4, C.C.P.; Blackmore v. Brennan, 43 Cal. App.2d 280, 284, 110 P.2d 723. But the fact that he deliberately drove onto the highway just ahead of the approaching stage which was traveling at a rapid rate of speed, without yielding the right of way as required by Section 553 of the Vehicle Code, in broad daylight when the entire intersection and the stage were in plain view, warranted the court in assuming that the presumption was thereby dispelled. Even though reasonable minds might differ regarding that issue, we may not hold that the court abused its discretion in granting the new trial, so far as that issue is concerned.

[3] The more serious question is whether the evidence adequately shows that Connell was performing one of the duties of his employment at the time of the accident. The attorney for appellants has very forcefully contended in his excellent briefs and on oral argument that the evidence utterly fails to show that Connell was acting within the scope of his employment at the time of the accident. He insists that Connell was merely returning to his home in his own car after his day's work had been completed. We have concluded, however, that there is sufficient evidence and reasonable inferences to be drawn therefrom, to distinguish this case from the ordinary rule exempting liability for injuries received in "going to or coming from" the place of employment. It is true that Connell's usual working hours as a farmhand were from 8 a. m. to 7 p. m.; that he was driving his own car in returning to his residence at the time the accident occurred. But it is reasonable to infer from the preceding quoted evidence that he was required to return his field working tools each evening to the "headquarters" of his employer on the same farm, rather than to leave them in the field, and that the employer allowed him five gallons of gasoline per week for that purpose. The tools were found in his car after the accident occurred. Moreover, he was furnished by his employer a residence at "headquarters" on the same ranch for himself and wife, free of cost, as a part of the consideration for his employment, to which he was returning when the accident occurred. It is immaterial that the tools were actually left in the car over night, instead of storing them in some other place on the premises. These facts indicate that Connell was actually engaged in performing a part of his duties of employment in going to his allotted residence on the farm and in returning his working tools after the irrigating of the alfalfa had been completed for the day. Truck Insurance Exchange v. Industrial Accident Comm., 27 Cal.2d 813, 167 P.2d 705.

[4] In determining whether Connell was engaged in the performance of his duties in going to his assigned residence furnished by the employer on the premises where he worked, and in returning his tools to "headquarters" it is said in 1 Restatement of the Law of Agency, 508, sec. 229 (j), that: "* * * A servant is authorized to do anything which is fairly and reasonably regarded as incidental to the work specifically directed or which is usually done in connection with such work."

The ordinary "going and coming rule" (1 Campbell's Workmen's Compensation, 146, sec. 163) does not apply to the circumstances of this case. Where the contract of employment contemplates that the employee shall eat and sleep on the premises of the employer, under the recognized "bunkhouse rule", injuries received thereat incident to assigned duties may be deemed to have occurred in the course of employment. 1 Campbell's Workmen's Compensation, 188, sec. 196. If the employee is required to travel on the public highway in performance of a service for the employer, even though he is then returning "to his business headquarters or to his home", when he is injured in a highway collision, the employee may be deemed to be acting in the course of his employment. 1 Campbell's Workmen's Compensation, 192, sec. 200. In the following section of the last-cited authority it is said that: "The fact that a servant furnishes his own conveyance and is left to his own devices in the performance of his duties does not sever the relation of master and servant nor take him out of the scope of his employment. This is particularly true where the nature of his employment is such as to require the use of some means of conveyance, but none is furnished by the employer. The use of his own automobile is properly regarded as an incident of his employment."

[5, 6] In the present case the furnishing of gasoline for use of Connell's car in going to and coming from his residence on the same property, and in conveying the tools to the headquarters, indicates that such service was intended to be within the scope of employment. Of course the burden was on plaintiff to prove that the relationship of master and servant existed at the time of the accident, and that the wrongful act of the employee was performed within the scope of employment. 16 Cal. Jur. 1110, sec. 67. But those questions are for the determination of the jury (Poncino v. Reid-Murdoch & Co., 212 Cal. 325, 298 P. 818; 16 Cal. Jur. 1111, sec. 67; 39 C.J. 1361, Sec. 1591), or for the decision of the court on motion for a new trial, unless there is no evidence or reasonable inferences from which such conclusions may be drawn. Where there is evidence of the employment and of the acts complained of which are within the course of employment, or incidental thereto, as there is in this case, we may not interfere with the discretion of the court in that regard.

The numerous cases cited by the appellants on the foregoing issues are distinguishable on the facts from the present case. Many industrial accident cases under the Workmen's Compensation Act are cited and relied upon by both parties. Courts are required to liberally construe the provisions of Divisions IV and V of that act in favor of injured workmen. Labor Code, sec. 3202. In industrial accident cases it has been held that the Commission may consider hearsay evidence in determining the liability. London Guarantee & Accident Co. v. Industrial Accident Commission, 203 Cal. 12, 14, 263 P. 196. Such distinctions, however, merely apply to the weight or rules of evidence and not to the principles of law governing the liability created on doctrines of master and servant or respondeat superior. That liability applies to both classes of cases. Keeping in mind the distinctions with relation to procedure and adequate proof, the industrial accident cases are applicable to the present suit.

We conclude there is ample evidence in this case to show that Connell was engaged at the time of the accident in the performance of a duty incident to his employment by appellants, and that the court therefore did not abuse its discretion in granting a new trial as to them.

The order is affirmed.

PEEK, J., and ADAMS, P. J., concur.

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81 Cal.App.2d 720

## In re BEVELLE'S ESTATE.

Civ. 15996.

District Court of Appeal, Second District,
Division 3, California.
Oct. 8, 1947.

**1. Costs 🔑172**

Generally attorney's fees are not recoverable as cost except as expressly allowed by statute or agreed to by express contract.

**2. Costs 🔑2**

"Costs" are those fees and charges which are required by law to be paid to the courts or some of their officers, or the amount of which is expressly fixed by law.

See Words and Phrases, Permanent Edition, for all other definitions of "Costs".

**3. Costs 🔑173(1)**

Where a statute authorizes the allowance of an attorney's fee, the fee is not technically regarded as part of the "costs".

**4. Executors and administrators** ⚿194(1)

The use of the word "of" in section of Probate Code providing that "costs of all proceedings" provided in chapter treating of family allowance must be paid by the estate as expenses of administration was not distinguishable from costs "in" all proceedings, and did not include as "costs" attorney's fee of widow incurred on petition for family allowance. Probate Code, §§ 383, 580, 683, 1003, 1013, 1105; Code Civ.Proc. §§ 1031, 1032a, 1032.6, 1033, 1033½, 1332.

See Words and Phrases, Permanent Edition, for all other definitions of "Costs of All Proceedings".

**5. Executors and administrators** ⚿194(1)

The section of Probate Code authorizing superior court or court on appeal in its discretion to order costs to be paid by any party to proceedings, or out of assets of estate, as justice may require when not otherwise prescribed does not change the meaning of the term "costs" or authorize the court to include something other and different than what the term implies, so as to authorize inclusion as "costs" payable by estate as expense of administration, attorney's fees of widow incurred upon petition for family allowance. Probate Code, §§ 683, 1232.

**6. Executors and administrators** ⚿194(1)

A widow was not entitled to recover from estate as "costs" attorney's fee incurred upon widow's petition for family allowance on ground that the allowance would be just and equitable. Probate Code, § 683.

**7. Executors and administrators** ⚿194(1)

A widow is not entitled to costs incurred upon petition for family allowance unless a cost bill is filed within statutory period. Probate Code, § 683.

**8. Executors and administrators** ⚿194(7)

Allowance to widow of costs incurred upon petition for family allowance would be affirmed on appeal notwithstanding a cost bill was not filed within statutory period where no objection was made to the allowance in the probate court or on appeal. Probate Code, § 683.

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Proceeding in the matter of the estate of Joseph C. Bevelle, deceased, wherein the special administrator petitioned for instructions. From an order instructing special administrator to pay costs and attorney's fees of widow incurred upon widow's petition for family allowance, a beneficiary of will appeals.

Order affirmed as modified.

A. Noah Borah, of Los Angeles, for appellant Morris Silver.

Paul R. Hutchinson, of Los Angeles, for respondent Jeanette Bevelle.

VALLÉE, Justice pro tem.

Appeal by a beneficiary under the will of Joseph C. Bevelle, deceased, from an order of the probate court instructing a special administrator to pay the costs and attorney's fees of a widow incurred upon her petition for family allowance. The order was made upon a petition by the special administrator asking for instructions.

Jeanette Bevelle, widow of Joseph C. Bevelle, deceased, petitioned the court for a family allowance. She was represented by attorney Paul R. Hutchinson, Esq. After contest, and on August 13, 1946, the petition was granted. Thereafter, Paul R. Hutchinson, Esq., presented a bill to the special administrator for $200 for services rendered by him as attorney in connection with the petition for family allowance and $2.50 for costs expended in connection therewith. The bill was on the stationery of Paul R. Hutchinson, Esq. and was not verified. It set out the services rendered by him in some detail. Thereafter, the special administrator filed its "Petition for Instructions Re Claim for Attorneys Fees and Costs in Re Services Rendered Re Family Allowance," in which it set forth the facts above recited, stating that there was a question whether Probate Code section 683 included the payment of attorney's fees. After a hearing the court instructed the special administrator that the claim for attorney's fees and costs in the amount of $202.50, incurred by the widow, should be and was declared to be a cost for obtaining the family allowance and an expense of administration, and ordered that the widow have judgment against the estate for the sum of $202.50, as an expense of administration to be paid in the course of administration.

The sole question upon this appeal is whether the allowance of $200 for attorney's fees was proper. No objection is made to the allowance of the $2.50 costs.

[1] Probate Code section 683 provides: "The costs of all proceedings provided for in this chapter must be paid by the estate as expenses of administration." The section is in Chapter XI, treating of, among other matters, "Family Allowance." The general rule is that attorney's fees are not recoverable as costs except where expressly allowed by statute or agreed to by express contract. Pacific Gas & Electric Co. v. Nakano, 12 Cal.2d 711, 715, 87 P.2d 700, 121 A.L.R. 417; Kahn v. Smith, 23 Cal.2d 12, 15, 142 P.2d 13; Viner v. Untrecht, 26 Cal.2d 261, 272, 158 P.2d 3; Bank of America, etc., Ass'n v. Moore, 18 Cal.App.2d 522, 529, 64 P.2d 460; Bank of America Nat. Trust & Savings Ass'n v. West End, etc., Co., 37 Cal.App.2d 685, 696, 100 P.2d 318; Exchange Nat. Bank of Tulsa v. Ransom, 52 Cal.App.2d 544, 547, 126 P.2d 620. The rule applies in probate proceedings. In re Estate of Olmstead, 120 Cal. 447, 52 P. 804; In re Estate of Johnson, 198 Cal. 469, 245 P. 1089; In re Estate of Wallace, 12 Cal.2d 476, 86 P.2d 95; In re Estate of Marré, 18 Cal.2d 191, 114 P.2d 591; In re Estate of Gallo, 71 Cal.App. 352, 235 P. 66.

[2, 3] The term "costs" means those fees and charges which are required by law to be paid to the courts or some of their officers or the amount of which is expressly fixed by law. Blair v. Brownstone Oil & Refining Co., 20 Cal.App. 316, 128 P. 1022; Pezel v. Yerex, 56 Cal.App. 304, 311, 205 P. 475; Moss v. Underwriters' Report, Inc., 12 Cal.2d 266, 274, 83 P.2d 503; In re Estate of McGinn, 2 Coffey Prob.Dec. 313. Where the statute authorizes the allowance of an attorney's fee, the fee is not technically regarded as part of the costs. Schallert-Ganahl Lumber Co. v. Neal, 94 Cal. 192, 29 P. 622.

[4] Respondent contends that because section 683 of the Probate Code says "the costs of all proceedings" as distinguished from "the costs in all proceedings," attorney's fees are included in the term "costs" as used in the section. The contention is without merit. "Costs" mean "costs," whether "of" or "in" the proceedings. The well defined meaning of the term is not enlarged by the use of the preposition "of" rather than "in." Some of the code sections providing for the allowance of costs use "of" (Code Civ.Proc., secs. 1031, 1032a, 1032.6; Probate Code, secs. 383, 580, 1003, 1013, 1105), others use "in" (Code Civ. Proc., secs. 1031, 1033½). However used, the term has never been construed as including attorney's fees. See, Moss v. Underwriters' Report, Inc., 12 Cal.2d 266, 83 P.2d 503, holding that "necessary disbursements," as used in Code of Civil Procedure, section 1033, is to be construed as including only those items coming within the definition of "costs"; also, In re Estate of McGinn, 2 Coffey Prob.Dec. 313, where it was held that "fees and expenses" did not mean anything more than "costs," where both were used in section 1332 of the Code of Civil Procedure (now Probate Code, section 383) providing for costs and expenses in a contest of a will after probate.) Whenever an allowance of attorney's fees is authorized to be made by the Probate Code, it is specifically provided for. (See, Probate Code, secs. 703, 716.)

[5] In support of the order, respondent relies upon Probate Code section 1232, which reads: "When not otherwise prescribed by this code or by rules adopted by the Judicial Council, either the superior court or the court on appeal, may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require." Section 1232 is in Article III of Chapter XXII prescribing "Rules of Procedure." This section merely authorizes the court to exercise its discretion in determining by whom and out of what fund the costs are to be paid. It does not change the meaning of the term or authorize the court to include something other and different from what the term implies. (11A Cal.Jur. 246.) It

does not purport to empower the court to award attorney's fees. In Re Estate of Olmstead, supra, 120 Cal. 447, 52 P. 804, the probate court allowed attorney fees to unsuccessful petitioners for the probate of a will for the services of their attorneys in defending a contest before probate. The Supreme Court said that "Attorneys' fees are not in any proper sense a part of the costs in a case," and held that they were not allowable under section 1720 of the Code of Civil Procedure, now section 1232 of the Probate Code. In Re Bundy, 44 Cal. App. 466, 186 P. 811, 812, cited by respondent, is not helpful. In that case, attorneys' fees were awarded the petitioner in a proceeding for the appointement of a guardian of the person and estate of an alleged incompetent. The basis of the decision was that in guardianship proceedings "the principles to be applied are quite unlike those in ordinary administration," and that an applicant for letters of guardianship "acts for and on behalf of one who cannot act for himself." In the Bundy case the court said (44 Cal.App. at page 467, 186 P. at page 812): "It is quite true that such fees are not allowed in ordinary probate proceedings when they are incurred for the benefit of the person employing the attorney." Here the fees were incurred for the sole benefit of the person employing the attorney.

[6] The contention of respondent that a family allowance is limited to maintaining the family in that station in life to which it was accustomed during the lifetime of the deceased and that, therefore, the widow should be allowed her attorney's fees, is without merit. In Re Estate of Marré, supra, 18 Cal.2d 191, 114 P.2d 591, was an appeal by a beneficiary of a trust from that portion of an order which denied his petition for an allowance from the trust funds with which to pay the fees of his attorney. The beneficiary had been successful in obtaining an order requiring the trustees of the trust to make payments to him for his support and maintenance. In Re Estate of Marré, 18 Cal.2d 184, 114 P.2d 586. The Supreme Court held (18 Cal.2d at page 192, 114 P.2d at page 592): "It is suggested that under the facts of this case attorney's fees constitute a necessary expense of the beneficiary and should, therefore, be paid from the trust funds as a portion of the amount due for support and maintenance. The amounts payable, however, are to be determined in the sole judgment of the trustees, and under the facts here presented no ground is shown entitling appellant to an order of the court awarding him attorney's fees." The mere fact that it might appear just and equitable to allow a recovery of attorneys' fees is no justification for such allowance. Bank of America Nat. Trust & Savings Ass'n v. West End, etc., Co., supra, 37 Cal.App.2d 685, 696, 100 P.2d 318.

[7, 8] It is doubtful whether the $2.50 expended by the widow for items which come within the definition of costs was properly allowed. See, In re Estate of Ricaud, Myr.Prob. 158, holding that a cost bill must be filed within the statutory period. Here no cost bill was filed. However, no objection was made to the allowance in the probate court and none is made here.

The order called "Judgment on Petition for Instructions Re Claim for Attorney's Fees and Costs in Re Services Rendered Re Family Allowance" is modified by striking therefrom the sum of $200 allowed as attorney's fees. As thus modified, it is affirmed.

SHINN, Acting P. J., and WOOD, J., concur.

81 Cal.App.2d 751

## BIONDINI v. AMSHIP CORPORATION et al.

Civ. 13391.

District Court of Appeal, First District, Division 1, California.

Oct. 10, 1947.

Hearing Denied Dec. 8, 1947.

**1. Trial 🔑165, 178**

Nonsuit or directed verdict may be granted only when, disregarding conflicting evidence and giving plaintiff's evidence proper value and indulging in every legitimate inference deducible therefrom, evidence is insufficient to support a verdict for plaintiff.

**2. Trial 🔑139(1), 142**

Trial court is not justified in taking case from jury at close of plaintiff's case unless, as a matter of law, no other reasonable conclusion is legally deducible from evidence and any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it on appeal or trial court to set it aside.

**3. Wharves 🔑21**

Whether truck driver employed by drayman, who was hired by subcontractor to haul debris away from ship, was an invitee or merely a licensee of general contractor in using scaffolding on ship in process of transferring debris from deck to truck was for jury.

**4. Wharves 🔑21**

As to ship at large, plaintiff, as an employee of a subcontractor, was a business visitor and invitee of general contractor who held contract to repair ship.

**5. Negligence 🔑32(3), 136(15)**

One may be an invitee as to a certain portion of the premises and a licensee or trespasser as to other portions, and whether, in a given case, invitation includes that part of premises where injury occurs is generally a question for trier of fact.

**6. Negligence 🔑32(3)**

The invitation of a proprietor extends not only to all parts of premises which patron is expressly invited to use, but also to such parts as he is impliedly invited to enter, and invitation also extends to those portions of premises where invitee, under condition of his invitation, would naturally be likely to go.

**7. Wharves 🔑21**

Where subcontractor, engaged by general contractor to remove debris from ship, instructed drayman's truck driver to use long scaffold in moving debris from deck of ship to truck and did not advise driver not to use short scaffold when it was built to replace long scaffold and subcontractor's employees frequently used scaffold in helping to load truck, whether driver was an invitee of subcontractor in using short scaffold at time of his injury was for jury.

**8. Negligence 🔑20**

Where a company expressly or impliedly adopts an applicance of another company and invites others to use it, and they do, company owes such invitees a duty to exercise reasonable care to see to it that appliance is safe.

**9. Wharves 🔑21**

Whether subcontractor, which was engaged in removing debris from deck of vessel, impliedly invited truck driver of drayman, who was hauling debris away, to use a short scaffold erected at side of vessel by general contractor, whether subcontractor assumed responsibility for maintenance and safety of such scaffold and whether it adopted scaffold as its own were questions for jury.

**10. Negligence 🔑136(9, 14)**

Whether a particular act or omission constitutes negligence is ordinarily a jury question, and it is only when reasonable minds cannot differ in respect to whether proved facts and reasonable inferences therefrom make out negligence or nonnegligence that such issues may properly be taken from jury.

**11. Wharves 🔑21**

Where drayman's truck driver was injured because of a defective scaffold, if driver was a bare licensee, general contractor and subcontractor merely owed him a duty to refrain from inflicting willful injury upon him, but, if he was an invitee of either or both, then invitor owed him a duty to exercise ordinary care to provide a safe scaffold.

**12. Wharves 🔑21**

Whether cursory, visual inspection of scaffold by general contractor's safety inspector satisfied duty to exercise due care for safety of contractor's invitee was for jury.

**13. Wharves 🔑21**

Where drayman's truck driver was injured when a plank on scaffold erected by general contractor broke, on question of whether general contractor's safety engineer exercised due care in inspecting scaffold, jury was entitled to consider fact that broken plank was not produced and that safety inspector made no attempt to find it or to examine it to find out what caused it to break.

**14. Wharves 🔑21**

Evidence authorized jury finding that, if subcontractor invited drayman's truck driver to use scaffold built by general contractor, subcontractor failed to fulfill its duty of due care for safety of driver, in that it made no effort to ascertain whether scaffold was suitable or safe.

**15. Negligence 🔑44**

Where subcontractor assumes an element of control of scaffold erected by general contractor by making use of scaffold for its own purposes, subcontractor owes ascertain whether duty to its invitees to scaffold can be used safely.

**16. Negligence 🔑121(2)**

The doctrine of res ipsa loquitur applies to a factual situation involving injury resulting from the collapse of a scaffold.

**17. Negligence 🔑121(2)**

The doctrine of res ipsa loquitur has no application where injured person is a bare licensee, but does apply where injured person is an invitee.

**18. Wharves 🔑21**

Subcontractor could not escape liability under res ipsa loquitur doctrine for injuries suffered by a business invitee in the collapse of a scaffold erected by general contractor and used by subcontractor, on the ground that scaffold was not within subcontractor's "exclusive" management and control.

**19. Wharves 🔑21**

In action by drayman's truck driver against general contractor and subcontractor for injuries sustained in collapse of a scaffold erected by general contractor and used by subcontractor, whether either or both contractors had control of scaffold so as to make res ipsa loquitur doctrine applicable was for jury.

**20. Wharves 🔑21**

That truck driver knew that he was injured by the collapse of a plank in a scaffold erected by general contractor and used by subcontractor did not prevent the application of the doctrine of res ipsa loquitur as to subcontractor on the ground that driver knew as much about the cause of his injuries as subcontractor did, since driver had no way of knowing how or why the plank collapsed and subcontractor was in the superior position with respect to such knowledge.

**21. Negligence 🔑121(2)**

The application of the doctrine of res ipsa loquitur is barred by plaintiff's equal knowledge with defendant of the cause of the injury, not equal knowledge of the fact of injury.

**22. Wharves 🔑21**

Where drayman's truck driver was injured in the collapse of the scaffold built by general contractor and evidence was sufficient to authorize a jury finding that leaderman of crew that built scaffold did not exercise ordinary care in inspecting planks used and that general contractor's safety inspector did not use ordinary care in inspecting completed scaffold, nonsuit as to leaderman and safety inspector was error.

◆

Appeal from Superior Court, Alameda County; A. J. Woolsey, Judge.

Action by William Biondini against Amship Corporation, Harbor Ship Service

Company, and others for damages for injuries sustained when plaintiff fell from a scaffolding attached to a ship. Judgment of nonsuit, and plaintiff appeals.

Reversed.

John J. Taheny and Terence J. Boyle, both of San Francisco, for appellant.

Brown, Rosson & Berry, of Oakland, for respondent Harbor Ship Service Co.

Johnson, Ricken & Johnson, of Oakland (Stanley C. Smallwood, of Oakland, of counsel), for respondent Amship Corporation.

PETERS, Presiding Justice.

Plaintiff brought this action against the several defendants for damages for personal injuries received by him when he fell from a scaffold attached to a ship. At the close of plaintiff's case all defendants moved for a nonsuit on the grounds that the evidence failed to show that defendants breached any duty of care owed to plaintiff, and failed to show that, so far as plaintiff was concerned, any of the defendants were negligent. The motions were granted and judgment entered. Plaintiff appeals.

[1, 2] The rules applicable to the power of the trial court to grant a nonsuit are too well settled to require extended discussion. They were succinctly stated in the frequently cited case of In re Estate of Lances, 216 Cal. 397, 400, 14 P.2d 768, as follows: "A nonsuit or a directed verdict may be granted 'only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.' * * * Unless it can be said as a matter of law that, when so considered, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury." This court has recently reiterated these rules in a case involving an appeal from a judgment notwithstanding the verdict. Docherty v. Key System, 80 Cal.App.2d 888, 184 P.2d 33. Tested by these standards it is quite apparent that the trial court abused its powers in granting the nonsuit in the instant case.

The following are the relationships of the various parties: The defendant Amship Corporation operated a shipyard. At all times here relevant it had a contract to repair the U. S. S. "Aloith," it being the general contractor. It entered into a subcontract with defendant Harbor Ship Service Company under which the latter agreed to perform the task of removing the debris from the vessel. Harbor Ship, in turn, subcontracted to a drayman, Fletcher by name, the job of carrying away the debris. Under this last subcontract Fletcher was required to furnish a truck and driver. Plaintiff, William Biondini, was the driver of the truck furnished by Fletcher. While removing debris from the ship to the truck the scaffold upon which plaintiff was standing collapsed and plaintiff was hurt. The scaffold was built by Amship, and defendant Ames was the leaderman of the Amship crew that constructed the scaffold. Defendant Carlson was the Amship safety inspector.

The plaintiff contends that there is evidence from which the jury could have found that he was impliedly invited by Amship to use the scaffold; that there is evidence from which the jury could have found that Amship had actual knowledge that the scaffold was being used in unloading the debris; that the evidence shows that Harbor Ship directed plaintiff to use the scaffold in the unloading process and thus adopted it as its own appliance; that there is evidence from which the jury could have found that under the circumstances Harbor Ship impliedly assumed joint responsibility with Amship for the safety of the scaffold, and impliedly represented to plaintiff that it was a safe appliance to use; that there is ample evidence from which the jury could have found that Amship and its defendant employees, and Harbor Ship, were negligent. In addition, plaintiff asserts that the doctrine of res ipsa loquitur applies as against both Amship and Harbor Ship and that for that reason alone the judgment of nonsuit must be reversed. Defendant Amship and its defendant employees maintain that plaintiff, as to it, was a mere licensee in using the scaffold; that it extended no express or implied invitation to plaintiff to use the scaffold; that there is no evidence of any act of negligence on its part; that there is no basis for the application of the doctrine of res ipsa loquitur as to it. Defendant Harbor Ship maintains that under the evidence it owed plaintiff no duty with respect to the scaffold, and that it had no right of management or control over it and cannot be held responsible for its collapse. It also contends that it was not negligent and that the doctrine of res ipsa loquitur is not applicable.

As before noted, Amship, as general contractor, contracted with Harbor Ship for the latter to remove the debris from the ship and to dispose of it. Harbor Ship, in turn, subcontracted with Fletcher, who was required to furnish a truck and driver for these purposes. Plaintiff was employed by Fletcher as driver, and started work on this job early in January, 1945. Plaintiff testified that Fletcher told him to report with his truck to the supervisor of Harbor ship at the dock, Barrera by name, for his working orders. Barrera told plaintiff that the rubbish and debris on the ship had to be removed, and that Harbor Ship employees on the ship would assist him in removing the debris from the ship, and in loading the truck. When plaintiff first reported to Barrera there was a long scaffold attached to the ship some few feet below the level of the deck, which scaffold extended practically the entire length of the vessel on the dock side. There was a lot of equipment piled along the dock and Barrera warned plaintiff that, in throwing the debris from the deck to the truck, he should be careful not to hit this equipment; that shortly thereafter one of the Harbor Ship employees started to throw some heavy boxes from the deck into the truck, and one of the boxes fell off and hit some of the piled equipment; that Barrera then told plaintiff to use the scaffold with the "heavy stuff"; that the "heavy stuff" should first be relayed from the deck to the scaffold and from there to the truck. Thereafter, and on frequent occasions, plaintiff and the Harbor Ship employees used the scaffold for this purpose. On many occasions plaintiff would stand on the scaffold and various Harbor Ship employees would hand him down sacks of broken concrete, and plaintiff would then drop then into his truck. These sacks weighed 75 to 100 pounds. At this time, and at all times here involved, there was a ladder, without rails, leading from the dock to the deck and a gangplank, but at no time was either used to remove the debris. This was at least partially due to the fact that most of the time the equipment piled on the dock prevented the truck from being parked close to them, and also due to the fact that the accepted, easiest and quickest method of removing the debris was to throw it over the side into the truck.

These activities continued for about three weeks, during which time the long scaffold was frequently used as described. Amship then caused the long scaffold to be removed, and Amship employees replaced it with a short one. It was from this short scaffold that the plaintiff fell. It was about six feet in length, and the flooring consisted of three 2″x12″ planks nailed to 4″x4″ crosspieces. There was a guardrail attached to this scaffold.

Plaintiff testified that before the day of the accident he had never used the small scaffold. At one time he testified that, prior to the accident, he had never observed anyone on the scaffold, while at another time he testified that he had observed some welders using it. There is ample testimony that both Amship and Harbor Ship employees used the scaffold, and there is some testimony that Harbor Ship employees used it in removing debris from the deck.

On the day of the accident—February 7, 1945—plaintiff testified that he backed his truck directly under the center of the short scaffold and then proceeded to the deck of the vessel. On that day the debris to be removed consisted of sacks of broken concrete. Plaintiff testified that he enlisted the aid of several Harbor Ship employees to assist in loading the truck, and then slid down to the floor of the scaffold on one of the cables by which the scaffold was suspended. It was his intent to stand on the scaffold, to have the men hand him down the sacks, and then he intended to drop them into the dump truck. He testified that he was standing in the center of the scaffold on the middle board when the flooring gave way and he fell. He fell between the dock and the ship, and was seriously injured. He testified that he had not yet received any of the sacks from the men above when he fell. From other testimony it is quite clear that the center plank broke in half, jaggedly, at about the middle of that plank. It is of some significance that, although the safty engineer of Amship was present immediately after the accident, neither he nor any other employee of Amship or of Harbor Ship made any attempt to examine the broken plank to discover the cause of the break, it appearing from the evidence that such broken plank disappeared shortly after the accident and that none of the witnesses knew what had happened to it.

Plaintiff admitted that no one from Amship had told him that he should or could use either the long or short scaffold, and that he had not been told by Harbor Ship employees to use the short scaffold.

Defendant Lester Ames was a leaderman employed by Amship and in charge of the construction and maintenance of all scaffolds on the "Aloith." He had an office on the dock about thirty feet from the ship from which the long and short scaffolds were visible. His crew constructed both scaffolds. He testified that at his orders the long scaffold had been removed and the short one constructed about a week before the accident. The lumber for all scaffolds was procured from the lumberyard operated by Amship. When a scaffold was dismantled the "good" lumber that was salvaged was put in one pile and the "unfit" lumber in a scrap pile. In constructing a scaffold the crew would use the "used" timbers from the "good" pile. He testified that the day after the short scaffold was constructed he visually inspected it by looking down on it from the deck; that he did not get on it; that he paid no attention to the run of the grain in the 2"x12" flooring; that cross-grained timbers should not be used in a scaffold; that the plank flooring was nailed into crosspieces with 16-penny nails; that after the accident he observed that the middle plank of the scaffold was missing; that he made no search for the missing plank, and does not know what happened to it; that his crew was subject to a standard order to examine all planks about to be used in scaffold construction; that he was familiar with dry rot; that the only way he knew to detect dry rot was to "sound" the planks with a hammer; that he did not "sound" any of the planks in the small scaffold nor did he know whether any of his crew had done so.

Clarence Chizer, a leaderman for Harbor Ship, in charge of a gang that was cleaning up the debris on the ship, testified that his crew frequently used the large scaffold in helping plaintiff to load his truck, and that he had observed both Amship and other Harbor Ship employees using the scaffold; that about three days before the accident his crew used the short scaffold in loading heavy material into the truck.

George Blackman was in one of the gangs employed by Harbor Ship to clean up the debris. He saw the plaintiff get on the scaffold just before the middle plank broke. The witness testified that he and the others with whom he worked had used the small scaffold several days before the accident in loading concrete into plaintiff's truck; that he had observed other employees on the short scaffold and that he, his crew, and others had frequently used the long scaffold in the removal of heavy rubbish; that he had never used any other method in removing the heavy rubbish.

Defendant Sutton W. Carlson testified that he was the safety inspector for Amship for two months prior to and at the time of the accident; that he knew Harbor Ship had a crew on the "Aloith" removing the debris, and knew that plaintiff had a truck there for that purpose; that it was his duty to inspect all scaffolds and to order defects, if any, remedied; that he inspected the short scaffold daily by looking at it from the deck; that he did not go down on the scaffold; that he does not know whether the floor planks were new or used lumber; that he made no inspection of the wood in the small scaffold to determine its quality or soundness; that he paid no special attention to the grain of the wood in the flooring; that he did not know of any tests for ascertaining the particular soundness of a plank; that he arrived at the scene of the accident before plaintiff was removed from the dock; that a little lated he noted one plank was missing from the scaffold; that he made no effort to find the missing plank; that prior to the accident he had observed debris being thrown from the deck of the ship, but had not observed any one on the scaffold for that purpose; that the small scaffold was built for the benefit of welders, pipefitters and painters.

*Should the issue as to whether or not plaintiff in using the scaffold was an invitee of Amship have been submitted to the jury?*

It is the theory of plaintiff that he used the scaffold for the mutual and common benefit of all the parties; that it was a practical necessity to use the scaffold in removing the debris; that such use was the usual and customary method of doing the work; that no notice was given not to use the scaffold; that under the evidence Amship had constructive knowledge of its use; that under the evidence the jury could have implied an invitation by Amship to plaintiff to use the scaffold; that this issue should have been submitted to the jury. Defendant Amship argues that admittedly there was no express invitation on its part to plaintiff to use either the long or the short scaffold; that there was no practical necessity for using the scaffold to relay the debris from the deck to the truck; that the vessel was equipped with a ladder and a gangplank and a crane; that, as a matter of law, under the evidence, plaintiff was, as to Amship, at most, a licensee and not an invitee.

[3] It is our opinion that, under the evidence, the question as to whether plaintiff was an invitee or licensee of Amship should have been submitted to the jury. In our opinion there was substantial evidence and reasonable inferences from that evidence that would support a finding that Amship knew of the use of the scaffold by plaintiff and Harbor Ship employees, knew that the use of the scaffold in relaying the heavy debris from the deck to the truck was the usual and customary method of performing that operation, and knew that it was the only practical and economical method of performing that job. This being so, the jury could have found that plaintiff was using the scaffold for the mutual benefit of all parties, and was impliedly invited by Amship to use it for that purpose. The existence of the ladder and gangplank which could have been used by plaintiff and the Harbor Ship employees in removing the heavy debris, although facts that could be considered by the jury on this issue, certainly do not compel the conclusion that the use of the scaffold was not a practical necessity. It is a reasonable interpretation of the evidence that neither the ladder nor the gangplank had ever been used for that purpose, and that neither could be practically used for such purpose. The ladder had no rail. To carry down heavy sacks of debris on such a ladder would have been dangerous and impractical. There is evidence that the foot of the gangplank was constantly cluttered up with materials and equipment so that that means of egress would have been difficult, slow and impractical. It reasonably can be inferred from the evidence that the crane was never used except in unusual circumstances to remove the debris.

[4-6] There is no doubt that with respect to the ship at large, plaintiff, as an employee of a subcontractor, was a business visitor and invitee of the general contractor, Amship. Dingman v. A. F. Mattock Co., 15 Cal.2d 622, 104 P.2d 26; Hill v. Eaton & Smith, 65 Cal.App.2d 11, 149 P.2d 762; Leenders v. California Hawaiian, etc., Corporation, 59 Cal.App.2d 752, 139 P.2d 987. Of course, the fact that plaintiff was an invitee of this defendant as to the use of the deck is not determinative of the question as to whether he was impliedly invited to use the scaffold. A person may be an invitee as to one portion of the premises and a mere licensee or even a trespasser as to others, but the question as to the extent of the invitation is usually one for the jury and not for the court. The

true rule is stated in Gastine v. Ewing, 65 Cal.App.2d 131, at page 140, 150 P.2d 266, at page 270, as follows: "It is true * * * that one may be an invitee to a certain portion of the premises and a licensee or trespasser as to other portions. * * * The question as to whether the invitation, express or implied, included that part of the premises where the injury occurred is generally not one of law. On the contrary, it is usually a question of fact for the determination of the court or jury. [Citing cases.] The invitation of a proprietor extends not only to all parts of the premises which the patron expressly is invited to use, but also to such parts as he or she is impliedly invited to enter, and the invitation also extends to those portions of the premises where the invitee, under circumstances and conditions of his invitation, would naturally be likely to go."

There are several other cases that indicate that under circumstances substantially similar to those here existing it is a question of fact and not one of law as to whether the injured party in using the particular facility involved was an invitee or licensee. One such case is Buckingham v. San Joaquin Cotton Oil Co., 128 Cal.App. 94, 16 P.2d 807. There the plaintiff was a truck driver employed by one who had a contract with defendant gin operator to convey cottonseed to defendant's mill and unload it there. Plaintiff dumped his seed upon a certain conveyor belt, and, when the machine clogged, he stood on top of the cottonseed and pushed the seed along with his feet. That was the usual and customary method used by all truckmen in such a situation. Due to a defect in the machine one of plaintiff's feet slipped through and was amputated. A judgment against the operator of the mill was affirmed. At page 98 of 128 Cal.App., at page 808 of 16 P.2d, the court stated: "An invitation to use the premises of another is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using them."

In applying this rule to the facts of the case the court stated (at p. 99 of 128 Cal. App., at page 809 of 16 P.2d):

"In the instant case respondent was on the premises of appellant engaging in work for the mutual benefit of it and himself. There is substantial evidence that, in order to accomplish this work, it was necessary for respondent to get on top of the conveyor for the purpose of removing the obstructions that prevented the cottonseed from being carried to appellant's mill. This was the usual and customary method used by all of the truckmen in unloading the seed into the conveyor. Respondent had received no notice from appellant that such use of the conveyor was not permitted.

"While there was no express invitation upon the part of appellant permitting respondent to so use the conveyor, we are of the opinion that under these circumstances there was an implied invitation to use the conveyor for the aforesaid purposes." See, also, Bush v. Weed Lumber Co., 63 Cal.App. 426, 218 P. 618.

Another case worthy of mention is Dobbie v. Pacific Gas & Electric Co., 95 Cal. App. 781, 273 P. 630. There the plaintiff was an employee for an independent contractor who had contracted with defendant to do some work on defendant's premises. In going to a portion of the premises where some of the work was to be performed plaintiff fell through a skylight. If plaintiff was a mere licensee of defendant he could not, under the facts, recover. Defendant claimed that, with respect to the portion of the premises in which the skylight was located, plaintiff, as a matter of law, was, as to defendant, a licensee. The appellate court, in affirming a judgment for the plaintiff, held that the question as to whether or not the invitation included that portion of the premises was one for the jury, and that the facts supported the implied finding that he was an invitee.

Under the rule of these cases it would seem quite clear that whether or not plaintiff was an invitee of Amship in using the scaffold was a question of fact for the jury, and that it was prejudicial error for the trial court to have taken that issue from them.

*Should the issue as to whether or not plaintiff in using the scaffold was an invitee* *of Harbor Ship have been submitted to the jury?*

Plaintiff urges that, although the long and short scaffolds were built and owned by Amship, under the evidence it was for the jury to determine whether Harbor Ship impliedly adopted the scaffolds as its own, whether it impliedly assumed responsibility for their maintenance and safety, and whether this defendant invited plaintiff to use the short scaffold. This defendant urges that it never invited plaintiff to use the short scaffold, that it had no right of control over it, and that under such circumstances it owed plaintiff no duty of care to ascertain whether the short scaffold was safe to use. These contentions are unsound.

[7] It is an admitted fact that the supervisor for Harbor Ship expressly instructed plaintiff to use the long scaffold in removing the heavy debris from the vessel. After the long scaffold was removed and the short one substituted for it, no one told plaintiff that the short scaffold could not be so used. Moreover, there is evidence that prior to the accident Harbor Ship employees frequently used the short scaffold in removing the debris from the vessel. Inasmuch as there is no evidence that Harbor Ship ever objected to such use, since plaintiff had been instructed to use the long scaffold and had not been instructed not to use the short one, and, inasmuch as it is a reasonable inference that the supervisor of Harbor Ship knew or should have known that Harbor Ship employees were using the short scaffold in removing the debris, it would seem quite clear that it was a jury question as to whether, under the circumstances, Harbor Ship did or did not invite plaintiff to use the short scaffold.

[8] But, says Harbor Ship, even if we invited plaintiff to use the scaffold we were under no duty to see that it was safe and had no legal right to repair it inasmuch as Harbor Ship did not erect it, did not own it, and did not control it. Those factors, while important, are not conclusive. A company may expressly or impliedly adopt an appliance of another company, and invite others to use it, and, if they do, the company owes to such invitees a duty to exercise reasonable care to see to it that such appliance is safe.

The proper rule was illustrated in Dawson v. Pacific Electric Ry. Co., 177 Cal. 268, 170 P. 603. In that case defendant was employed to unload a vessel and employed plaintiff to assist in that job. In unloading the vessel defendant used certain rope slings, some owned by it and some by the owner of the vessel. One of the slings owned by the owner collapsed and plaintiff was injured. At page 271 of 177 Cal., at page 605 of 170 P., the court stated: "Much is made of the fact that the sling in question belonged to the owners of the ship, and that, in the course of the work, the slings were used as they came from the hold without any further inspection. But the evidence shows that the defendant had a number of slings of its own, and that these were used interchangeably with the slings belonging to the vessel. It appears that neither defendant's foreman, nor any other of its servants, made any inspection of the slings belonging to the ship. While the foreman testified, in general terms, that he had examined the slings, his further examination developed the fact that his inspection had been limited to the slings of the appellant. If the defendant saw fit, for its own convenience, to use the ship's slings in connection with its own, it was certainly open to the jury to find that the obligation of due care required it to make some inspection of the ropes furnished by the vessel, before employing them in its work."

Another interesting case on the same general subject is Perry v. D. J. & T. Sullivan, Inc., 219 Cal. 384, 26 P.2d 485. In that case a general contractor was performing work on a building, and subcontracted certain roof work to another contractor. The general contractor erected a ladder to the roof of the building, and, during the course of the work, this ladder was loosened at the top by the subcontractor. The foreman of the general contractor was injured. In affirming a judgment for the plaintiff the court stated (at page 388 of 219 Cal., at page 487 of 26 P.2d):

"Appellants first argue that respondent Perry in nailing the ladder to the roof, which the Sullivan Company was under contract to lower, must be deemed as to said company to be a mere licensee to whom said appellants owed no duty other than to refrain from willful and wanton injury. This is not the true rule. There is no dispute as to the status of the employers of the respondent, and the appellant Smith respectively while on the premises of the owner. Each was there under contract to perform separate and distinct work on the building, independent of each other. As to the owner, they were each invitees, and as to each other they were strangers between whom there was no privity of contract. As such contractors, they owed to the employees of each other the same duty of exercising ordinary care for their safety during the progress of the work as they owed to the public generally [Citing authorities.] The duty of care in the instant case was not only to refrain from the infliction of willful or wanton injury, but to exercise ordinary care for the safety of the employees of the other contractor on the building.

"Appellants claim that the responsibility for the safe condition of the ladder was the responsibility of the respondent and not the responsibility of the appellants, and insist that inasmuch as there was no duty on the part of the appellants to keep the ladder in a safe condition, they should not be held liable for any injury resulting from the fact that the ladder was not in a safe condition. * * * It is true that if none of the employees of the Sullivan Company had interfered in any manner with the ladder, no responsibility for any injury occurring as a result of the dangerous condition of the ladder could be placed upon the Sullivan Company or their employees for the reason that there was no obligation upon them to keep the ladder in a safe condition. But that is not the situation here. Smith, foreman for the Sullivan Company, did interfere with the ladder and voluntarily assumed control of it, and having done so, he thereby undertook the duty of using ordinary care to see that it continued to be safe for the use of others engaged in work on the building, whose duties required them to make use of the ladder. We do not wish to state that by the voluntary assumption of control over the ladder by Smith, he thereby became an insurer of the safety of anyone thereafter using the ladder. We do state, however, that by such voluntary assumption of control over the ladder he did incur the duty of using ordinary care to the end that no injury should occur as a result of a dangerous condition of the ladder. 'The true rule of liability on the part of a voluntary undertaker should be this, that he be required to exercise that degree of care and caution which would seem reasonable and proper from the character of the thing undertaken.'"

Of course these two cases, one involving an employee's rights against his own employer, and the other an interference by the sub-contractor with an appliance constructed by the general contractor, are factually distinguishable from the instant case, but, in spite of such factual distinctions, they establish the rule that even though appliances are owned or controlled by another, there may be a voluntary assumption of use by one who is a non-owner, and that in such event the non-owner owes a duty of due care to those who use the appliance at the non-owner's invitation. None of the cases cited by Harbor Ship establishes a contrary rule. In Hill v. Eaton & Smith, 65 Cal.App.2d 11, 149 P.2d 762, the appellate court, in holding that under the facts there existing a general contractor owed no duty of care to an employee of a subcontractor who fell through an open skylight, pointed out that there the skylight was an obvious danger that should have been anticipated by the plaintiff, and seemingly held that the injury was the result of the plaintiff failing to protect himself. In Scott v. George A. Fuller Co., 41 Cal.App.2d 501, 107 P.2d 55, the injured man used an appliance that he was not expressly or impliedly invited to use, and was injured. Obviously, such employee was not entitled to recover. In George v. Trinity Church, 176 Cal. 553, 169 P. 69, the general contractor built a scaffold for a subcontractor to be used by the subcontractor. The scaffold collapsed and an employee of the subcontractor was injured. He sued the owner and general contractor. The opinion states that it was the duty of the subcontractor to maintain the scaffold after its erection, and the evidence shows that the scaffold was sound and safe when erected. Under such circumstances it would seem quite clear that the general contractor had no responsibility for the maintenance of the scaffold, and the court so held.

[9] It is our opinion that whether or not Harbor Ship impliedly invited plaintiff to use the short scaffold, whether it assumed responsibility for its maintenance and safety, and whether it adopted the scaffold as its own, were questions of fact that should have been left to the jury.

*Was there any evidence of negligence on the part of either Amship or Harbor Ship in failing to maintain the scaffold in a safe condition?*

[10] Of course, whether a particular act or omission constitutes negligence is ordinarily a jury question, and it is only when reasonable minds cannot differ with respect to whether proved facts and reasonable inferences therefrom make out negligence or non-negligence, that such issues may properly be taken from the jury. As was said in Davidson Steamship Co. v. United States, 205 U.S. 187, 192, 27 S.Ct. 480, 482, 51 L.Ed. 764, quoting from Richmond & Danville Railroad Co. v. Powers, 149 U.S. 43, 45, 13 S.Ct. 748, 37 L.Ed. 642: "'* * * where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts, being undisputed, fair-minded men will honestly draw different conclusions from them.'"

[11-13] If plaintiff was a bare licensee, then the defendants merely owed him a duty to refrain from inflicting wilful injury upon him. There is no evidence of any such wilful injury. But if plaintiff was an invitee of either or both defendants, then the invitor or invitors owed him a duty to exercise ordinary care to provide a safe scaffold. There is ample evidence from which the jury could infer that if either defendant owed a duty of due care to plaintiff such defendant violated that duty. Carlson was employed by Amship to check upon the safety of all the scaffolds constructed by Amship. By his own testimony he failed to make a careful check of the safety of the short scaffold. He simply visually inspected it from the deck of the "Aloith." It was a question for the jury whether such cursory inspection satisfied the duty to exercise due care. The plank was obviously defective because it broke in half with the weight of one man. It is quite significant, and the jury would be entitled to consider this fact on this issue, that the broken plank was not produced, and Carlson made no attempt to find it or to examine it to find out what caused it to break.

[14, 15] If the jury should find that Harbor Ship was an invitor of plaintiff as to the short scaffold, then there is ample evidence that it did not fulfill its duty of due care. Harbor Ship made no effort at all to ascertain whether the short scaffold was suitable or safe. If, as the evidence indicates, Harbor Ship assumed an element of control by making use of the scaffold for its own purposes, then it was under a duty to ascertain whether the scaffold could be used safely. A jury might reasonably find that Harbor Ship was not free to delegate that duty to Amship, and to assume that because Amship constructed it, it was safe.

*Is the doctrine of res ipsa loquitur applicable as to either or both defendants?*

[16] There can be no doubt that the doctrine of res ipsa loquitur is applicable to a factual situation involving injury resulting from the collapse of a scaffold. This precise point was involved in Nolen v. F. O. Engstrum Co., 175 Cal. 464, 166 P. 346, where the Supreme Court, in affirming a judgment for plaintiff, stated (at page 466 of 175 Cal., at page 347 of 166 P.): "Scaffolds built for such purposes do not usually break or fall with the weight of the workmen, if properly constructed. The fact that while the plaintiff was at work upon the scaffold it fell and precipitated him to the ground was of itself sufficient evidence that the scaffold was defectively con-

structed. The plaintiff testified that he felt the supports giving away at the time of falling. From this there would be a reasonable inference that the supports were insufficient, either because they were too weak to sustain the weight, or because they were not sufficiently nailed. The doctrine of res ipsa loquitur applies."

[17] Amship argues that the doctrine has no application where the injured person is a bare licensee. That is undoubtedly the law. Brust v. C. J. Kubach Co., 130 Cal.App. 152, 19 P.2d 845. But, as already pointed out, it was for the jury to say whether plaintiff was an invitee or licensee. If the jury should find that plaintiff was a mere licensee, then neither defendant is liable, and the doctrine of res ipsa loquitur is not applicable. But, if the jury should find that plaintiff is an invitee as to either or both corporate defendants, then, as to such defendant or defendants, the doctrine is applicable.

[18, 19] Harbor Ship argues that the doctrine is not applicable to it because the scaffold was not within its "exclusive" management and control. The law does not prohibit the application of the doctrine against two or more defendants where there is joint control. Price v. McDonald, 7 Cal.App.2d 77, 45 P.2d 425; Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258. It was for the jury to say whether either or both of these defendants had "control" of the scaffold, and if it should find that either or both had such control it should be instructed that the doctrine under discussion is applicable to that defendant or defendants.

[20, 21] The argument of Harbor Ship that the doctrine is inapplicable because, so it is contended, plaintiff knows as much about the cause of his injuries—i.e., the collapse of the plank—as it does, is palpably unsound. It is true, of course, that plaintiff knows that he was injured by the collapse of the plank, but plaintiff has no way of knowing how or why the plank collapsed. If the jury should find that this defendant had joint control with Amship over the scaffold, it is quite clear that as to plaintiff this defendant was in a superior position with respect to knowing how and why the plank collapsed. It must be remembered that the plank was available for inspection by the employees of this defendant after its collapse. The plank was not examined and was not produced at the trial, and neither this defendant nor Amship made any attempt to explain its disappearance. It is not the plaintiff's equal knowledge of the fact of injury that bars the application of the doctrine of res ipsa loquitur, but equal knowledge with defendant of the cause of the injury.

*Liability of the individual defendants.*

[22] The nonsuit was also erroneously granted as to the employees of Amship who were named defendants. Ames was leaderman of the crew that built the scaffold. Carlson was the safety inspector for Amship. There is ample evidence to require that the issue as to whether these employees were negligent should have been submitted to the jury. The jury could find that Ames did not exercise ordinary care in inspecting the planks, and that Carlson did not exercise ordinary care in inspecting the completed scaffold. If the jury should so find then these defendants would be joint tort feasors with Amship.

The judgment is reversed.

BRAY, J., and FINLEY, Justice pro tem., concur.

81 Cal.App.2d Supp. 973

## PEOPLE v. JOHNSON.

Cr. A. 2303.

Appellate Department, Superior Court,
Los Angeles County, California.
Sept. 4, 1947.

**1. Criminal law 🔑450, 1169(9)**

In prosecution for selling alcoholic beverage to obviously intoxicated person, admission of police officer's testimony that such person was obviously intoxicated in witness' opinion was prejudicial error as invading jury's province to determine such issue. Gen.Laws, Act 3796, § 62.

**2. Criminal law 🔑1036(9)**

On appeal from conviction of selling alcoholic beverage to obviously intoxicated person, defendant could raise question of error in admitting police officer's testimony in answer to question whether such person was obviously intoxicated, though another officer was later permitted to answer same question without objection. Gen.Laws, Act 3796, § 62.

**3. Intoxicating liquors 🔑161**

The statute declaring person selling alcoholic beverage to obviously intoxicated person guilty of misdemeanor places duty on seller to use his powers of observation to such extent as to see and hear what is easily seen and heard under existing circumstances before serving intended purchaser, but seller is not required to subject purchaser to tests which would disclose symptoms of intoxication not readily apparent to anyone having normal powers of observation by sight, hearing, and smell. Gen.Laws, Act 3796, § 62.

**4. Intoxicating liquors 🔑161**

Where commonly known outward manifestations of person's intoxication exist, one selling alcoholic beverage to such person violates law, whether sale is made because of failure to observe what is plain and easily seen and discovered or because seller ignores that which is apparent after observation. Gen.Laws, Act 3796, § 62.

**5. Intoxicating liquors 🔑238(5)**

In prosecution for selling alcoholic beverage to obviously intoxicated person, whether outward manifestations of such person's intoxication, as shown by evidence, were obvious to person having normal powers of observation and recognizable as usual indications of intoxicated person, was jury's exclusive province to determine. Gen.Laws, Act 3796, § 62.

**6. Intoxicating liquors 🔑232**

In prosecution for selling alcoholic beverage to obviously intoxicated person, evidence of purchaser's previous actions in another bar outside defendant's observation was inadmissible on question whether purchaser was obviously intoxicated. Gen. Laws, Act 3796, § 62.

**7. Intoxicating liquors 🔑232**

In prosecution for selling alcoholic beverage to obviously intoxicated person, police officers' testimony as to results of tests, given purchaser by witnesses for purpose of determining whether he was intoxicated after he had consumed part of liquor purchased from defendant, was inadmissible. Gen.Laws, Act 3796, § 62.

Appeal from Municipal Court of City of Los Angeles; Wallace W. Toelle, Judge.

Mrs. Nellie Johnson was convicted of selling an alcoholic beverage to an obviously intoxicated person in violation of Alcoholic Beverage Law, § 62, Gen.Laws, Act 3796, § 62, and, from the judgment on the verdict and orders denying a motion for a new trial and a motion in arrest of judgment, defendant appeals.

Judgment reversed and cause remanded for a new trial, order denying motion for new trial reversed, and appeal from order denying motion in arrest of judgment dismissed.

Hindin, Weiss & Girard, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., and John W. McElheney, Deputy City Atty., all of Los Angeles, for respondent.

STEPHENS, Judge.

Defendant was found guilty upon trial by jury of violating section 62 of the Alcoholic Beverage Control Act, Stats. 1937, p. 2175, 2 Deering's Gen.Laws, Act 3796 by selling to one John Holalek, who was then and there obviously intoxicated, an alcoholic beverage. The portion of section 62 of the act with which we are here concerned, reads as follows: "Every person who sells * * * any alcoholic beverage * * * to any obviously intoxicated person shall be guilty of a misdeameanor."

[1, 2] Over defendant's objection a police officer was allowed to answer this question: "Officer, based upon your experience and your observation of this man Holalek on that evening, in your opinion was he obviously intoxicated?" This was the very issue to be determined by the jury and it was prejudicial error to allow the answer. People v. Crossan, 1927, 87 Cal.App. 5, 16, 261 P. 531; People v. Wepplo, 1947, 78 Cal.App.2d Supp. 959, 963, 178 P.2d 853. The fact that another officer was later permitted to answer the same question without objection does not deprive appellant of her right to here call attention to the error. People v. Driggs, 1909, 12 Cal.App. 240, 108 P. 62; People v. Castro, 1899, 125 Cal. 521, 58 P. 133; Green v. Southern Pac. Co., 1898, 122 Cal. 563, 55 P. 577. By the very nature of the offense as defined by the statute, it does not permit of opinion evidence. It does not penalize the seller for selling to any person who is intoxicated, but only to one who is "obviously" intoxicated. Webster's New International Dictionary defines "obvious" as "easily discovered, seen or understood; plain; evident." Bouvier defines it as "apparent; evident; manifest."

[3-5] It seems clear, therefore, that a duty is placed upon the seller, before serving the intended purchaser, to use his powers of observation to such extent as to see that which is easily seen and to hear that which is easily heard, under the conditions and circumstances then and there existing. On the other hand, it is equally clear that he is not required to subject the customer to tests which would disclose symptoms not readily apparent to anyone having normal powers of observation—sight, hearing and possibly smell. The use of intoxicating liquor by the average person in such quantity as to produce intoxication causes many commonly known outward manifestations which are "plain" and "easily seen or discovered." If such outward manifestations exist and the seller still serves the customer so affected he has violated the law, whether this was because he failed to observe what was plain and easily seen or discovered, or because, having observed, he ignored that which was apparent. Upon the trial, therefore, the facts constituting the alleged outward manifestations should be presented, and it is the exclusive province of the jury to determine whether or not they are such as to be obvious to a person having normal powers of observation, and recognizable as the usual indications of an intoxicated person.

[6] Evidence was also admitted concerning previous actions of the purchaser in another bar outside the observation of defendant; this was clearly erroneous.

[7] The officers were also permitted, over objections by the defendant, to testify to the results of certain tests which they gave him for the purpose of determining whether or not he was intoxicated. These tests were made after he had been served with and had consumed part of the liquor purchased from defendant. This was, of course, erroneous, not only because the evidence did not pertain to the question of whether or not his condition of intoxication was obvious at the time of sale, but also because this last drink may have contributed to his condition when the tests were made.

The judgment is reversed and the cause is remanded for a new trial. The order denying motion for a new trial is reversed; the appeal from the order denying motion in arrest of judgment is dismissed.

SHAW, P. J., and BISHOP, J., concurred.

81 Cal.App.2d 913

## LEVIN v. BROWN et al.

Civ. 15884.

District Court of Appeal, Second District, Division 2, California.

Oct. 17, 1947.

**1. Railroads 🔑348(1)**

In action for injuries sustained when pedestrian was struck by interurban car at a crossing of sidewalk over private right of way, evidence established as matter of law that pedestrian was guilty of negligence proximately contributing to accident, precluding recovery, in that pedestrian either looked and failed to see approaching car or failed to look before stepping on tracks.

**2. Railroads 🔑346(5)**

Where a person steps upon a track in front of an approaching car and is promptly struck by it, his contributory negligence is a necessary inference.

**3. Negligence 🔑122(1)**

When satisfactory proof concerning a fact is wholly irreconcilable with the presumption that a person takes ordinary care of his own concerns, the presumption is dispelled and disappears. Code Civ.Proc. § 1963, subd. 4.

**4. Railroads 🔑327(3)**

Where pedestrian failed to exercise any care for his own safety in running onto interurban track, where it crossed sidewalk of one of the principal streets of city, as interurban car in plain view moved slowly toward sidewalk, whether stop, look, and listen rule applied at that crossing was immaterial.

**5. Railroads 🔑338**

As respects last clear chance doctrine, a motorman of an interurban car is not charged with knowledge that a pedestrian will leave a place of safety for one of grave peril, or that he will not exercise his faculties of observation and caution and recklessly expose himself to danger when it is clear that by merely seeing an obvious destructive engine and by remaining off its fixed and certain path he would be assured of his safety.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Morris Levin against A. E. Brown, Pacific Electric Railway Company, and others for injuries sustained when plaintiff was struck by an electric car operated by individual defendant and owned by corporate defendant. Judgment of nonsuit, and plaintiff appeals.

Affirmed.

Katz, Gallagher & Margolis, by John W. Porter, all of Los Angeles, for appellant.

Frank Karr, C. W. Cornell, and O. O. Collins, all of Los Angeles, for respondent.

MOORE, Presiding Justice.

Plaintiff appeals from a judgment of nonsuit granted at the conclusion of his evidence on the ground that he was guilty of contributory negligence. He had been stricken down by a car of the corporate defendant operated by defendant Brown while it was on the company's private right of way crossing the sidewalk on which appellant was walking.

The accident occurred about 5:35 p.m. of September 15, 1943, on South Main street in Los Angeles near its intersection with Jefferson street. Main street extends in a northerly and southerly direction, while Jefferson intersects it at right angles. On double tracks the Los Angeles Railway operates its system of yellow, electrically propelled cars on Main as well as on Jefferson street. The company owns a private right of way in the same vicinity, known as the "Air Line," whose red cars run from the company's principal Los Angeles station to the city of Santa Monica. Near the Jefferson-Main intersection the Air Line lies in a straight northeast-southwest direction for at least 600 feet. Its north rail crosses the west curb of Main street about 25 feet south of the southwest corner of Jefferson and Main. Lying adjacent to the right of way, on the south side thereof, is the building in which appellant had worked for three months prior to the accident. He had emerged onto Main street from a door of that building about "five or six seconds" before his collision with the red car.

As appellant stepped out he approached the curb and looked southerly for a northbound yellow car that might convey him northerly on Main street. Seeing none he started northward toward the southwest corner of Jefferson and Main about 80 feet distant where he saw a standing yellow car that would turn north on Main. He looked across Main street while 25 feet south of the Air Line track. He always looked "in that direction because there is cars coming sometimes on the Pacific Electric tracks going from east to west." Although he saw 140 feet east on the Air Line track he observed no car approaching. He proceeded "straight ahead toward the car * * * that was at Jefferson. When I was in the middle of the track * * * all of a sudden there is a car two or three feet from me, * * * coming from my right over the west sidewalk * * * there was no bell, no ringing, no whistling, so I tried to save myself, but it was too near me." The fender struck his left foot; "and so the car slowed down * * * the top of the fender hit me on the head then I fell over on the south side * * * entirely south of the track." This car stood 12 feet, 10 inches high, nine feet, 10 inches wide, and weighed 78,900 pounds. At the time of the accident there was no watchman at the point of the intersection of the sidewalk with the Air Line, no wigwag signal nor railway-cross-arm.

However, there were the customary "X" signs of a railroad crossing suspended from wires over the street, 20 feet above the pavement, one south of the Air Line, and one to the north. The sun was shining and appellant had looked to the east down the Air Line track and had seen no car, notwithstanding that the track is straight for over 300 feet east of Main street and no object obstructed his view in that direction. The red car had started up from a standing position on the east side of Main street and was moving at a pace of about five miles per hour when the motorman, then 20 feet from the point of impact, noticed that appellant did not see the car. It was impossible then by the exercise of ordinary care for him to stop the huge car within less than 20 or 30 feet, although he applied the emergency brakes as appellant hurried to the point of impact.

The court granted the motion for nonsuit on the ground of appellant's gross negligence which proximately and directly contributed to the happening of the accident.

[1] Considering only the most favorable evidence presented the judgment is justified. Appellant was in all respects normal. It was daylight; while he had never seen a red car go by yet he knew the Air Line track was there, he had often heard its freight trains passing as he worked. The rail road crossing sign hung above the street between him and the company's track. After one look eastward down the right of way while he was 25 feet south of the point of impact, he never looked again as he strode that 25 feet during which the red car was either standing at its approach into Main street or was moving its ungainly bulk across that boulevard. Had he looked to the northeast before stepping onto the track necessarily he would readily have seen the car. Had he in the exercise of ordinary care looked at any time as he proceeded from the point 25 feet south of the track he would have seen the red car and have avoided his injury. The inferences were therefore unavoidable that he was negligent and that his negligence caused his injuries. Deike v. East Bay St. Rys., Ltd., 7 Cal.App.2d 544, 551, 46 P.2d 812; Flores v. Los Angeles Ry. Corporation, 15 Cal.App.2d 576, 579, 59 P.2d 856; Locke v. Los Angeles Ry. Corporation, 10 Cal.App.2d 478, 480, 51 P.2d 1111.

[2] If appellant looked as he says and did not see the enormous car within his view he was negligent in not seeing. If he failed to look, which he denies, he was negligent in such failure. Before stepping onto the track of an interurban or street railway it is the duty of any pedestrian to stop and look in the direction of anticipated danger and to continue to be alert for perils of the roadbed. Jonas v. Los Angeles Ry. Corporation, 57 Cal.App.2d 824, 828, 136 P.2d 39. Where a person steps upon a track directly in front of an approaching car and is promptly struck by it his con-

tributory negligence is a necessary inference. Schooley v. Fresno Traction Co., 56 Cal.App. 705, 710, 206 P. 481.

Other than appellant's contemptuous disregard of possible danger no rational explanation of the accident is at hand. Since he could have stood on the sidewalk south of the track as the ponderous engine neared him it is inescapable that the accident was due solely to his negligence if not his foolhardiness. Gore v. Market St. Ry. Co., 4 Cal.2d 154, 158, 48 P.2d 2. No danger was present to discourage his loitering for a moment there. If he chose to race with fate and the red car his only safety lay in speeding across the track before it could arrive at the sidewalk. To step upon a track while ignoring a slowly approaching locomotive is to invite injury.

[3] Appellant contends that he is entitled to the benefit of the presumption that a person takes ordinary care of his own concerns. Code Civ.Proc. § 1963, subd. 4. Such contention has been divested of all merit by decisions of the courts. It is the established rule that when satisfactory proof concerning a fact is wholly irreconcilable with that presumption "the latter is dispelled and disappears from the case." Westberg v. Willde, 14 Cal.2d 360, 365, 94 P.2d 590, 593; Dull v. Atchison, T. & S. F. R. Co., 27 Cal.App.2d 473, 477, 81 P.2d 158; Heintz v. Southern Pac. Co., 63 Cal.App. 2d 699, 706, 147 P.2d 621. In support of his thesis that he is entitled to the presumption appellant cites Smellie v. Southern Pac. Co., 212 Cal. 540, 299 P. 529, and Ellison v. Lang Transp. Co., 12 Cal.2d 355, 84 P.2d 510. They are readily distinguished. In the Smellie case the decedent was a guest in the truck of one Ireland at the time of the fatal accident. Ireland was in sole control of the truck and deceased was not responsible for the operation of the truck. He could not therefore have been guilty of contributory negligence. Since there was no evidence that he did not exercise ordinary care or that he did not commit an overt act the presumption was available to his heirs. In the Ellison case the instruction was that the presumption remained only until it was overcome by satisfactory evidence. The absence of such qualifying language has required reversal on other occasions. See Kelly v. Fretz, 19 Cal.App.2d 356, 65 P.2d 914.

[4] It is contended that "it is clear that under the circumstances of this case the plaintiff was not required to stop, look and listen before entering upon defendant's track," citing Amendt v. Pacific Electric R. Co., 46 Cal.App.2d 248, 256, 115 P.2d 588; Lund v. Pacific Electric R. Co., 25 Cal.2d 287, 297, 153 P.2d 705; Scott v. San Bernardino Valley Traction Co., 152 Cal. 604, 93 P. 677. Appellant's argument is that the old rule of "stop, look and listen" does not apply to crowded streets where rights are equal; that a traveler has a right to assume, until informed to the contrary, that operators of street cars will use ordinary care, give the usual signals and keep the usual lookout ahead. But the old rule has no application here. Appellant failed to exercise any care at all for his safety, and with utter indifference to results ran onto the track as the interurban car in plain view moved slowly toward the sidewalk on which he was hastening to board a street car. The cases cited by appellant are distinguished by the facts proved with reference to the crowded streets, the unusual amount of vehicular traffic, the presence of two trains, the plaintiff's having been struck by a car behind him, obstruction of the view of the railway, a bicyclist's being overtaken and struck by a car.

Finally, appellant contends that the judgment for nonsuit was error because "the facts establish that defendant Brown had the last clear chance to avert the accident," citing Darling v. Pacific Electric R. Co., 197 Cal. 702, 242 P. 703. The Darling case is distinguished in that at the time Mrs. Darling reached the track the approaching car was obscured by heavy vehicular traffic. While she was apparently unconscious of the near presence of the electric car, the motorman saw her predicament as he was crossing the intersecting street. The jury determined, although she was contributorily negligent, (1) that after Mrs. Darling became aware of her peril she could not by the use of ordinary care have extricated herself, and (2) that the motorman had actual knowledge of her situation and by ordinary care could have avoided striking her.

[5] A motorman is not charged with knowledge that a pedestrian will leave a place of safety for one of grave peril, or that he will not exercise his faculties of observation and caution and recklessly expose himself to danger, when it is clear that by merely seeing an obvious, destructive engine and by remaining off its fixed and certain path he would be assured of his safety. Korchak v. Pacific Electric R. Co., 9 Cal.App.2d 89, 93, 48 P.2d 752.

In view of the foregoing it is not necessary to discuss appellant's argument that defendants were negligent. The nonsuit was granted solely upon the ground of appellant's contributory negligence.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

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81 Cal.App.2d 852

## MORENO v. BLINN et al.

Civ. 3479.

District Court of Appeal, Fourth District, California.

Oct. 16, 1947.

**1. Landlord and tenant ⇨92(1)**

An option to lessee to purchase leased premises was not construable as permitting lessor to sell the premises subject to the lease irrespective of option clause, where language used in lease and practical construction by the parties indicated that the lessee was given an unlimited right to purchase the premises if lessor decided to sell.

**2. Specific performance ⇨57**

Where recorded lease provided that lessors should have right to sell realty, but that lessee should have first right to purchase, and lessors sold part of realty to third persons without giving lessee opportunity to purchase and without stipulation in deed that sale was subject to lease, lessee was entitled to specific performance of option provision, though third persons were making no threat to interfere with lessee's possession.

**3. Specific performance ⇨57**

Where lease provided that lessors should have right to sell realty but that lessee should have first right to purchase, and lessors obtained a modification of lease from lessee permitting sale of 7 of the 30 acres and also a quitclaim from lessee as to any rights in the seven acres, and subsequently lessors sold remaining 23 acres to third persons without any notice to lessee, lessee was entitled to specific performance as to the 23 acres, over objection that lessee's option to purchase was not divisible.

**4. Husband and wife ⇨14(9)**

Lessee's option in lease to purchase leased realty from husband and wife, who were co-owners, was not void because lease was only signed by husband, where husband was acting as wife's agent in making lease, and all but one of the rent receipts in evidence were signed by the wife.

**5. Husband and wife ⇨14(9)**

Third person purchasing leased premises could not claim that option to lessee to purchase was void because not signed by wife of lessor where she made no objection.

**6. Specific performance ⇨30**

Provision in lease giving lessors permission to sell leased realty, but giving lessee first right to purchase, was not too uncertain to be specifically enforced, on ground that purchase price was not named, since purchase price was a matter capable of ascertainment.

**7. Specific performance ⇨121(9)**

Evidence supported finding that lessee did not lose his right to specific performance of provision in lease giving him an option to purchase the realty on ground of laches, especially where lessors were not prejudiced.

◆

Appeal from Superior Court, San Bernardino County; Martin J. Coughlin, Judge.

Action by Ventura Moreno against William A. Blinn and Clara D. Blinn and

Ventura Garcia and Enedina Garcia for specific performance of an option in a lease to purchase leased realty. William A. Blinn and Clara D. Blinn died before trial of the action, and the action was dismissed as to them. From a judgment for the plaintiff as to the other defendants, they appeal.

Judgment affirmed.

Ibanez & Snider and Richard A. Ibanez, all of Los Angeles, for appellants.

Charles D. Warner, of Chino, for respondent.

BARNARD, Presiding Justice.

This is an action for specific performance. On October 15, 1938, Blinn leased 30 acres of farm land to the plaintiff for a term of six years, expiring October 15, 1944. The lease contained a clause giving Blinn "permission to sell said property, but giving tenant first right to purchase." The tenant was also given the right to remove, at the expiration of the lease, any improvements placed thereon by him. The lease was recorded, and the plaintiff went into possession. In developing a dairy, he placed improvements worth $3500 on the property.

In February, 1943, Blinn sold seven of the 30 acres to a third party. Before making this sale Blinn took the matter up with Moreno and obtained from him a modification of the lease and also a quitclaim as to any rights in the seven acres. In April, 1943, Moreno called on Blinn's attorney and inquired what price Blinn would accept for the remainder of the property. On May 1, 1943, this attorney wrote Moreno that Blinn would accept $7500. Nothing further was done with this but in the latter part of October or early part of November, 1943, the Blinns sold and conveyed the property to the defendants Garcia for $4500. The conveyance was a straight deed which was not made subject to the plaintiff's lease. It was conceded that the Garcias had actual as well as constructive notice of the terms of the plaintiff's lease. Shortly after this conveyance was made and sometime in November, 1943, the plaintiff inquired of Blinn's attorney as to whether the place had been sold. The attorney replied that he did not know but would find out. Early in January, 1944, the plaintiff first learned, as a fact, that the place had been sold to the Garcias. On February 8, 1944, the plaintiff served written notice and tender on Blinn and Garcia, offering to pay $4500 as the price which they had fixed on the property and notifying them that, in any event, he desired to exercise his option and purchase the property. After the sale the plaintiff paid the rent, as it came due, to Garcia.

The date on which this action was brought does not appear but the third amended complaint was filed on January 22, 1945. Blinn and his wife were joined as defendants, but both having died before the trial the action was dismissed as to them. The court found in all respects in favor of the plaintiff and judgment was entered in his favor providing that he should deposit $4500 in court, that the defendants Garcia should convey the property to the plaintiff, receiving the $4500, and reserving jurisdiction to enter such further judgment as might be necessary in order to obtain a full conveyance of the property to the plaintiff. From this judgment the defendants Garcia have appealed.

[1] It is first contended that respondent's right to purchase this property was contingent and never came into existence. It is argued that the lessor had the right to sell the property subject to the lease, irrespective of the option clause; that the option clause was intended to apply only in the event the lessor desired to sell and at the same time terminate the lease; that this was not done; and that the respondent was allowed to remain on the property until the expiration of his lease. In support of this contention certain cases from other states are cited.

In making these contentions, several important elements are overlooked. Another interpretation of the lease is possible and plausible. The lease was recorded shortly after it was made, and it was not necessary to give the respondent an option to buy in order to protect his rights for the term of the lease. The option to buy was intended to mean something, it was not necessary in order to protect the respondent's possession during the term of the lease, and there is nothing in the record to show it was limited to that purpose. The language used would indicate that he was given an unlimited right to purchase the property if the lessor decided to sell. Not only is this a reasonable interpretation, but it is supported by the acts and conduct of the parties. When the first seven acres were sold, earlier in 1943, the lessor was careful to get from the respondent not only a written release of his right to farm the seven acres, but also a quitclaim. On principle and on the facts, this case cannot be distinguished from the case of Wilson v. Brown, 5 Cal.2d 425, 55 P.2d 485, where evidence as to the intention of the parties was held to be controlling.

[2] A further consideration is that when the Blinns sold to the Garcias their deed was not made subject to the respondent's lease. The property was sold outright, the conveyance did not mention the lease or the respondent's rights thereunder, the respondent was not informed of the sale until it had been completed, he was not given an opportunity to purchase the property, and the fact that the new purchasers later elected to allow him to remain on the property could not be controlling. The lessor attempted to sell without a reservation as to the lease rights, and, under any view, the right to exercise the option came into existence.

[3] It is next contended that the respondent's right to purchase the property, if any, was not divisible and that specific performance will not lie to enforce the sale of a portion of the property covered by an option. This contention is without merit. The original lease was modified by written agreement bteween the parties on February 22, 1943, eliminating the portion sold to the third party from the terms of the lease. Having so agreed, the full terms of the lease remained applicable to the remaining portion.

[4, 5] It is next argued that the respondent's option to purchase was void because the lease was not signed by Mrs. Blinn as a coowner of the leased property. Blinn and his wife were joint owners of the property. There is ample evidence that Blinn was acting as agent for his wife in making the lease, that she knew the facts, and that she confirmed his actions in that regard. Aside from several other pieces of evidence, all but one of the receipts for the rent which are in evidence, were signed by Mrs. Blinn. Moreover, no such objection was even raised by Mrs. Blinn and the appellants are in no position to raise such a claim in their own behalf.

[6] Some contention is made that the right given to the respondent to purchase the property is too uncertain to be specifically enforced. The objection seems to be that the purchase price was not named. The respondent was given the first right to purchase for the price at which the lessor was willing to sell. That was a matter capable of ascertainment, and it became fixed and determined long before this action was brought.

[7] The appellants' final contention is that the respondent was not entitled to specific performance because of his own laches. The evidence supports the court's finding against this contention. It appears that the respondent desired to buy the property as early as April, 1943, that he had the money in the bank to pay for it, and that he considered the price then asked, $7500, as too high. That it was too high is indicated by the fact that it was sold to the Garcias a few months later for $4500. The respondent was not given an opportunity to purchase at that price before that sale was made, and he knew nothing of that sale until it had been completed. Within less than a month thereafter he endeavored to ascertain the facts in that regard but was not successful until early in January, 1944. About a month later, he made a written offer and tender to both Blinn and Garcia, giving notice of his election to exercise his option and offering to pay the price for which the property had been sold. While the exact date does not appear this action was started within a reasonable time thereafter. In the meantime, he had to pay the rent in order to preserve his rights. Moreover, the sale to the Garcias had been fully completed before the re-

spondent was aware of it, they did not change their position because of anything done by him, and no possible damage or prejudice to them appears.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

81 Cal.App.2d 843

**PEOPLE v. GALUPPO et al.**

**Cr. 4156.**

**District Court of Appeal, Second District, Division 1, California.**

**Oct. 16, 1947.**

**1. Criminal law 🔑1144(13)**

On appeal from a judgment of conviction, District Court of Appeal must view evidence in a light most favorable to prosecution.

**2. Criminal law 🔑1159(3)**

Where there was a conflict in the evidence, and that conflict was resolved against defendant by the jury, the jury's verdict would not be disturbed on appeal.

**3. Criminal law 🔑569**

Evidence sustained convictions for robbery of taxicab driver and violation of statute making theft and unlawful driving and taking of a vehicle a crime, over defense that defendant was forced to take part in the crimes at the point of a gun by his codefendant. Vehicle Code, § 503.

**4. Criminal law 🔑1035(3)**

Ordinarily, unless a party aggrieved by claimed misconduct of trial judge promptly calls judge's attention to purported impropriety, his claims in that regard will not be considered on appeal.

**5. Criminal law 🔑1035(3)**

Brusque conduct of trial court toward defendant's counsel, stating, and in stating during counsel's argument to jury that court would not tolerate any more statements by counsel concerning facts not in evidence and that it was contempt of court if counsel should persist, did not amount to a miscarriage of justice, and could not be made a ground for reversal of convictions, in absence of objection thereto by defendant's counsel.

**6. Criminal law 🔑1170(2)**

In prosecution for robbing a taxicab driver and for violation of Vehicle Code by taking the taxi cab from the driver, refusal to permit defendant to introduce a card which was in his possession at time of his arrest, and on which appeared address to which driver was directed to transport defendant on night of robbery, was not prejudicial error, where defendant had testified regarding address and regarding who lived there and no effort was made by prosecution to contradict such testimony. Vehicle Code, § 503.

**7. Criminal law 🔑872**

Where jury returned into court with a verdict finding defendant guilty of robbery, but failing to state the degree, and court inquired whether jury had decided the degree, and foreman of jury replied that it was first degree, and court requested jurors to raise their hands if they agreed that it was first-degree robbery, and all jurors raised their hands, a verdict of guilty of first-degree robbery was rendered over defendant's objection that jury should have been returned to jury room for further deliberation and that jury arrived at its verdict in the courtroom as to degree of the robbery. Pen.Code, §§ 1149, 1156, 1163, 1164.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Michael J. Galuppo and another were convicted of a robbery and a violation of the Vehicle Code making the theft or unlawful driving and taking of a vehicle a crime, and from judgments of conviction and order denying motion for new trial, the named defendant appeals.

Judgments and order affirmed.

Anthony C. Kolda, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Alberta Gattone, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the District Attorney of Los Angeles County, the above-named defendants were jointly charged in Count I with the crime of robbery, and in Count II with a violation of section 503 of the Vehicle Code. Following the entry of the not guilty pleas the cause proceeded to trial before a jury, resulting in the conviction of both defendants on all counts of the information. Defendant Galuppo alone prosecutes this appeal from the judgments of conviction and from the order denying his motion for a new trial.

[1] Viewing the evidence in a light most favorable to the prosecution as we must do following a guilty verdict, we find in the record testimony that on the early morning of December 26, 1946, the defendants at the point of a gun held up and robbed a taxi driver, taking from him certain cash and a wrist watch. They then forced the taxi driver to alight from his vehicle and the defendants drove away in it. After driving the taxicab but a few blocks, they encountered engine trouble, the engine stopped, they were unable to restart it, abandoned the cab and after walking several blocks were taken into custody by two police officers approximately twenty minutes after the consummation of the crime. At the time of the arrest this appellant had a gun in his pocket and was wearing the wrist watch taken from the cab driver.

The facts and circumstances surrounding the robbery as testified to by the victim thereof were not disputed by either defendant. For his defense, appellant herein relied upon testimony given by himself and his codefendant that he was forced by the latter, at the point of a gun, to participate in the robbery; that whatever he did was done because he was in fear of his life. In that regard, appellant testified that he had known his codefendant for two or three days prior to the robbery; that on the night of the holdup the two defendants met at a bar, consumed some liquor, a little later partook of some food and black coffee; that they then decided to take a taxicab to the home of a girl friend of appellant who resided at 2916 East Sixth Street in the city of Los Angeles; that shortly after they entered the cab appellant's codefendant directed the driver up a blind street. That thereupon his codefendant drew a gun and placed it against appellant's ribs, saying, "Just keep your mouth shut and do what I tell you." That after the cab stopped and the driver alighted therefrom, appellant's codefendant said to him, "Go out there and frisk him; see if he has got any more money; see if he is lying." That when they got out of the cab appellant's codefendant said to him, "Get out of the way, you yellow so-and-so," and "Let me frisk him." The cab driver had already delivered the money from his wallet to defendant Marlatt. Appellant further testified that following the robbery his codefendant, pointing the gun at him, said, "You better get back in the cab." That when they abandoned the cab and started walking, he pleaded with defendant Marlatt to give him the gun and wrist watch, a plea that was answered a second or two before the arrival of the police officers, when defendant Marlatt handed appellant the gun and wrist watch. Defendant Marlatt corroborated appellant's testimony as above narrated.

There was before the jury, however, testimony that shortly after their arrest the defendants made statements to the officers outside the presence of each other. These statements were practically identical, and coincided with each other. In his statement to the officers, outside the presence of his codefendant, appellant told the officers that the gun belonged to him; that he had purchased it several days before for $2; that before the defendants entered the cab they had talked about a holdup and appellant had given the weapon to defendant Marlatt. Appellant admitted having the gun in his pocket when the officers arrived, saying, "Marlatt gave it back to me after we held the cab driver up." Finally, when asked if there was anything further he wished to tell the interrogating officer, appellant said: "All I can say is that I am glad it ended this way. I don't know why

I did it, but I was broke." Thereafter, both defendants were brought before the officers and in the presence of each other corroborated the statements separately made by them. The foregoing statements were made on December 26, 1946, and the first suggestion that appellant desired to change any of such statements was made about April 6, 1946, when he addressed a post card to one of the police officers.

The evidence that appellant actively participated in the robbery was direct, clear, positive, and admitted by himself. Therefore, his defense that he was forced to participate by threats and fear of bodily injury did no more than create a conflict in the evidence. It was for the jury to determine whether appellant in his statements to the officers made shortly after his arrest or in his testimony, spoke the truth.

[2] Indeed, there was enough testimony of appellant's guilt, furnished by himself, to give rise to a conflict in the evidence, and that conflict having been resolved against appellant by the jury, the verdict will not be disturbed on appeal. The logic of the jury's conclusion that appellant was a willing aider and abettor of his codefendant is strongly fortified by appellant's conduct during the robbery and immediately thereafter, and by his aforesaid admissions made shortly after his arrest.

[3] Appellant's contention that a reversal of the judgments should ensue, because under the evidence in this case an inference of innocence might be drawn just as reasonably as an inference of guilt, is answered adversely to him by the cases of People v. Newland, 15 Cal.2d 678, 681, 682, 104 P.2d 778; People v. Bassett, 68 Cal.App 2d 241, 246, 156 P.2d 457; and People v. Wade, 71 Cal.App.2d 646, 650, 163 P.2d 59. Appellant's claim that the evidence is insufficient to support the verdicts and judgments cannot, therefore, be sustained.

It is next urged that appellant was not accorded that fair and impartial trial guaranteed by law to everyone accused of crime. In this regard appellant asserts "that treatment accorded appellant's counsel, including suggestions and threats of punishment for contempt which were unwarranted * * * may well have served to discredit the defendant in the eyes of the jurors."

The first instance of claimed impropriety in the remarks of the trial judge occurred during the cross-examination of the complaining witness. In an effort to impeach the witness, appellant's counsel was reading from the transcript of the preliminary examination when an objection was interposed. In ruling upon the objection the trial judge stated:

"I will sustain the objection to this cross examination upon the ground it is improper. You cannot go to work and read the transcript where there is testimony that does not vary from his testimony here."

On another occasion during the re-cross-examination of the same witness appellant's counsel was examining the transcript of the preliminary examination in an apparent effort to locate certain testimony when the following transpired:

"The Court: You may proceed, Mr. Kolda, please. We are waiting. Mr. Kolda, will you please * * *

"Mr. Kolda: Your Honor, I am sorry. I am still of the impression there is some testimony here—

"The Court: Well, we cannot take time out while you read the transcript. You were furnished that transcript several days ago and you have had plenty of time to read it. You cannot take time out during the course of this trial, while the jury is waiting here, while you read that transcript."

And again during the direct examination of appellant his counsel was questioning him as to his "past history." After testifying to his age, his residence and past employment, the record reflects the following:

"Q. Just prior to that what were you doing? A. Well, two and one-half years prior to that I spent in the Navy, sir.

"Q. You spent in the Navy? A. That is right; United States Navy.

"The Court: I think we have gone far enough into the past history.

"By Mr. Kolda: Where is your home? A. Well, before I went in the Navy my home was in New York City, sir.

"Q. You were discharged here in Los Angeles?

"Mr. Leavy: I object to that as immaterial.

"The Court: Objection sustained."

Complaint is made that the court permitted an unduly long and extended examination of appellant after the latter had stated some three times that he did not know the name of the police officer he said had beaten the codefendant Marlatt and that the trial judge himself conducted a lengthy inquisition along the same lines. While this examination was in progress the court in sustaining an objection said to appellant's counsel:

"Objection sustained. I do not want counsel to make any more voluntary statements. Limit yourself to objections. I do not want any statements of fact or alleged facts."

Further complaint is made that the court unduly restricted the argument to the jury by appellant's counsel with the following statement:

"Counsel should not argue as to punishment. That is a matter that the jury does not have to decide; you should not consider that."

Again, after appellant's counsel in his argument to the jury had stated, with reference to the testimony of the codefendant, "I believe he was telling the truth. I believe he knows—and I heard that he was advised it would be San Quentin for him for quite a while," the district attorney started to object, whereupon the trial judge said: "Just a minute. I have noticed four instances, sir, in which you have made statements as to what you know, what you believe, which is not in the evidence. Now, you know that is not proper and * * *

"Mr. Kolda: Your Honor,—

"The Court (continuing):—you should know that I won't tolerate that in my court. You may argue the evidence, but as to matters which you say you personally know or which you personally believe, you must refrain from those things. It is highly improper and unethical. It is contempt of court if you are going to persist in it."

[4] At no time during the trial did appellant's counsel assign the remarks of the trial judge as erroneous or prejudicial. The law is well settled in this state that under ordinary circumstances, unless a party aggrieved by claimed misconduct on the part of the trial judge promptly calls the attention of the court to the purported impropriety, his claims in that regard will not be considered on appeal. The reason for this rule is to give the judge an opportunity to correct the error if any, and remove any prejudice therefrom, by promptly instructing the jury to disregard the statements made. Although appellant's counsel made no objections to the remarks of the trial judge, the latter, of his own motion, at one point of the foregoing proceedings addressed the jury as follows: "Mr. Kolda,—Ladies and gentlemen, I am sorry this has happened. I don't want you to draw any inference from the situation which has occurred here in court constantly. I am trying to help counsel. But I must insist that you cannot read that transcript."

[5] Though it be conceded that the attitude of the judge towards appellant's counsel was brusque and at times may have manifested a feeling of displeasure toward counsel, we cannot agree with appellant that the remarks of the court were derogatory or tended to "discredit the defendant in the eyes of the jurors." After reading the entire record of this trial, we are satisfied that the remarks of the trial judge did not result either in prejudice to appellant or in a miscarriage of justice. Appellant not having assigned the remarks of the judge as prejudicial, and the nature of the remarks not being such that any prejudicial effect thereof could not have been cured by prompt admonition to the jury to disregard them, we must follow the well established rule that they cannot be made a ground for reversal of the judgments on appeal.

[6] Appellant complains of the ruling of the court sustaining an objection to the introduction into evidence of a card in his possession at the time of his arrest, and upon which appeared the address to which

the cab driver was directed to transport appellant and his codefendant on the night of the robbery. We fail to perceive any prejudicial error in this ruling. Appellant had testified regarding the address and who lived there, while the cab driver in his testimony agreed that he directed to an address on East Sixth Street. No effort was made by the prosecution to contradict this line of testimony.

Finally, appellant asserts that "no legal verdict was rendered or recorded." In this connection it appears that when the jury returned into court with their verdicts the following proceedings transpired:

"The Court: In the case of People v. Michael J. Galuppo and Mark A. Marlatt, No. 110901, let the record show the defendants are in court and the jury is in court. Have you agreed upon a verdict, Mr. Foreman?

"The Foreman: We have, your Honor.

"The Court: You may deliver it to the bailiff, please.

"(Verdicts were thereupon handed to the court by the bailiff.)

"The Court: In the verdict as to the robbery, the jury did not make a finding as to the degree. Did the jury decide what the degree of the robbery was?

"The Foreman: First degree.

"The Court: Is that the agreement of all the jurors? If so, just all raise your hands, so there will be no question. The record will show the jury unanimously have so found. That is as to both defendants, I take it?

"The Foreman: Yes.

"The Court: The record will so show. The clerk may read the verdicts returned by the jury.

(The clerk thereupon read the verdicts as returned by the jury.)

"Mr. Bird: The defendant Marlatt will waive the reading of the recorded verdicts as to him.

"The Court: You may record the verdicts.

"Mr. Kolda: At this time may I have the jury polled?

"The Court: Yes. Counsel has asked to have the jury polled. This may be a new procedure to some of you ladies and gentlemen. The clerk will ask the jurors whether these are their verdicts. If they are, you will answer in the affirmative. Of course, if they are not, you will answer in the negative.

"(The clerk thereupon polled the jury.)

"The Clerk: The jury answers unanimously in the affirmative, your Honor.

"The Court: This will conclude your services in this particular case. The clerk may record the verdicts.

"(The jury thereupon retired.)"

Appellant's complaint refers only to the verdict rendered in the robbery charge, in which the jury was required to find the degree of the crime, and has no application to the verdict rendered in the count of the information wherein he was charged with a violation of section 503 of the Vehicle Code.

[7] Appellant earnestly urges that when the court observed that the written verdict returned did not find upon the degree of the robbery it was the court's duty to return the jury to the jury room for further deliberation upon and completion of their verdict, if they were able to agree upon the degree of the offense. In support of his contention, appellant relies upon section 1156 of the Penal Code. But this section applies only to special verdicts. However, if the finding as to the degree be regarded as a special verdict, then in the case at bar, such special verdict was rendered in the alternative method prescribed in section 1153 of the Penal Code. That is, it was in the presence of the jury entered upon the minutes of the court, read aloud to the jury and agreed to by them. If the finding as to the degree of the crime be regarded as part of the general verdict, then the verdict against appellant was rendered in conformity with sections 1149, 1163 and 1164 of the Penal Code. That is to say, as reflected by the record herein, the foreman was asked if the jury had agreed upon a verdict as to the degree of the offense of robbery. He answered in the affirmative. He was then requested to

disclose it, which he did. The court then requested the jurors to indicate by a show of hands whether that was their verdict. The show of hands was unanimously in the affirmative. Appellant is in error when he asserts that the jury arrived at their verdict as to the degree of the crime in the courtroom. The foreman declared, and the jurors unanimously affirmed the declaration that such verdict had theretofore been arrived at in the jury room. Furthermore, at appellant's request, the jury was polled and each juror stated that the foregoing was his or her individual verdict. No possible prejudice could have resulted to appellant's substantial rights by not having the jury returned to the jury room to reduce the verdict to writing.

For the foregoing reasons, the judgments and the order denying appellant's motion for a new trial, are, and each is, affirmed.

YORK, P. J., and DORAN, J., concur.

81 Cal.App.2d 939

## SHARPE v. JOHNSON, Chief of Police.

Civ. 3468.

District Court of Appeal, Fourth District, California.

Oct. 17, 1947.

**1. Municipal corporations ⚷594(6), 622**

The Laguna Beach city ordinance prohibiting maintenance of any table game, marble game, or similar device in places of business or other places of public resort is not prohibitory but regulatory only, and hence within scope and purview of police power of city.

**2. Municipal corporations ⚷63(2)**

The reasonableness of Laguna Beach city ordinance prohibiting maintenance of any table game, marble game, or similar device in places of business or other places of public resort rests largely in city legislative body's discretion, with reasonable exercise of which courts should not interfere.

**3. Municipal corporations ⚷625**

The Laguna Beach city ordinance prohibiting maintenance of any table game, marble game, or similar device in places of business or other places of public resort is not invalid as unreasonable. U.S.C.A. Const. Amend. 14.

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Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Action by Dick Sharpe against Paul H. Johnson, as Chief of Police of the City of Laguna Beach, to enjoin defendant from enforcing a city ordinance. From a judgment of dismissal entered after demurrer to the complaint had been sustained without leave to amend, plaintiff appeals.

Judgment affirmed.

Adrian Marks, of Santa Ana, for appellant.

Jack J. Rimel, of Santa Ana, for respondent.

GRIFFIN, Justice.

Plaintiff and appellant seeks an injunction against defendant and respondent, as Chief of Police of the City of Laguna Beach, prohibiting him from enforcing a city ordinance in respect to possession of certain "Goalee" machines or devices in places of business or other places of public resort, which ordinance declares such devices and equipment to be a nuisance, provides for the abatement thereof, and for penalties for its violation. Section 2 of the Ordinance provides:

"It shall be unlawful for any person, firm, or corporation to keep, maintain, possess or have under control in any place of business or in any other place of public resort * * * any 'table game', or * * * 'marble game' * * * or any device similar thereto, the operation, use or play of which is set into operation or controlled by placing therein any coin * * * or by the payment of any fee."

It is admitted that the "Goalee Machines," as alleged in the complaint, come within the provisions of section 2.

Plaintiff alleges generally that he is the owner of certain coin-operated amusement machines called the "Goalee Machines"; that there are no prizes offered for scoring in said games; that there are no free games allowed for scoring any score; that said games are merely for the purpose of amusement; that plaintiff is engaged in the business of placing these machines in various places of business; that he receives a percentage of the proceeds; that he has entered into agreements with several business places in said city to place and operate said machines; that the city has no ordinance requiring that a license be obtained for the operation of this type of machine; that he has made oral application to the defendant for permission to operate the machines in said places of business in said city and that defendant refused him permission so to do; that if plaintiff installs said machines therein, as aforesaid, defendant will have plaintiff arrested under said ordinance and that plaintiff will be deprived of his right to engage in a lawful and legal business; that the ordinance in question is an arbitrary and discriminatory exercise of the police power and amounts to the taking of property of plaintiff without due process of law, and the impairment of his property rights under the Fourteenth Amendment to the Constitution of the United States; and that unless defendant is restrained by the judgment of the court he will carry out his threats and plaintiff will be subjected to a multiplicity of suits. He prays that the ordinance be declared null and void and asks that defendant be enjoined from enforcing the ordinance.

A demurrer was interposed, claiming that the complaint does not state facts sufficient to constitute a cause of action. It was sustained without leave to amend. Judgment of dismissal followed.

On appeal plaintiff argues that the police power of a municipality does not extend so far as to allow the municipality, by ordinance to "absolutely prohibit simple amusement" which, in itself, is a legitimate and lawful business and is not inherently vicious and dangerous. Citing In re Hall, 50 Cal.App. 786, 195 P. 995, 976. That action grew out of an ordinance which prohibited dancing between certain hours in the city of Pasadena. In holding that such ordinance unduly interfered with personal rights and reasonable use of the property, the court said:

> "The ordinance does not confine the prohibited acts to any particular locality, or to buildings in any particular part of the city; nor does it differentiate between public dance halls—admittedly proper subjects for reasonable regulation in the exercise of the police power—and rooms in private homes wherein dancing may be conducted or dance music performed for the amusement and enjoyment of the householders, members of their families, and guests."

Ex parte Murphy, 8 Cal.App. 440, 97 P. 199, 201, also relied upon by defendant, involved an ordinance prohibiting the maintenance of any billiard hall or pool room in a *public place* in South Pasadena, excepting hotels which had obtained permits. There it was conceded that the business of conducting a public billiard hall and pool room was not *per se* a nuisance. It was pointed out that the provisions of the ordinance did not "apply to the individual who keeps a pool table in his house for the use of himself and guests, nor to the hotelkeeper who maintains tables for use of *bona fide* guests only. In neither case can it be said to be public, nor that it creates in either a monopoly of the business. All are alike amenable to the law prohibiting them from conducting such place for hire or public use." It was there held that "The question of the reasonableness of ordinances regulating the conduct of such business, and excluding their operation from, or confining it to, certain prescribed limits, as well as the uniform operation of the same, is always a proper subject for judicial inquiry." See, also, Ex parte Meyers, 7 Cal.App. 528, 94 P. 870; and Goytino v. McAleer, 4 Cal.App. 655, 88 P. 991.

[1] We do not construe the ordinance as *"absolutely"* prohibiting the possession or operation of the "simple amusement" in that city, but it only provides that such form of amusement shall not be maintained or kept "in any place of business * * *" or "other place of public resort." It appears to us, therefore, that the ordinance is

not necessarily prohibitory but may be considered regulatory only, and, accordingly, comes within the scope and purview of the police power of said city.

[2, 3] In re Lawrence, 55 Cal.App.2d 491, 131 P.2d 27, appears to us to be directly in point. It involved maintenance of such devices as "pin games" or "marble games." It was there held that the activity in maintaining such games was subject to municipal regulatory measures and was within the scope of the police power, and that an ordinance providing it shall be unlawful to keep or maintain such devices "in places of business or in any other place of public resort" but permitting such games at private houses or in certain delineated amusement zones, has the same force within the limits of the municipality as a statute has throughout the state and is not prohibitory but regulatory only, and as such is within the scope and purview of the police power, and the question of its reasonableness is largely one resting in the discretion of the legislative body and not one within the province of the courts to interfere if such discretion has been reasonably exercised.

In Sternall v. Strand, 76 Cal.App.2d 432, 172 P.2d 921 (hearing denied by the Supreme Court), a similar question was presented in reference to the possession of pin-ball machines automatically providing for "free games", which possession was prohibited under an ordinance of the County of San Diego. In that case the question of the attendant evils, which had given rise to a situation calling for action on the part of the Board of Supervisors in reference to the operation of such machines, was discussed. Sections 11 and 12 of that ordinance cited among the many other reasons for its adoption "that as a practical matter it is beyond the power of the enforcement officers to control the operation of these machines and compel compliance with the laws against gambling * * * that the operation of these machines has become a racket and constitutes a menace to good government; and that as long as these machines continue in operation there can be no considerable improvement in the county with reference to proper enforcement of the laws and to good government." It was there held that since the reasonableness of the ordinance was passed upon by the legislative authority, this court would not hold the ordinance void as unreasonable where there was room for a difference of opinion on the question; and that the question as to the reasonableness of the ordinance is primarily one for the legislative authority.

Judgment affirmed.

BARNARD, P. J., concurs.

MARKS, J., being disqualified, did not participate herein.

81 Cal.App.2d 928

## PEOPLE v. CALLIHAM.

Cr. 4117.

District Court of Appeal, Second District,
Division 2, California.
Oct. 17, 1947.

**1. Robbery** 🔑24(1, 5)

Discovery of victim's purse in defendant's possession when arrested constituted substantial proof of robbery, victim's fright at the time purse was taken induced by being dragged into the darkness by defendant and pushed back on the ground when she protested the taking being sufficient to make the taking "robbery" without proof of further force.

See Words and Phrases, Permanent Edition, for all other definitions of "Robbery".

**2. Robbery** 🔑6, 7

Either force or intimidation is the gist of the crime of "robbery".

**3. Rape** 🔑53(2)

Evidence sustained conviction of assault with intent to rape as against contention that victim consented to intercourse.

**4. Rape ⚷11**

When attacked by a rapist, it is primarily for the victim to decide to what extent she can with safety resist, and, where a trier of the facts determines that her resistance was overcome by force or that she desisted in her struggle with rapist by reason of fear induced by his application of force, the finding necessarily follows that she did not consent to the intercourse. Pen. Code, § 261.

**5. Rape ⚷16(4)**

Where victim succeeded in preventing consummation of intended rape and defendant was convicted only of assault with intent to rape, the extent of victim's resistance was important only as negating defendant's testimony that his act was with her consent. Pen.Code, § 261.

**6. Criminal law ⚷1043(2)**

An objection to evidence will not be considered unless the precise ground for its exclusion was clearly specified to trial court.

**7. Criminal law ⚷1036(9)**

Appellant cannot abandon objection to evidence made in trial court and demand a reversal upon grounds of objection asserted for the first time in reviewing court.

**8. Criminal law ⚷1043(2)**

Permitting cross-examination of defendant on trial for robbery and assault with intent to rape concerning possession of burglar's tools, over general objection that such evidence was incompetent, irrelevant and immaterial, without pointing out basis of such incompetency or irrelevancy, was not prejudicial error as admitting evidence of other offenses and implanting a suspicion that defendant was about to commit burglaries.

**9. Witnesses ⚷277(3)**

Where defendant on trial for robbery and assault with intent to rape testified that he was innocent of a criminal attack and had engaged in intercourse with prosecutrix pursuant to agreement, cross-examination concerning his possession of burglar's tools and stolen articles and being unshod at time of attack was proper.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Alpine Calliham was convicted of robbery and assault with intent to commit rape, and he appeals.

Judgment affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Alberta Gattone, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Having been convicted by the court of robbery and of assault with intent to commit rape, defendant seeks a reversal of the judgment on the grounds that no force was applied in the robbery and no resistance was made to the rape; that is, the evidence is not sufficient proof of the crimes.

The prosecutrix testified that about 12:30 o'clock on a Sunday morning as she was walking on Hooper avenue in Los Angeles on the way to visit her brother she was grabbed around the neck and pulled backward to a dark place behind some garages. The man laid her backward, pulled off her slacks and pants, zipped open her red purse which had fallen beside her, removed its contents and searched the pockets of her slacks. He then put down the purse and lay upon her for five minutes attempting to perform an act of sexual intercourse while she kept moving. She did not scream or try to rise because she was "too scared * * * was scared to death, and couldn't make no sound." During such performance the police officers arrived and her assailant jumped up and ran.

That the victim was choked in her struggle with appellant was proved by Mrs. Bjarklund who occupied the house next to the alley. She heard "a lot of heavy breathing" after a noise like a man staggering into her yard as he hit against her house. She heard some one say twice: "Don't choke me," and a noise as if someone had fallen at the side of her house. She asked her neighbor to call the police. After the officers arrived the victim came out in front of the house holding up her slacks and telling the police that her assailant had grabbed her around the neck, choked her and dragged her into the yard. The police succeeded in capturing the culprit only after they had pursued him through several adjacent premises and fired six shots at him. He was then identified by the victim as her assailant. A red purse belonging to her containing 89 cents was removed from the man's pocket by a deputy sheriff at the Maywood Hospital.

[1, 2] While the testimony of the prosecutrix is somewhat hazy as to whether she had any money at the time of the assault, it was definitely established by her that appellant took her purse from the ground and pushed her back as she protested. Although she did say then to the miscreant that she had no money, the discovery of her purse in appellant's possession was stronger evidence of his robbery than her recollection of the contents of her purse and is substantial proof of a robbery. Her fright at the time induced by his dragging her into the darkness and his pushing her back at the time of his taking the purse is sufficient to make it robbery without proof of further force. Rice v. State, 204 Ala. 104, 85 So. 437. Either force or intimidation is the gist of the crime. People v. Goldberg, 302 Ill. 559, 135 N.E. 84; Reese v. State, 91 Tex.Cr.App. 457, 239 S.W. 619; Henderson v. State, 172 Ala. 415, 55 So. 816.

[3] Appellant's guilt of an assault with intent to rape was shown by clear and direct testimony which the trial court believed. The victim had imbibed six highballs with a jigger of whisky in each during the evening prior to the attempted visit to her brother. According to appellant's testimony the two had met and had several drinks at a night club. He started to take her home in his automobile. But he put her out on 66th street where she proceeded up Hooper avenue. He testified that he accompanied her and that by agreement they engaged in the intercourse. The court was not required to believe appellant's story as to the prosecutrix's consent merely because he so testified. Such specious defense is easy of utterance but the truth of it is to be determined by the trier of fact. It was a rational interpretation of the entire evidence that appellant, knowing the beclouded state of the women's mind, stopped at some distance from her home, permitted her to disembark, removed his shoes in order to make his approach by stealth and thus seize and remove his victim to a sequestered spot.

[4, 5] Despite the implied finding of mere assault with intent to rape, appellant insists that a reversal should follow because he testified that two acts of intercourse were consummated with the prosecutrix consenting. The court's finding supported by the woman's testimony disposes of his argument as to her not resisting. Notwithstanding the facts that she was too frightened and too choked to scream she did successfully avoid the more serious crime. Proof of her vehement exertion was not necessary to show her resistance. When attacked by a rapist it is primarily for the woman to decide to what extent she can with safety resist. People v. Lay, 66 Cal.App.2d 889, 892, 893, 153 P.2d 379. Where a trier of the facts decides that a prosecutrix's resistance was overcome by force or that she desisted in her struggle with the rapist by reason of her fear induced by his application of force, the finding necessarily follows that she did not consent to the intercourse. Ibid; Penal Code, sec. 261. But inasmuch as appellant succeeded only to the extent of attacking his victim the extent of her resistance was important only as negating his testimony that his act was with her consent.

The pleading of the instant victim, "don't choke me," and her heavy breathing corroborate her testimony that she was dragged by the neck to the scene of the crime. In reply to such proof appellant offers nothing but his ipse dixit that he had a "date" with the woman. Furthermore, when the officers appeared appellant by his flight did not behave like a person engaged in a lawful act. To assault a woman for a purpose of violating her sexuality is a heinous crime for the consequences of which any culprit, however ignorant, dreads apprehension.

People v. Bales, 74 Cal.App.2d 732, 169 P.2d 262, is not authority for reversing the instant judgment. While that defendant was tried for forcible rape no force was used upon the complainant, no objection made to his act, no call for help, no fight. She was not threatened by the accused nor did she apprehend immediate bodily harm with accompanying apparent power to achieve his purpose. But in that case the court declared that the former rule that there must be resistance to the utmost prevails no longer.

The final contention is that the court erred in permitting appellant to be asked on cross examination the following:

"Q. As a matter of fact, you intended to perform some burglaries that night in that neighborhood where you saw that woman? A. No.

"Q. Isn't that why you had your shoes off? A. No.

"Q. And isn't that why you changed your clothes? A. No.

"Q. And left your clothes in your car? A. No.

"Q. Isn't it a fact, that at the time you were arrested you had on your person the following articles: a four inch screw driver? A. Yes.

"Q. One skeleton key?

"Mr. Broady: Just a minute; I will object to that as incompetent, irrelevant and immaterial, and not tending to prove any attempted rape, or robbery either, having possession of a screw driver and a key.

"Mr. Johnstone: Except that he has told stories to account for his presence out there.

"Mr. Broady: I did not object to that.

"The Court: The objection is overruled.

"Mr. Johnstone: Also a six-inch length of baling wire, didn't you? A. Yes.

"Q. And a pair of black leather gloves? A. Yes.

"Q. And a hairpin? A. I don't know anything about that.

"Q. And a red leather purse? A. Yes.

"Q. And the only money you had on your person was the money in the purse? A. No, I had some money in my pocket.

"Q. On your person at the time you were searched? A. Yes."

[6-9] Appellant now argues that such questions violate the rule which forbids evidence of other offenses and were an attempt to implant a suspicion that appellant was about to commit burglaries. There are two answers to such contention: (1) At no point in the course of such interrogation did appellant specify the basis of his objection. Not a word was said about the questions' calling for evidence of other crimes or about their implanting in the mind of the judge any kind of suspicion. The only protest interposed was the general objection following the inquiry as to his possession of a skeleton key at the time of his arrest. To constitute as prejudicial the admission of evidence it must be shown that the court's attention was directed to the specific vice of the inquiry as it appertained to the pending issues, so that a fair and intelligent ruling could be made. An objection to evidence will not be considered by the reviewing court unless the precise ground for its exclusion was clearly specified to the trial court. Also, an appellant may not abandon the objections he made in the trial court and demand a reversal upon grounds named for the first time in the appellate court. People v. Sellas, 114 Cal.App. 367, 377, 300 P. 150; People v. Owens, 123 Cal. 482, 56 P. 251; People v. Wignall, 125 Cal.App. 465, 467, 474, 13 P.2d 995; People v. Leavitt, 127 Cal.App. 394, 396, 15 P.2d 894; People v. Larrios, 220 Cal. 236, 247, 30 P.2d 404. It follows that appellant's neglect to point out the basis of the incompetency or irrelevancy of the prosecutor's questions defeats his claim of prejudicial error in admitting the testimony. (2) Appellant had testified that he was innocent of a criminal attack and had engaged in intercourse with the prosecutrix pursuant to agreement. After he had attempted to prove that his purposes were innocent it was not error to allow an impeachment of his testimony. It was, therefore, not prejudicial to admit his testimony of his possession of familiar tools of the burglar and of stolen articles or to receive evidence that he was unshod at the time of his attack.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

81 Cal.App.2d 838

## In re VAN VLACK.

No. 4119.

District Court of Appeal, Second District, Division 1, California.

Oct. 16, 1947.

**1. Infants 🔑16**

Evidence that stepfather was granted probation in prosecution for offense committed against 10-year-old stepdaughter was sufficient to sustain judgment declaring stepdaughter to be ward of juvenile court under statute extending juvenile court's jurisdiction to minor whose home is unfit place because of depravity of person in charge of minor. Welfare and Institutions Code, § 700(d); Pen.Code, § 288, 288a.

**2. Infants 🔑16**

The main purpose of the juvenile court act is to safeguard the morality and character of children of tender years. Welfare and Institutions Code, § 550 et seq.

**3. Infants 🔑16**

Where stepfather sexually molested minor stepdaughter for more than four years with knowledge of mother, and stepdaughter was declared ward of court after father was convicted for contributing to delinquency and was placed on probation, and mother left stepfather and took child to Ohio for a short time and returned to California and lived with child and stepfather without notifying probation officer, juvenile court in its discretion could find that welfare of child required that child be taken from custody of mother. Welfare and Institutions Code, §§ 700 (b, d), 739(d); Pen. Code, §§ 288, 288a.

**4. Infants 🔑16**

An appeal from finding of juvenile court that minor was juvenile delinquent was dismissed where juvenile court did not find that the minor was a juvenile delinquent.

◆

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Proceeding in the matter of Karol Lynn Van Vlack, a person under 21 years of age. From a judgment of the superior court of Los Angeles county sitting in separate session as a juvenile court, wherein Karol Lynn Van Vlack was adjudged to be a ward of the court, and from the alleged finding of the juvenile court that she was a juvenile delinquent, she appeals.

Appeal from finding dismissed and judgment affirmed.

Gladys Towles Root, of Los Angeles, for appellant minor.

Fred N. Howser, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent People.

YORK, Presiding Justice.

This is an appeal by the minor, Karol Lynn Van Vlack, from an order of the Juvenile Court adjudging her to be a ward thereof, and also from the "finding of the Juvenile Court that she is a juvenile delinquent."

On January 7, 1947, a petition was filed by a deputy sheriff of Los Angeles County wherein it was alleged that Karol Lynn Van Vlack, aged 10 years, was a person defined in subdivision (d) of section 700, Juvenile Court Law (now Welfare & Institutions Code), in that her home was an unfit place for her by reason of depravity on the part of her stepfather and neglect on the part of her mother.

It was further alleged that said minor was before the said court in May of 1946 on a petition filed under subdivisions (b) and (d) of section 700, supra, because she had accused her stepfather of committing acts upon her person in violation of sections 288 and 288a of the Penal Code and that her mother had knowledge of these acts; that said stepfather was arrested and told the investigating officer that he was guilty as charged; that the original charge was reduced to a charge of contributing to the delinquency of a minor, a misdemeanor, and said stepfather was granted probation; that thereafter the mother took the child to Bluffton, Ohio, remained there a short time, returned to Los Angeles with the child and again lived with her husband, said stepfather; that when these facts were discovered and brought to the attention of the Judge of the Juvenile Court, he directed that the minor be detained in Juvenile Hall and the instant petition be filed under subdivision (d), section 700, supra, the previous petition having been dismissed on November 26, 1946, presumably because the mother and the minor child were supposed to be residing at Bluffton, Ohio.

On January 23, 1947, the court adopted and approved the findings and recommendations of the referee made as result of a hearing on January 20, 1947, and declared said minor "a ward of the Juvenile Court under Subdivision (d), Section 700 of the Juvenile Court Law"; placed her in custody of the probation officer in a boarding school, arrangements for such placement to be made by said officer; prohibited the minor from visiting in her own home, but permitted the mother to visit her at the school; ordered the minor to remain in Juvenile Hall until placed and "until the District Attorney's Hold is lifted," and continued the matter for report on placement.

It is here contended that the evidence is insufficient to sustain the findings and that the findings are not in conformity with the provisions of the Welfare and Institutions Code.

After the filing of appellant's opening brief on appeal, a certificate by the Judge of the Juvenile Court, who heard the matter from its inception, was filed in this court in the form of a Clerk's Supplemental Transcript, to-wit:

"This will certify that the record on appeal in the above entitled matter, which was certified to by the County Clerk of Los Angeles County, was not the complete record before the Court at the time of the hearing of Petition No. 129702 (Jan. 7, 1947), as under the juvenile procedure all records and files in the minor's case were before the Court and considered at the time of the hearing on January 20, 1947.

"The Clerk's transcript on appeal should be corrected to include the Petition and files in case No. 126562 (May 21, 1946), *which was before the Juvenile Court and considered as evidence* in hearing Petition No. 129702, which was referred to in formulating a plan for the best interests of the child." (Emphasis added.)

Such record of the first proceeding is comprised of the petition, reports of hearings held by a juvenile court referee on May 28, June 11, August 13, and September 3, 1946, together with minute orders of the Juvenile Court Judge approving and adopting the recommendations made by said referee after each hearing.

At the hearing before the referee on the instant petition of January 7, 1947, the mother of the minor testified that when she was in court on September 3, 1946, she testified that she had sold her home, was separating from her husband and was taking a plane on September 9, 1946, for Bluffton, Ohio; that she arrived with the minor at Bluffton on September 11, and left there for California on October 19, 1946; that she was unable to stay because the children made her grandparents too nervous; that when she reached California she did not inform the probation officer of her action which she said she realized was against the order and instructions of the court and the understanding she had with the court at the time of the hearing of September 3, 1946; that she wrote two letters and had them mailed from Ohio to the probation department representing that she was still in Ohio when in fact she was in California; that her husband met her at the airport on October 20th and she went to live with him taking the minor with her. Said witness also testified at the instant hearing that she was out on bail and was to enter her plea on the 23rd to a charge of contributing.

In response to the referee's question regarding the status of his case, the stepfather testified that he was granted three years probation and ordered to pay a fine of $400.

In answer to the referee's question: "Would you tell me about this changing? I was under the impression that this man was charged with violation of 288 of the Penal Code," Pat Decker, a representative of the District Attorney's Office, replied:

"Four counts of contributing, I believe was the charge at that time, your honor. In the beginning it was 288 of the Penal

Code, and the defense attorney asked that the charge be reduced to four counts of contributing.

"Q. And it was granted? A. It obviously was granted. I don't believe there was even one count of 288 left at the time.

"Q. What was he tried on? A. He was first tried on incest.

"Q. And found guilty? A. Not found guilty. It wasn't incest because he was the stepfather, but there were 288 perversion, 288 or something, A. or B, I believe it wasn't a straight 288, and then it was reduced to four counts of contributing.

"Q. After he was tried? A. After the trial had begun, yes."

Turning to the record of the first proceeding, the referee on June 11, 1946, found as follows: "This matter was continued to this date from May 28, 1946. Minor is held on a District Attorney hold as a material witness against her stepfather. He was charged with violation of Section 288 of the Penal Code. Since this man has been held to answer and he will come up for plea on the 19th of June, 1946, it will be necessary to detain minor in Juvenile Hall." On June 13, 1946, the findings and recommendations of the referee dated June 11, 1946, were adopted and approved by the judge of the juvenile court.

[1] Since it is definitely shown by the testimony of the stepfather, above quoted, that he was granted probation in a prosecution for an offense committed against the minor, the evidence is amply sufficient to sustain the judgment of the court declaring the minor to be a ward of the juvenile court under subdivision (d) of section 700 of the Welfare and Institutions Code, which provides that "The jurisdiction of the juvenile court extends to any person under the age of twenty-one years who comes within any of the following descriptions: * * *

"(d) *Whose home is an unfit place* for him, by reason of neglect, cruelty, or depravity of either of his parents, or of his guardian or other person in whose custody or care he is."

The referee of the juvenile court made findings herein, which were adopted by the judge of that court, in part, as follows:

"* * * This child was molested sexually by her adoptive father over a period of four years. The mother was aware of what was going on. She failed to take steps herself, hoped she could work the problem out in her own way. Finally the adoptive father was arrested and charged with violation of Section 288 and 288a of the Penal Code. Subsequently this was changed to four counts of contributing, and he was found guilty, fined $400, and given 3 years probation. Minor was declared a ward under subdivisions (b) and (d), and after the trial of her adoptive father, she left with her mother and 18 months old brother for Bluffton, Ohio, to live in the home of her maternal grandparents. The mother at that time represented that she was separating from her husband, and had no intention of living with him, and that she had sold her home. The child arrived in Ohio by airplane September 11, 1946, and returned with her mother October 20, 1946. When the mother returned to California, she immediately took up her residence with her husband. At no time did she inform the probation officer that she was back in this jurisdiction. It would appear from the past history that the minor's home is unfit, and that she should not be permitted to remain in the same home with her adoptive father. Therefore, placement outside is indicated * * *."

[2, 3] The main purpose of the Juvenile Court Act is to safeguard the morality and character of children of tender years. Welfare and Institutions Code, § 550 et seq. In the circumstances presented by the record herein, it was within the discretion of the court to find that the welfare of the minor required that she be taken from the custody of her mother, in order to protect her from possible repetitions of the acts of the stepfather which had occurred in the past, and to the repetition of which the mother was subjecting her by taking her to live in the same house with the stepfather. See subd. (d), section 739, Welfare and Institutions Code.

[4] It was not found that the minor was a juvenile delinquent, therefore the appeal "from the finding of the Juvenile Court that she is a juvenile delinquent" is dismissed.

In all other respects the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

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81 Cal.App.2d 776

**BERTON et al. v. COCHRAN.**

**Civ. 15702.**

District Court of Appeal, Second District, Division 3, California.

Oct. 14, 1947.

Rehearing Denied Nov. 12, 1947.

Hearing Denied Dec. 11, 1947.

**1. Automobiles 🔑227(3)**

The doctrine of "last clear chance" presupposes that both parties were negligent, that there was an opportunity, a clear chance, a situation established by substantial evidence, that defendant saw or knew of plaintiff's perilous position, and could have avoided collision, but did not do so.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Clear Chance".

**2. Evidence 🔑14**

It is common knowledge that an interval of time is needed by a motorist, after deciding that brakes should be applied, to apply pressure on them, and that it requires an additional interval of time thereafter for the brakes to commence to be effective.

**3. Automobiles 🔑227(3)**

The doctrine of last clear chance does not require a splitting of seconds when emergencies arise, since the doctrine presupposes time for effective action and is not applicable where the emergency is so sudden that there is no time to avoid the collision.

**4. Automobiles 🔑227(3), 246(58)**

Where, under any view of the evidence as to distance motorist traveled after he saw boy on bicycle who emerged suddenly from a private driveway along which were shrubs, trees, and rock wall, it was clear that emergency arose suddenly, and there was no substantial evidence that motorist had time to avoid colliding with the bicycle, doctrine of "last clear chance" was not applicable, and refusal to give instruction on that doctrine was not error.

**5. Automobiles 🔑227(1)**

Testimony, which did not purport to show that motorist knew that bicyclist who suddenly emerged from a private driveway was in peril, did not authorize application of last clear chance doctrine, since a defendant cannot be held liable under the last clear chance doctrine on the theory that he would have discovered the peril but for remissness on his part.

◆

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Robert J. Berton, a minor, by Albert Berton, his guardian ad litem, and Albert Berton, individually, against Charles A. Cochran to recover for damages resulting from a collision between a bicycle which the minor was riding and an automobile driven by defendant. From a judgment for the defendant, the plaintiffs appeal.

Judgment affirmed.

Zagon, Aaron & Sandler, of Los Angeles, for appellants.

Nourse & Jones, of Los Angeles, for respondent.

PARKER WOOD, Justice.

In this action for damages resulting from a collision between a bicycle, which the minor plaintiff was riding from a private driveway onto a public highway, and an automobile, which the defendant was driving on the public highway, judgment upon a verdict was entered in favor of defendant. Plaintiffs appeal from the judgment upon the ground that the court erred in failing to give their requested instruction stating the last clear chance doctrine.

On August 13, 1945, about 6 p. m. and before dark, defendant was driving his automobile west on Valmont Avenue in Tujunga, and the plaintiff Robert Berton, aged 7 years, was riding a bicycle south on a private driveway which intersects that avenue. Valmont Avenue is paved, is level near the place of the collision, and along the north side of the main traveled portion of the avenue there is a small depression or drain which is paved and is a part of a 4-foot-wide paved shoulder which slopes gradually upward toward the outside of the highway. About 10 feet north of, and parallel with, the north edge of the shoulder there is a rock wall 3 or 4 feet in height which extends several feet to the east and to the west from the sides of the driveway. Along the wall there are shrubs and sycamore trees which extend above the wall. The driveway is paved, is about 10 feet wide and extends from the highway pavement to the north about 60 or 70 feet to a private garage, and the only portion of the driveway which is visible, during the last 150 feet while approaching the driveway from the east, is the portion from the north edge of the highway pavement to the rock wall, a distance of approximately 10 feet, referred to as the "mouth" of the driveway. The driveway slopes downward from the garage to the highway—a downgrade of approximately 1 foot in each 10 feet. The defendant, who had lived about 3 blocks from the place of the collision for 13 years, was driving at the time of the collision about 25 miles an hour and the right side of his automobile was about one foot south of the north edge of the main traveled part of the highway. In other words, the right side of his automobile was about 5 feet from the north edge of the 4-foot shoulder.

Defendant testified that when he first saw the boy, he (the boy) was about 5 or 6 feet north of the north edge of the highway and about 5 feet west of the east edge of the driveway, that is, about half way between the rock wall and the highway and about the middle of the driveway (with reference to east and west); that the boy was traveling between 15 and 20 miles an hour; that when he first saw the boy, defendant's automobile was about 10 feet east of the easterly edge of the driveway; that after he first saw the boy and before the collision, the bicycle traveled about 11 feet and the automobile traveled about 15 feet; that the boy went straight onto the highway and did not turn to the right or left; that the collision occurred in front of the driveway a second and a half after he first saw the boy; that it takes about a second to apply the brakes of his automobile and he applied them the moment he saw the boy; that the brakes of his automobile were in good condition and that traveling at the rate of 25 miles an hour his automobile would stop within a distance of 15 feet after the brakes take hold; and that his automobile went about 25 feet after the collision before it stopped at a point about 20 feet west of the westerly edge of the driveway.

A man who was riding with the defendant testified that when he first saw the boy he (the boy) was about 20 feet up the driveway and the automobile was about 10 or 12 feet east of the driveway; that the automobile was traveling about 20 miles an hour; that at the time the witness first observed the boy the defendant applied his brakes immediately; and that the boy went straight onto the highway and did not turn to the right or left.

Two police officers who arrived at the scene soon after the collision testified that defendant said he was approximately 30 feet east of the driveway when he first saw the boy.

A boy, aged 13 years, called as a witness by plaintiffs, testified that he was walking east on Valmont Avenue at a place approximately a block west of the driveway when he witnessed the collision; that when he first saw the boy on the bicycle, the boy was coming from the mouth of the driveway and at that time the automobile was about 50 or 60 feet east of the driveway; that when the boy came from the mouth of the driveway he turned to the east and traveled about 20 or 30 feet in that direction; that defendant said his brakes were weak and didn't hold and that he was going a little over the speed limit.

Another boy, aged 11 years, called as a witness by defendant, testified that he was walking with the preceding witness; that he did not see the boy come from the driveway, but he saw him after he was in the street when he made a turn to the left; that he first saw the automobile when it was about a block east of the driveway; that he saw the collision; and that defendant said his brakes were weak and he was going a little over the speed limit.

The minor plaintiff testified that he had never ridden a bicycle out of that driveway before the accident; that he started from the garage and coasted onto the street; that after he was in the street he used the pedals, and that he made a left turn in order to stay close to the north side of the street; that he looked both ways before he made the turn, and he saw the car that hit him; that the accident occurred just after he came off the driveway; and that is all he could remember until he woke up in the ambulance.

The father of the minor testified that on the next day after the accident the defendant said: That the boy came out of the driveway, made a right turn and traveled about 8 feet before he struck him; that he (defendant) was going a little over the speed limit; that "he tried to stop as quick as he could"; and that defendant would take care of everything.

The defendant, being recalled as a witness, testified that he did not say that the accident was his fault, or he was going too fast, or his brakes were too weak, or anything of that nature. He testified first that he did not tell the officers that he was approximately 30 feet east of the driveway when he first saw the boy.

[1] The question is whether an instruction on the doctrine of the last clear chance should have been given. "The doctrine of last clear chance presupposes that both parties were guilty of negligence; that there must be an opportunity, a *clear chance,* a situation established by substantial evidence, that the defendant saw or knew of plaintiff's perilous position and could have avoided the collision but, having such opportunity, did not do so." Dalley v. Williams, 73 Cal.App.2d 427, 433, 166 P.2d 595, 598. The evidence shows, according to defendant's testimony, that he was 10 feet from the driveway when he first saw the boy, and shows, according to defendant's alleged statement to the officers, that he was 30 feet from the driveway at that time. Since the driveway was 10 feet wide, it appears from the testimony just referred to that the defendant traveled either 15 feet or 35 feet after he first saw the boy and before the collision. According to defendant's alleged statement to the father of the boy, to the effect that the boy turned to the right and went about 8 feet before he was struck, it appears that the collision occurred 8 feet west of the center of the driveway, and, under that view of the evidence, the defendant traveled 23 feet or 43 feet after he first saw the boy and before the collision. Defendant was traveling about 25 miles an hour or about 37 feet a second at the time he first saw the boy. Therefore, in the view of the evidence most favorable to defendant (relative to the doctrine of the last clear chance), the defendant traveled 15 feet after he first saw the boy and before the collision, and if defendant traveled at the rate of 37 feet a second the collision occurred less than a second after defendant first saw the boy; and, in the view most favorable to plaintiff, the defendant traveled 43 feet after he first saw the boy and before the collision, and if defendant traveled at the rate of 37 feet a second, the collision occurred in less than a second and a half after he first saw the boy. The defendant testified that the collision occurred approximately a second and a half after he first saw him.

[2, 3] Counsel for plaintiff bases his argument, that defendant had a clear chance to avoid the accident, principally upon defendant's answer to his question as to how many times defendant could stop his automobile within a distance of 30 feet if he were traveling 25 miles an hour. Defendant answered that he could stop it twice —that he could stop within a distance of 15 feet. He explained, however, with reference to that answer that he meant that going at that rate he could stop within 15 feet after the brakes take hold and that it takes approximately half a second or a second to apply the brakes. Counsel's argu-

ment is to the effect that if he could stop twice within the 30 feet that he had a clear chance to avoid the accident. The explanation given by the defendant, regarding that answer, is the reasonable interpretation to be placed upon it. The answer should not be interpreted to mean that he could have stopped his automobile twice within a distance of 30 feet going at the rate of 25 miles an hour, since it appears that it would be impossible after stopping the automobile at the end of the first 15 feet to operate it again at the rate of 25 miles an hour within the next 15 feet of the 30 feet and also stop it within the last 15 feet. It is common knowledge that it requires an interval of time, after deciding that the brakes should be applied, to apply pressure on them and that it requires an additional interval of time thereafter for the brakes to commence to be effective. According to defendant's testimony, the boy traveled, after defendant first saw him, about 11 feet straight onto the highway; and according to defendant's alleged statement to the father, that the boy turned to the right and went 8 feet to the west, the boy traveled about 19 feet. Since the boy was traveling about 15 miles an hour or about 22 feet a second, it appears that he traveled the 11 feet in about one-half second, or that he traveled the 19 feet in about one second. All of the driveway except the 10 feet next to the highway pavement was obscured from defendant's view by the rock wall, bushes and trees, and the minor plaintiff was riding the bicycle downgrade at a fast rate. Irrespective of whether the defendant was 10 feet or 30 feet from the driveway when he first saw the boy, or whether the defendant traveled 15, 23, 35 or 43 feet, after he first saw the boy and before the collision, it appears that the collision occurred within a second or two after defendant first saw him. In the case of Bagwill v. Pacific Electric R. Co., 90 Cal.App. 114, at page 121, 265 P. 517, at page 519, the court said: "Certainly the doctrine of last clear chance never meant a splitting of seconds when emergencies arise. * * * Like the body of the law of negligence, to which the doctrine is appended, the test remains as that of ordinary care under all of the circumstances. * * * The words mean exactly as they indicate, namely, last *clear* chance, not possible chance." In Dalley v. Williams, supra, 73 Cal.App.2d at page 432, 166 P.2d at page 598, it was said: "The doctrine presupposes time for effective action and is not applicable where the emergency is so sudden that there is no time to avoid the accident."

[4] Under any view of the evidence herein as to the distance defendant traveled after he saw the boy, it is clear that the emergency arose suddenly and that there is no substantial evidence that defendant had time to avoid a collision with the fast moving bicycle. The doctrine of the last clear chance is not applicable herein and it was not error to refuse to give an instruction on that doctrine. "The giving of an instruction submitting an issue on the last clear chance doctrine, where there is not sufficient evidence to justify the submission, is reversible error." Dalley v. Williams, supra, 73 Cal.App.2d at page 437, 166 P.2d at page 600.

[5] The testimony of the boy, who was about a block west of the driveway, that the automobile was about 60 feet east of the driveway when the boy was coming from the mouth of the driveway, and the testimony of the other boy who was with him that the automobile was about a block east of the driveway when he first saw the automobile, is not of value concerning the doctrine of the last clear chance in that such testimony does not, of course, purport to show that defendant knew the boy was in peril. A defendant "cannot be held liable, under the last clear chance rule, upon the theory that he would have discovered the peril but for remissness on his part." Dalley v. Williams, supra, 73 Cal.App.2d at page 436, 166 P.2d at page 600.

The judgment is affirmed.

SHINN, Acting P. J., and VALLÉE, Justice pro tem., concur.

Hearing denied; EDMONDS and CARTER, JJ., dissenting.

81 Cal.App.2d 818

## HENRY J. KAISER CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 13516.

District Court of Appeal, First District, Division 1, California.

Oct. 16, 1947.

**1. Workmen's compensation ⚷940**

The determination as to whether a person is an "executive" or "managing officer", within provision of Workmen's Compensation Act authorizing additional compensation for injuries resulting from serious and willful misconduct of executive or managing officer, depends upon actual duty and authority bestowed upon a person, and not the name applied to him. Labor Code, § 4553.

See Words and Phrases, Permanent Edition, for all other definitions of "Executive" and "Managing Officer".

**2. Workmen's compensation ⚷940**

A foreman, head operator, or other employee may be a supervisory employee with powers of a "managing officer", within provision of Workmen's Compensation Act authorizing additional compensation for injuries resulting from serious or willful misconduct of managing officer, although such person has charge of but a small unit of an entire plant, if his invested authority is a general discretionary power of direction of an integrate department of his employer's business. Labor Code, § 4553.

**3. Workmen's compensation ⚷940**

A foreman or head operator at rock crushing plant, who had job of starting screening machinery, and who had responsibility of seeing that laborers who worked about that machinery discharged their jobs, was a "managing officer" or "general superintendent", within provision of compensation act authorizing additional compensation for injuries resulting from serious and willful misconduct of managing officer or general superintendent. Labor Code, § 4553.

See Words and Phrases, Permanent Edition, for all other definitions of "General Superintendent".

**4. Workmen's compensation ⚷1743**

In compensation proceeding involving question of employer's liability for increased compensation because of serious and wilful misconduct of employer, a general finding as to serious and willful misconduct will suffice, regardless of number of allegations set out, to fix element of serious and willful misconduct. Labor Code, §§ 4553, 6400-6404.

**5. Workmen's compensation ⚷1939**

Whether serious and willful misconduct of employer causing employee's injury has been made out by evidence is question of fact for Industrial Accident Commission, and reviewing court will not interfere with commission's determination on conflicting evidence or on inferences reasonably drawn therefrom. Labor Code, §§ 4553, 5953.

**6. Workmen's compensation ⚷939**

"Serious and willful misconduct", within provision of Workmen's Compensation Act authorizing additional compensation for injuries resulting from serious and willful misconduct of employer, is based upon knowledge or equivalent of knowledge from all surrounding circumstances, that act or omission to act is likely to result in serious injury to others. Labor Code, § 4553.

See Words and Phrases, Permanent Edition, for all other definitions of "Serious and Willful Misconduct".

**7. Workmen's compensation ⚷939**

The test whether an act is "serious and willful misconduct", within provision of Workmen's Compensation Act authorizing additional compensation, is not that employer knew that act would and intended that it should harm employee, but rather that employer or his managing official representative knew or should have known that performance of the act or its omission was likely to cause harm to employee. Labor Code, § 4553.

**8. Workmen's compensation ⚷1939**

Where laborer at rock crushing plant was injured when head operator of screening machine forgot that he had directed laborer to enter bin of machinery for purpose of clearing screen of rocks and started up the machinery, whether employer's failure to place head operator in position where he could see employee working under screen, whether there was distraction of operator's mind sufficient to exonerate employer from charge of willful misconduct, and whether employer had taken reasonable precaution to eliminate reckless conduct on part of operator were questions for Industrial Accident Commission. Labor Code, § 4553.

**9. Workmen's compensation ⟹1674**

Evidence supported finding that injuries to laborer at rock crushing plant who was injured when head operator of screening machine forgot that he had directed laborer to enter bin of machinery for purpose of clearing screen of rocks and started up the machinery were caused by serious and willful misconduct of employer or one of its managing officers, so as to render employer liable for increased compensation. Labor Code, § 4553.

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Proceeding by Henry J. Kaiser Company, employer, to review an order of the Industrial Accident Commission awarding to Edward Horton, employee, 50 per cent. additional compensation by reason of finding of serious and willful misconduct on part of employer.

Award affirmed.

Thelen, Marrin Johnson & Bridges, of San Francisco, for petitioner.

T. Groezinger and John A. Rowe, Jr., both of San Francisco, for respondent.

WARD, Justice.

This is a review of an order of the Industrial Accident Commission awarding to Edward Horton, fifty percent additional compensation by reason of a finding of serious and willful misconduct on the part of his employer.

The employer, a corporation, operates a rock crushing plant in Contra Costa County. It is admitted that respondent employee sustained certain injuries arising out of and occurring in the course of his employment; that subsequently he was an applicant before the Industrial Accident Commission for ordinary compensation (Labor Code, § 3207), and for an increased compensation award directly in favor of the employee and against the employer for serious and willful misconduct, Labor Code, § 4553. The applications were granted.

Horton was employed as a laborer in the screening and separating unit of the crusher plant, which unit was in charge of Frank Bertagnolli, and was operated apparently by a set of push buttons located on a raised platform or tower from which position the operator supervised the work. Wooden bins were located beneath screens, which acted as selectors in sorting out the various sizes of rock dumped upon them. During a shutdown of the screening operations due to the fact that trucks had not yet arrived from the gravel pit with rock to be screened, Bertagnolli, who is generally referred to in the transcript of evidence as "Red," directed Horton to enter a bin for the purpose of cleaning out an accumulation of debris and clearing the screen of rocks which clogged it. In the performance of this work Horton was required to work in a bent over or a prone position. He had just finished the cleaning when Red "started the machinery just as I got my head through the hole coming out from under the screen and this revolving screen has about a three or four inch angle bar on it. When I hollered, it hit me in the mouth and threw me up on top of it. He stopped it when I hollered." Red immediately ran to Horton's assistance, exclaiming: "I'm sorry I forgot I sent you in there." Horton received "a crushing injury of the premaxillary bone, and of the alveolar bone of the maxillae and their contained teeth. The alveolar bone injury extended from the right first molar tooth to the left first bicuspid tooth. Some of the teeth were pushed palatally, some were forced forwardly toward the lip, and some of the teeth were depressed deeply into the soft tissues of the face." Part of the jaw bone was eventually removed by surgical operation; other injuries of a serious nature were sustained. Horton eventually returned to work but to an easier job.

Bertagnolli testified: "As plant operator I have the job of starting the belts and the machinery on the plant itself; and as the foreman I have the responsibility of seeing that the men at the plant itself discharge their jobs. * * * As the foreman I have the responsibility of seeing that the men carry out certain jobs attached to the operation of the plant itself. * * * Well, that is to say, the belts, the conveyor belts and the moving equipment in the plant such as the crushers and the screens, with the exception * * *. Well, the operation of the plant itself, after all the equipment is started, the operation begins with the carrying of rock out of the pit, which is up the hill, I'd say maybe a quarter of a mile or so, and it is brought down by means of trucks * * * I don't tell them [the truck drivers] what to haul or when to haul or anything of the sort. My operation, as far as the plant itself is concerned, begins with the unloading of the material from the pit into the grizzly, which is the start of the rock actually on its way along the conveyors and into the screens and the crushers and the what not. That is where my responsibility begins and then, as I say, I have a control for the feeder at the grizzly and the belts that takes the rock from that particular place to the other equipment in the process of crushing and screening and what not." There are approximately seven men working in connection with the screens, including mechanics, oilers and laborers, to whom the head operator or foreman gave "orders." As stated, the injured employee was classified as a laborer. One of the duties of the laborers was to clear the screens as often as necessary, generally during the noon hour. On this occasion the head operator and foreman said to the employee: "You might as well go and clean it now as wait till noon."

Speaking of the accident, Bertagnolli said: "I didn't actually see the rib hit Ed * * * I saw it seconds after it happened because the screen doesn't stop and start immediately. In other words, the momentum of the screen itself, if it has a load in it, will start with a jerk and the momentum of the screen itself will carry on. Now what happened, I hit the button, stopped it immediately, and the momentum carried Ed right on the top side of the screen. * * * I don't know what hit him as far as actually seeing him, but the only thing that could have hit him is the so-called rib." Bertagnolli had complete charge of starting and stopping the mechanical operation of the machine. In answer to the question: "It was not safe for him to be where he was working if the machinery was put in motion?" the head operator answered: "No. Naturally." In answer to the question "You wouldn't have started it if you had remembered he was there, would you?" Bertagnolli answered: "Certainly not." The report made by the foreman reads: "11:15 to 12:00, 45 minutes time down. Horton injured, plant stopped." The plant had stopped prior thereto while the foreman awaited the arrival of the trucks. To the question "In other words, at about 10:20 the plant stopped and it was closed down all the rest of the morning except for just the momentary start when Horton was hurt?", Bertagnolli answered: "That's right."

Wilbur, designated as the plant superintendent, testified that he was in charge of the plant, but the only order he could remember giving to the injured employee was on the first day of his arrival and that order was "to report to Red." In answer to the questions: "In fact, he [Red] had charge of men such as Horton in directing them in the performance of all of their duties, didn't he?" he answered: "That's right."

The original hearing referee determined that Horton's injury was due to negligence but that no serious and wilful misconduct was involved. The commission may require a referee merely to hold hearings and to make return of the testimony of the commission (Labor Code, § 5314), or if findings are made by the referee to report such findings to the commission. "Upon the filing of the report of the referee, the commission may confirm, adopt, modify, or set aside the same or any part thereof and may, with or without further proceedings, and with or without notice, enter its order, findings, decision, or award based in whole or in part upon the report of the referee, or upon the record in the case." Labor Code, § 5315. In the present matter the report of the referee was filed and "having read the entire transcript" the commission panel—so to speak—reversed the finding of the referee and found that the injury was due to serious and wilful misconduct.

The main purpose of this review is to have declared erroneous the serious and wilful misconduct finding made by the commission panel. In this respect, three contentions are made in the petition. First, that the record supports only a finding of "negligence or forgetfulness," and not wilful misconduct; second, even if wilful misconduct could be charged against the fellow-employee who was responsible for Horton's injury, such employee was not an "executive, managing officer, or general superintendent" of the corporation, as is required under Labor Code, § 4553 as a condition to the right of an injured corporate employee to the 50% added compensation; and, third, that since Horton's application for the award set out several grounds of alleged serious and wilful misconduct based upon Labor Code, §§ 6400–6404, the commission's general finding of such misconduct—as above set out—is fatally deficient.

If either the second or the third contentions, though somewhat technical, may be upheld, it will not be necessary to discuss the main issue presented, namely, serious and wilful misconduct.

[1] Petitioner maintains that the entire plant was an integrated unit, and solely in charge of one Wilbur, the "plant superintendent"; and that the foreman was only in charge of the "screening" machinery and the "foreman" of those employees of the plant who worked about that machinery. It may be conceded that it is not the name applied to an officer or employee, such as vice-president, foreman, etc., but rather the actual duty and authority bestowed upon such person that determines the question. Petitioner relies upon Bechtel etc. Corp. v. Ind. Acc. Comm., 25 Cal.2d 171, 153 P.2d 331. There is some language in the cited case that might be construed in support of petitioner's contention, but the gist of the decision is that it is not the title of the party but whether he has been invested with supervisory and discretionary powers of direction.

Respondents rely upon California Shipbuilding Corp. v. Ind. Acc. Comm., 27 Cal. 2d 536, 165 P.2d 669, and Vega Aircraft v. Industrial Acc. Comm., 27 Cal.2d 529, 165 P.2d 665. In the Shipbuilding case it appeared that there had been delegated to a certain shipwright foreman, the duty of erecting guard rails about all uncovered holes on the deck of the ship in conformity with Industrial Accident Commission safety rules. It was held that the foreman had sufficient general discretionary powers of a substantial nature bestowed upon him, so that he might be designated an authorized managing officer. However, in the Vega Aircraft case it was said that the test set forth in the Bechtel case applied to the facts of the Vega Aircraft case. In the Bechtel case the status of the foreman was that of one who received numerous orders daily from his superiors. In the present case the foreman received orders only occasionally.

[2] A foreman, head operator or other employee may be a supervisory employee, with bestowed powers of a supervisor or managing officer or directing head within the meaning of sec. 4553 although such person has charge of but a small unit of an entire plant, if his invested authority is a general discretionary power of direction and control of an integrate department of his employer's business. California Shipbuilding Corp. v. Ind. Acc. Comm., supra.

[3] In this case the facts heretofore noted are sufficient to hold that the foreman or head operator, Bertagnolli, was invested with such general discretionary powers of command over employees as to classify him as a supervisory employee (Bechtel, etc., Corp. v. Ind. Acc. Comm., supra; Vega Aircraft v. Industrial Acc. Comm., supra) duly authorized to represent the company.

[4] Petitioner also contends that the commission's general finding that "the injury herein was caused by the serious and wilful misconduct of the employer" can-

not be sustained because it does not indicate which of the grounds alleged in the application, i.e., Labor Code, §§ 6400–6404, was found to be the basis of the commission's added award. The sections referred to have to do with the safety of the employees, and the duty of the employer with respect thereto. Respondents rely upon Taylor v. Industrial Acc. Comm., 38 Cal. App.2d 75, 100 P.2d 511 and Dawson v. Ind. Acc. Comm., 54 Cal.App.2d 594, 129 P.2d 479. It will not be necessary to consider this point at great length as petitioner in the closing brief or on oral argument did not press it.

It is sufficient to say that in Vega Aircraft v. Industrial Acc. Comm., supra, a wilful misconduct case, not on all fours with the facts of the Taylor case, the court, 27 Cal.2d at page 536, 165 P.2d at page 668 said: "The finding is sufficient because it can be made certain by reference to the record." Whatever merit may be ascribed to the holding in the Taylor case, the Supreme Court in Lumbermen's Mut. Cas. Co. v. Ind. Acc. Comm., 29 Cal.2d 492, at page 499, 175 P.2d 823, 827 (often referred to as the Cacozza case) said: "The case of Taylor v. Industrial Acc. Comm., 38 Cal. App.2d 75, 100 P.2d 511, relied upon by petitioner, insofar as it holds that a finding that there was serious and wilful misconduct is insufficient, is out of harmony with the foregoing authorities, and is disapproved."

This court is bound by the latest expressed view of the Supreme Court, namely, that a general finding will suffice, regardless of the number of allegations set out, to fix the element of serious and wilful misconduct. In substance, it was held that the commission need only find ultimate facts, with no necessity of finding on probative facts upon which the ultimate finding is based. No definition of serious and wilful misconduct on the part of the employer appears in the Workmen's Compensation Act but the purpose of the section has been considered in judicial decisions.

[5, 6] Serious and wilful misconduct is determined upon the facts of each case. It is the rule that whether serious and wilful misconduct has been made out by the evidence is a question of fact for the commission, and a reviewing court will not interfere with the commission's determination on conflicting evidence or on inferences reasonably drawn therefrom. Labor Code, § 5953; Hathaway v. Industrial Acc. Comm., 13 Cal.2d 377, 90 P.2d 68; Ethel D. Co. v. Industrial Acc. Comm., 219 Cal. 699, 28 P.2d 919; Dawson v. Ind. Acc. Comm., supra. There must be knowledge or the equivalent of knowledge, from all the surrounding circumstances, that the act or omission to act is likely to result in serious injury to others. In the present case the foreman knew that he had ordered the employee into such a position that if anyone pressed the switch button that set the machinery in operation, it became a position of danger.

In E. Clemens Horst Co. v. Industrial Acc. Comm., 184 Cal. 180, 193 P. 105, 107, 16 A.L.R. 611, the superintendent of the particular plant involved testified that certain machinery upon which the injured employee was working "occasionally became clogged" and that he knew that a shaft connected with the machine "was 'open underneath and on the back.'" However, as the representative of the owner of the plant he had never "turned his mind to the matter"; he had ignored and dismissed the dangerous condition of the machinery from his mind either through indifference or forgetfulness. Similarly, if the representative of the employer in this case had not forgotten but had *"turned his mind to the matter"* of the employee under the grading cage, the action of pressing the operating button would not have occurred. In Vega Aircraft v. Industrial Acc. Comm., supra, 27 Cal.2d at pages 533, 534, 165 P.2d at page 667, it is said: "Serious and wilful misconduct is conduct which the employer knew, or should have known, was likely to result in serious injury or which evinced reckless disregard for the safety of the employee." The misconduct on the part of the employer must be serious *and* wilful. Labor Code, § 4553. "'Serious misconduct' of an employer must therefore be taken to mean conduct which the employer either knew, or ought to have known, *if he had turned his mind to the matter,* to be conduct likely to jeopardize the safety of his employes." (Emphasis added) E. Clemens Horst Co. v. Industrial Acc. Comm., supra, 184 Cal. at page 188, 193 P. at page 108; see, also, Beven on Workmen's Compensation, Fourth Ed., p. 401. "It is so well settled as to require no citation of authority that petitioner was charged with the duty of maintaining a safe place for its employes to work, and we do not think it can be said the evidence is insufficient to establish serious misconduct, in that petitioner's officers knew, or ought to have known, *if they had turned their minds to consider* the matter, of the conditions under which Mrs. Hamilton was required to work. [Emphasis added] next, as to whether such serious misconduct was 'willful.' It has frequently been said that willful misconduct involves the *knowledge* of the person that the thing which he is doing is wrong. [Citing cases] Conceding that knowledge is required, it seems to us that in order to prove the requisite knowledge, it is not necessary for the evidence to show positively that the person was notified of the unsafe condition of his premises, but that it is sufficient if it appears that the circumstances surrounding the act of commission or omission are such as 'evince a reckless disregard for the safety of others, and a willingness to inflict the injury complained of.' Louisville etc. Ry. Co. v. Bryan, 107 Ind. 51, 7 N.E. 807." E. Clemens Horst Co. v. Industrial Acc. Comm., supra, 184 Cal. at page 189, 193 P. at page 108, 16 A.L.R. 611; see, also, Dawson v. Ind. Acc. Comm., supra; Porter v. Hofman, 12 Cal.2d 445, 85 P.2d 447.

In Johannsen v. Industrial Acc. Comm., 113 Cal.App. 162, 166, 298 P. 99, 100, it is said: "Had he turned his mind to a consideration of the subject, he must have known that a person working in the trench was in jeopardy, which danger could readily have been obviated by the necessary bracing."

It has been said that wilfulness must show some degree of wantonness. The word "wanton" may not be an apt expression to be used in defining "wilful misconduct" as the latter term *is used in the Workmen's Compensation Act.* Labor Code, § 4553. "Wanton" as there used means merely that the act or its omission was reckless and in disregard of injury likely to occur to others. It is noteworthy that recent Supreme Court decisions relative to wilfulness as used in section 4553 are not based upon the use of the word "wanton." Vega Aircraft v. Industrial Acc. Comm., supra; California Shipbuilding Corp. v. Ind. Acc. Comm., supra; Hatheway v. Industrial Acc. Comm., supra; Bethlehem Steel Co. v. Ind. Acc. Comm., 23 Cal.2d 659, 145 P.2d 583.

[7] The test whether an act is *wilful* misconduct as used in section 4553 is not that the employer knew that the act would, and intended that it should, harm an employee, but rather that the employer or his managing official representative knew or *should have known* that the performance of the act or its omission *was likely* to cause harm to an employee. Parkhurst v. Industrial Acc. Comm., 20 Cal.2d 826, 129 P.2d 113; Bethlehem Steel Co. v. Ind. Acc. Comm., supra; Vega Aircraft v. Industrial Acc. Comm., supra.

A given condition may be the result of facts constituting mere negligence, whereas under different circumstances it may be regarded as arising from wilful misconduct. In the present case the foreman testified that it was not safe for an employee to be where "he [the employee] was" if the machinery was put in motion.

Petitioner contends that the facts here present merely a case of negligence based upon forgetfulness. Forgetfulness assumes at least a momentary period during which one is insensible of previous knowledge of facts, circumstances or conditions. Heedlessly omitting to do or not to do an act which results in injury to another may be the basis of a suit for damages. *A transitory or short lived period of oblivion to a known danger is negligence as a matter of law where the forgetfulness is not induced by some sudden and inadvertent disturbing cause.* 19 Cal.Jur., p. 586, sec. 28. Whether some sudden and sufficiently disturbing cause intervened is a question to be determined by the triers of the facts.

Negligent conduct may occur from inadvertently doing an act or inattentive omission of its performance. Wilful misconduct means something more. As applied to the facts of the present case a condition had arisen solely by reason of the corporation representative placing an employee in a position of danger. No concurrent or contributing act or omission to act was involved. The full duty to protect the employee rested upon the corporation's representative. The effort made by the employee to escape from the position of danger was nullified and extinguished by the representative of the corporation. The foreman ordered the employee into a space to clear the screen of rock. He testified that the operation of the machine had been stopped because trucks had not arrived with rock, and that his attention had been distracted by another employee. With this condition existing, when trucks arrived with rock the foreman ascended the platform or tower from which he could see the operation of the several screens and the machinery, but could not see the employee under the screens. He pressed the button or buttons located behind him, which started the operation of the machinery, and stopped it immediately when he heard the cry of the employee when injured. The foreman knew that the employee had descended below the screen, and knew that starting the machinery would result in danger to the employee. Gorden v. Industrial Acc. Comm., 199 Cal. 420, 249 P. 849, 58 A.L.R. 1374.

There is evidence that the foreman did not see the employee when he was under the so-called chute. There is evidence that the foreman from the operating tower saw another employee on an upper chute and waited until that man was out of danger; and there is evidence from which a reasonable inference may be drawn that not until Horton "was carried up on top of the screen" through the operation of the machinery "and he jumped up and held himself on the structure" was the foreman able to see him, although he had previously heard him "holler."

While forgetfulness of a known danger alone under some circumstances may constitute only negligence, in the present case there was more than inattention. The sending of an employee into, under or near machinery which, if it moves, will injure him, without providing some means of protecting such employee other than the memory of the foreman when starting the machinery, he being in a position where he could not observe the peril of the employee, was in and of itself sufficient to warrant a finding of wilful misconduct by the commission.

[8, 9] Whether the failure of the *company* to place the head operator in a position where he could see an employee working under the screen; whether there was a distraction of the foreman's mind sufficient to exonerate the employer from the charge of wilful misconduct; and whether the corporation had taken reasonable precaution, irrespective of statutes or rules, to eliminate reckless conduct on the part of a foreman, in view of all the facts and circumstances of this case, were questions to be decided by the triers of the facts. Bethlehem Steel Co. v. Ind. Acc. Comm., supra; Neel v. Mannings, Inc., 19 Cal.2d 647, 122 P.2d 576; Gibson v. County of Mendocino, 16 Cal.2d 80, 105 P.2d 105. A reviewing court may not say as a matter of law, in view of all the facts and circumstances, that the finding of serious and wilful misconduct is not supported or that it is unreasonable or in excess of the powers of the commission. On the contrary, the commission was justified in finding serious and wilful misconduct in that the act of directing an employee to perform the particular work assigned, with the possibility of starting up the machinery before the completion thereof, was the performance of a reckless act that was dangerous and likely to result in physical injury.

The award of the commission is affirmed.

PETERS, P. J., and BRAY, J., concur.

## CASTLE v. SCHULMAN et al.*
## Civ. 16062.

**District Court of Appeal, Second District, Division 2, California.**

**Oct. 15, 1947.**

**Hearing Granted Dec. 11, 1947.**

**1. Constitutional law ⟹290(6)**

If a street improvement bond is foreclosed by a city treasurer, the notice by publication required by statute constitutes due process of law and binds owners and holders of junior bonds. Streets and Highways Code, § 6503.

**2. Constitutional law ⟹290(6)**
**Municipal corporations ⟹579**

A foreclosure and sale through court proceedings of property under a defaulted street improvement bond, which was a prior lien on the property, did not constitute due process of law so far as junior bondholder was concerned, where junior bondholder was not made a party to the foreclosure action, and hence proceeding did not automatically eliminate junior lien of another street improvement bond on the same property.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Richard Castle against Irving Schulman and others, to quiet title to realty. From an order granting a motion for a new trial after judgment had been ordered for plaintiff, plaintiff appeals.

Order affirmed.

Ernest A. Oswald, of Los Angeles, for appellant.

Max Bergman and Leo Goodman, both of Los Angeles, for respondent Schulman.

McCOMB, Justice.

Plaintiff appeals from an order granting a motion for a new trial in an action to quiet title to certain real property after judgment had been ordered for plaintiff.

These are the undisputed facts:

Plaintiff and his wife are vested with title to a parcel of real estate through a commissioner's deed issued to them upon the completion of a court foreclosure of a defaulted street improvement bond.

Defendant Schulman is the owner of a certificate of sale issued by a city treasurer upon the foreclosure of another street improvement bond on the same property which was issued subsequently to the bond which is the basis of plaintiff's title. The owner or holder of the street improvement bond upon which defendant bases his claim to an interest in the property was not named or brought in as a party to the foreclosure action through which plaintiff obtained a commissioner's deed.

Plaintiff instituted the present action to quiet his title against defendant's subsequently issued bond and junior lien against the property.

This is the sole question for our determination:

*Does the foreclosure and sale through court proceedings of property under a defaulted street improvement bond, which is a prior lien on the property, automatically eliminate a junior lien of another street improvement bond on the same property, although the holder of the junior bond is not made a party to the foreclosure action?*

This question must be answered in the negative. The lien of a junior bond is not eliminated by the foreclosure through court proceedings of a senior bond when the holder or owner of the junior bond is not made a party to the foreclosure proceedings. (Wood v. Brady, 68 Cal. 78, 79, 5 P. 623, 8 P. 599. See also, Lee v. Silva, 197 Cal. 364, 369, 240 P. 1015; Wemple v. Yosemite Gold Min. Co., 4 Cal.App. 78, 86, 87 P. 280; Fox v. California Title Ins. Co., 120 Cal. App. 264, 266, 7 P.2d 722.)

Plaintiff argues that the foreclosure through court action of a street improvement bond eliminates junior liens, even though the owner or holder of the bond which creates the junior lien is not made a party to the action, because the holder of the street bond could have had the city treasurer, through appropriate proceedings pursuant to the provisions of sections 6500 et seq., of the Streets and Highways Code, foreclose the bond without making the holder or owner of the junior bond a party.

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* Subsequent opinion 195 P.2d 781.

[1] There is no merit in this contention for the reason that if a bond is foreclosed by a city treasurer, the treasurer is required to publish a notice of the sale of the property covered by the bond in a newspaper of general circulation in the city in which the bond was issued. (Sec. 6503, Streets and Highways Code.) This notice constitutes due process of law and binds the owners and holders of junior bonds.

[2] In the present case plaintiff is attempting to eliminate the lien of the junior bond holder without giving him any notice. Hence the proceeding does not constitute due process of law so far as the junior bond holder is concerned unless he is made a party to the foreclosure action. Since defendant was not made a party to the foreclosure action, his claim was not eliminated by the foreclosure instituted by plaintiff and the trial judge properly granted a motion for a new trial after judgment had been ordered in favor of plaintiff in the present quiet title action.

The order granting a new trial is affirmed.

MOORE, P.J., and WILSON, J., concur.

81 Cal.App.2d 934

## PEOPLE v. AVELINO.

Cr. 4146.

District Court of Appeal, Second District, Division 2, California.

Oct. 17, 1947.

**1. Criminal law 🔑1207**

A statute providing for change in treatment or disposition of inmates of a penal institution does not affect final judgment by which a felon has been sentenced to life imprisonment.

**2. Criminal law 🔑1202(6)**

The 1941 amendment to Penal Code making every person who had previously been adjudged to be an habitual criminal under statute as it read prior to effective date of amendment, eligible for release on parole after he shall have served minimum term of at least 12 years is merely a direction to Board of Prison Terms and Paroles, and is not an authorization to courts to vacate or revise their final judgments adjudging persons to be habitual criminals, which were rendered prior to the amendment. Pen. Code, § 644, as amended by St. 1941, p. 1082; §§ 3047, 3048, 3048.5.

**3. Criminal law 🔑996(2)**

A court is without jurisdiction to modify a sentence which it has pronounced if such sentence has been entered in minutes of court or if defendant has already begun serving his sentence.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

William Walter Avelino was convicted of attempted burglary of second degree and was adjudged habitual criminal by reason of three prior convictions, and he appeals from order denying his motion to modify that provision of the judgment of his conviction adjudicating him to be an habitual criminal.

Affirmed.

Fred N. Howser, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

Alexander L. Oster, of Los Angeles, for appellant.

MOORE, Presiding Justice.

Appeal from an order denying appellant's motion to modify that provision of the judgment of his conviction adjudicating him to be an habitual criminal.

On March 30, 1945, appellant was convicted of attempted burglary of the second degree and was adjudged an habitual criminal by reason of three prior convictions for each of which he had served a term in the state prison. Having been sentenced to serve the term prescribed as provided by section 644 of the Penal Code as enacted in 1941 (Stats. 1941, ch. 106, p. 1082, sec. 10), and having commenced the service of his sentence, the judgment was in effect his imprisonment for life in the state penitentiary. Thereafter in 1945 section 3048.5 was added to the Penal Code providing:

(1) Every person heretofore adjudged to be an habitual criminal under section 644 as it read prior to the enactment of this statute who could have been adjudged to be an habitual criminal under section 644 as amended by this statute shall be imprisoned for life and shall be eligible for a release on parole as provided under section 3047 and 3048 of this Code.

(2) Every such person heretofore adjuded to be an habitual criminal under paragraph (a) of section 644 as it read prior to the effective date of this statute shall be eligible for release on parole after he shall have served the minimum term of at least twelve years.

(3) "Every other person heretofore 'adjudged or determined to be an habitual criminal under either paragraph (a) or (b) of Section 644 of the Penal Code as that section read prior to the effective date of this act, shall be deemed to be imprisoned for life and shall be eligible for release on parole after he shall have served a minimum term of seven calendar years."

[1-3] Appellant contends that section 3048.5 is retroactive and therefore authorized the trial court to revise its judgment determining him to be an habitual criminal under the statute of 1941 by striking therefrom such adjudication. Such is not a reasonable interpretation of the quoted section. A statute providing for a change in the treatment or disposition of the inmates of a penal institution does not affect a final judgment by which a felon has been sentenced to life imprisonment. Section 3048.5 insofar as it applies to those already adjudged to be habitual criminals at the time of its enactment is merely a direction to the Board of Prison Terms and Paroles. It is not an authorization to the courts to vacate or revise their final judgments. It is the rule that a court is without jurisdiction in any manner to modify a sentence which it has pronounced if such sentence has been entered in the minutes of the court or if the defendant has already begun serving his sentence. People v. McAllister, 15 Cal.2d 519, 526, 102 P.2d 1072; People v. McVicker, 37 Cal.App.2d 470, 473, 99 P.2d 1110.

It is true that under the judgment and the statute of 1941 appellant is deemed to be serving a term for life, and that section 3048.5 provides for his parole after serving seven years. But there is no provision in the latter statute requiring the Board to parole him after seven years, although it does specifically declare that he shall be eligible for release on parole after he shall have served a minimum term of seven calendar years. Such provision for eligibility to parole is not the equivalent of a valid legislative direction to a trial court to amend its final judgments.

The order is affirmed.

McCOMB and WILSON, JJ., concur.

81 Cal.App.2d 967

**BETTY v. KNAPP et al**

**KNAPP v. BETTY et al.**

**Civ. 15891.**

District Court of Appeal, Second District,
Division 2, California.
Oct. 21, 1947.

Rehearing Denied Nov. 10, 1947.
Hearing Denied Dec. 18, 1947.

**1. Execution** 🔑73

Whether reasonable diligence has been exercised by an applicant for a writ of execution under statute dealing with execution of judgment after five years, is for determination by trial court whose decision will not be disturbed unless an abuse of discretion is shown. Code Civ.Proc. § 685.

**2. Execution** 🔑73

Evidence established that plaintiff acted with due diligence and was entitled to writ of execution on judgment under statute dealing with execution of judgment after five years. Code Civ.Proc. § 685.

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Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Lorn H. Betty against June Knapp and E. W. Knapp, husband and wife and Ellen B. Crowder to set aside as in fraud of creditors a conveyance made by Ellen B. Crowder to June Knapp, wherein judgment was entered in favor of the plaintiff. A writ of execution was issued by the Superior Court as against E. W. Knapp only, and he, opposed by Maurice Rose, doing business as the Golden State Finance Company, appeals.

Order affirmed.

S. V. O. Prichard, Oliver O. Clark and Robert A. Smith, all of Los Angeles, for appellant.

Alexander L. Oster and Marion P. Betty, both of Los Angeles, for respondents.

McCOMB, Justice.

From an order granting a motion for a writ of execution under Section 685 of the Code of Civil Procedure as against defendant E. W. Knapp only, he appeals.

These are the undisputed facts:

May 6, 1929, plaintiff recovered a judgment against Ellen B. Crowder and E. W. Knapp. The judgment became final on November 19, 1929. The action was number 260-222 in the superior court of Los Angeles county. On January 22, 1932, plaintiff commenced the present action for the purpose of setting aside as in fraud of creditors a conveyance made during the pendency of action number 260-222 by Ellen Crowder to June Knapp, the wife of defendant E. W. Knapp. On September 20, 1932, judgment was entered in this action in favor of plaintiff for $3431.50. The judgment, however, as against the defendant June Knapp was for costs only, which judgment recited that the judgment as against June Knapp had been fully satisfied.

On August 19, 1942, plaintiff obtained an alias writ of execution from the superior court of Los Angeles county directed to the sheriff of Orange county with instructions to levy the execution on real property of defendants in such county. This the sheriff did on October 20, 1942, whereupon June Knapp, wife of defendant E. W. Knapp, filed an action in the superior court of Orange county to enjoin the sheriff from selling the property upon which he had made levy. Within sixty days thereafter the sheriff returned the alias writ of execution wholly unsatisfied. The injunction suit in Orange county resulted in judgment in favor of plaintiff herein on March 7, 1945. Thereafter on September 13, 1945, a motion for a new trial was denied in said action.

On September 19, 1945, the sheriff of Orange county was instructed, pursuant to a writ of enforcement issued by the clerk of the superior court of Orange county, to sell the real property upon which he had previously made levy. On December 11, 1945, the Orange county superior court, however, quashed the writ of enforcement.

Based upon a recital of the foregoing facts a writ of execution under Section 685 of the Code of Civil Procedure was issued by the superior court of Los Angeles county in the present action on April 5, 1946, the motion for such order having been noticed for hearing March 6, and submitted on March 13, 1946.

This is the sole question necessary for us to determine:

*Was there sufficient showing that plaintiff had acted diligently in endeavoring to obtain a satisfaction of his judgment against defendant to warrant the issuance of the writ of execution under the provisions of Section 685 of the Code of Civil Procedure?*

[1] This question must be answered in the affirmative. Whether in a particular case reasonable diligence has been exercised by an applicant for a writ of execution under Section 685, Code of Civil Procedure is a matter for the determination of the trial court whose decision will not be disturbed on appeal unless it is shown that the trial court has abused its discretion.

In the present case the record discloses that an alias writ of execution was issued on August 19, 1942. We must presume that since the court gave an order for the issuance of this alias writ of execution plaintiff made a satisfactory showing of due diligence before the order was made. The record further shows that plaintiff was not able to enforce this alias writ of execution for the reason that an action was instituted in the superior court of Orange county by which the sheriff of that county was restrained from enforcing the writ until March 7, 1945, the date of the judgment in favor of plaintiff herein in the Orange county action.

[2] It is clear that plaintiff was not guilty of laches in failing to take further action until the motion for a new trial was denied September 13, 1945. He then promptly sought a writ of enforcement in Orange county which was quashed on December 11, 1945. Within three months the present motion was noticed for hearing, and within thirty days thereafter the motion was granted. From such facts it is evident that the trial court did not abuse its discretion in holding that plaintiff had acted with due diligence and that he was therefore entitled to a writ of execution pursuant to Section 685, Code of Civil Procedure.

The order is affirmed.

MOORE, P. J., and WILSON, J., concur.

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81 Cal.App.2d 919

## KINERT et ux. v. WRIGHT et ux.

**Civ. 15944.**

District Court of Appeal, Second District, Division 2, California.

Oct. 17, 1947.

**1. Trusts ⇨101**

Where defendant agent to whom plaintiffs furnished money to purchase specific tract of land purchased a larger tract for less money and, while concealing the facts from plaintiffs, took title to entire property in his own name and executed a spurious deed of trust thereon for purpose of making personal profit on transaction, plaintiffs were entitled to decree that they were owners of entire tract and that defendant held title in trust for them.

**2. Trusts ⇨101**

A person to whom funds are furnished to purchase property and who then takes title in his own name takes it as trustee for person providing the money.

**3. Trusts ⇨325**

A trustee is obligated to render to his beneficiary a full account of dealings with trust fund and where he refuses to account, all presumptions will be against him upon a settlement.

**4. Trusts ⇨289**

A trustee's duty to account for funds and property is not satisfied by rendition of a paper account showing disposition of property, but trustee is under duty to deliver property to his beneficiary.

**5. Principal and agent ⇨48, 56**

The relations of principal and agent are fiduciary in character, and an agent may not do anything which trustee is forbidden to do and may not act in his own name unless it is the usual course of business to do so. Civ.Code, § 2322.

**6. Trusts ⇨231(1)**

A trustee acquiring an interest adverse to that of his beneficiary in subject of trust must immediately inform beneficiary thereof, and failure to do so is a fraud against beneficiary. Civ.Code, §§ 2233, 2234.

**7. Principal and agent ⇨69(6)**

An agent given a specific amount of money to purchase specific property could not lawfully and by secret agreement purchase more property than that specified and retain excess property and money as his secret profit. Civ.Code, §§ 2233, 2234, 2322.

**8. Trusts ⇨102(1)**

When plaintiffs' funds passed into defendant's hands to purchase a specific tract of land, a confidential relationship was created and defendant was bound to exercise utmost good faith in use of money, regardless of whether words "trustee" or "agent" were spoken by parties in connection with transaction. Civ.Code, §§ 2233, 2234.

**9. Principal and agent ⇨48, 69(1)**

An agent is charged in full measure with duty of honesty and loyalty toward principal, and his obligation demands strictest integrity and the most faithful service and precludes him from taking any advantage. Civ.Code, § 2322.

**10. Principal and agent ⚷69(3)**

An agent must disclose to principal every fact known to him bearing upon value of property with which parties are dealing, the concealment of which would lead to principal's injury. Civ.Code, § 2322.

**11. Principal and agent ⚷69(3)**

Where agent deals with principal and obtains any benefit through transaction, agent has burden, as in case of a trustee, to show that no unfair means were used by him in such dealings. Civ.Code, §§ 2233, 2234.

**12. Trusts ⚷101**

An agent who was furnished money to purchase property became a "trustee" when he took title to property in his own name, using such money to make the purchase. Civ.Code, §§ 853, 2223, 2229, 2237.

See Words and Phrases, Permanent Edition, for all other definitions of "Trustee".

**13. Trusts ⚷352**

The fact that money given by plaintiffs to defendant to purchase specific property was not used by defendant in purchase of property, but was mingled with defendant's own money which was used to purchase a larger tract, including property specified, did not give defendant right to any of the property, where defendant at all times acknowledged that he had received money for purpose of procuring specific property. Civ.Code, §§ 853, 2223, 2229, 2237.

**14. Trusts ⚷101**

The defendant's acceptance and use of plaintiffs' money, which he mingled with his own funds, made defendant plaintiffs' agent and trustee without any express acknowledgment of trust on his part and imposed upon him the legal and equitable obligations of a fiduciary. Civ.Code, §§ 853, 2223, 2229.

**15. Trusts ⚷101**

Where agent is given funds with which to purchase property, but he purchases property for himself with his own funds he becomes trustee of and is deemed to hold title for his principal just as if he had used funds entrusted to him by principal. Civ.Code, §§ 853, 2223, 2229.

**16. Principal and agent ⚷69(6)**

If agent to whom money was advanced by principal to purchase specific property used his own money to purchase property, he was nevertheless plaintiffs' agent, the money advanced by him would be deemed to be a loan and his obligation to his principals would remain unchanged. Civ.Code, §§ 853, 2223, 2229.

**17. Trusts ⚷312**

Where defendant, to whom plaintiffs entrusted money to purchase specific property, purchased a larger tract with less money without disclosing the facts, defendant was not entitled to reimbursement for expenditures in tax suit involving such property and for other purposes in connection therewith. Civ.Code, §§ 2273, 2275.

**18. Trusts ⚷236**

The statutory provision authorizing reimbursement of trustee for expenditures is applicable only when trustee has acted honestly, dealt fairly with beneficiary and has not attempted to make secret profit or otherwise deceive and defraud beneficiary, and an involuntary trustee becoming such through his own fault is not entitled to reimbursement. Civ.Code, §§ 2273, 2275.

**19. Trusts ⚷236**

Where defendant to whom plaintiffs had entrusted $1,200 to purchase specific land spent $500 for purchase of a larger tract and his claim that he paid $120 as commission was not disputed by plaintiffs, defendant was entitled to credit for $620 and plaintiffs were entitled to recover the balance of $580.

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Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Reed C. Kinert and another against George G. Wright and another to recover title to property. From a judgment awarding plaintiffs only a portion of the property involved, the plaintiffs appeal.

Judgment modified and, as so modified, affirmed.

Blanche & Fueller, of Pasedena, for appellants.

Robt. E. Rosskopf, of Los Angeles, for respondents.

WILSON, Justice.

Appellants furnished money to their agent, respondent George G. Wright, for the purpose of purchasing a parcel of real estate selected and designated by them. He purchased not only the desired property but adjoining property as well, using therefor only a portion of the funds which they had furnished. This action was brought by appellants to recover title to the entire property so purchased. They have appealed from the judgment by which they were awarded only the portion that they originally designated. The appeal is on the judgment roll. The term "respondent" used herein refers to George G. Wright; "respondents" means both defendants, who are husband and wife.

1. The facts as stated in the findings. (The quotations are from the text of the findings of the trial court.) In February, 1945, appellants handed $1,200 to respondent "as their agent" for the purpose of purchasing a parcel of real property which they had selected. He represented that he could purchase it for that sum, accepted the money and "became plaintiffs' agent" for that purpose. A written memorandum was executed by respondent acknowledging receipt of the money. The representation that it would take $1,200 to buy the property was well known to respondent to be false and fraudulent in that not only the property selected by appellants but it and adjoining property as well could be purchased for less than that sum. Respondent made the false representations "intending to profit by his agency at the expense of plaintiffs" by purchasing with less than $1,200 more than the land desired by appellants and to use the additional land for his "own secret profit."

"In pursuance of his scheme to take advantage of plaintiffs" respondent did, prior to March 28, 1945, without informing appellants, purchase for $500 title to a large tract of land which included the property selected by them, subject to taxes ultimately determined to be $1,039 and street bonds then amounting to $294 with interest. Respondent subsequently admitted that he held title to the property which had been selected by appellants in trust for them.

The money received by respondent from appellants "was not used by defendants in the purchase of said property." It was mingled by respondent with his own funds and used "for his own purposes as his own money," but at all times he acknowledged that he had received $1,200 from appellants for the purpose above stated. He admitted his fiduciary relationship to them as a consequence thereof but such admission was only as to the portion of the property which they had selected. He at no time revealed the facts with reference to the amount paid for the property or the extent of the purchase or the encumbrances against the property, but at all times represented that he had purchased for appellants' account only that portion of the property which they had previously chosen and that he had paid therefor the total sum of $1,200. The representation so made "was knowingly false and untrue."

Without informing appellants of the facts relating to the purchase of the property respondent entered into a written contract with appellants whereby he agreed to build a house for them on the property they had selected. After the work of constructing the residence had been commenced respondent abandoned the contract and refused to complete the building.

Thereafter respondent made a purported accounting to appellants for the money received by him wherein he claimed to be entitled to $1,200, the purchase price of the property, plus $120 commission, although he had paid only $500 for the large tract of land and still retained the balance of appellants' money.

Unknown to appellants, taxes on the property had not been paid and were delinquent, the entire tract having been sold for nonpayment thereof. About July, 1945, by an action in court, the delinquent taxes were found to be $1,039. Respondent expended $160 for costs and attorney's fees in the action. In January, 1946, respondent redeemed the entire property from the delinquent taxes. The unpaid bonded indebtedness for street improvements remained a lien upon the property which, with interest and penalties, amounted to more than $1000 at the time of the trial. Respondent at no time disclosed to appellants the fact that the liens existed against the property, and the expenditures made by him were in pursuance of his "scheme to obtain a secret profit" at appellants' expense.

In August, 1945, respondents executed and delivered to appellants a grant deed covering the small tract that had been selected by the latter, subject to the taxes and street improvement bonds above mentioned and further subject to a recorded dummy deed of trust that had been executed by respondents without having received any consideration therefor, the beneficiary of which, contemporaneously with the execution of the deed of trust, had signed and delivered to respondents a request for reconveyance. Despite the fact that the deed of trust "was merely a sham" and had been executed without consideration, respondents refused to surrender the request for reconveyance until March 1, 1946, with the result that from the date of the deed from respondents to appellants until said March 1, the title to the property remained clouded by the spurious deed of trust, thereby preventing appellants from refinancing the property in order to complete the construction of the building which respondent had abandoned.

2. The conclusions of law and the judgment. From the foregoing findings of fact the court drew conclusions of law that appellants were entitled to have a clear title to the small tract of land which they had originally selected; that respondents should be required to execute such instruments as were necessary to that end; that appellants were entitled to have the existing lien of the street improvement bonds paid by respondents; that if respondents failed to pay the same within 15 days from the date of judgment appellants should pay the bonds and have a lien for the amount so paid on the real property purchased by respondents and allowed by the judgment to be retained by them; that appellants were entitled to a judgment against respondents for the sum of $820 with a lien therefor upon the property remaining in the names of respondents. Judgment was entered in accordance with the conclusions of law.

By their complaint appellants sought a judgment decreeing that they were the actual and legal owners of the entire property purchased by respondent; that respondent held title thereto in trust for appellants and that he be required to convey the entire tract to them. At the conclusion of the trial the court entered the following order in its minutes: "It is ordered that plaintiffs have judgment as prayed." Such is the judgment required by the law and the facts, but the judgment entered is at variance with the judgment ordered and affords far less relief to appellants than that to which they are entitled.

[1] Since the court found the facts to be that appellants furnished the sum of $1,200 to respondent; that he purchased the large tract of land for $500, at the same time representing that the entire sum had been paid for the smaller tract; that respondent became and was appellants' agent; that the representation as to the amount paid and the property purchased was known by respondent to be false and untrue; that respondent took title to the entire property in his name; that he executed and recorded a spurious deed of trust thereon, it is manifest that appellants should be granted the entire relief sought by their action. The conclusions of law must be amended and the judgment modified.

[2-4] 3. The obligations of an agent or a trustee. It is elementary that when one person furnishes funds to another with which to purchase property and the latter takes title in his own name he takes it as trustee for the person whose money was expended in the purchase. A trustee is under obligation to render to his beneficiary a full account of his dealings with the trust fund and where he refuses to account all presumptions will be against him upon a settlement. Bone v. Hayes, 154 Cal. 759, 766, 99 P. 172. The duty to account for funds and for property is not satisfied by the rendering of a paper account showing

the disposition made of the trust property. Obviously the mere furnishing of an account showing the receipt of trust funds and the use made thereof does not fulfill the duties of a trustee. He is under the further constraint to deliver the property to his beneficiary, since the latter is the rightful owner.

[5-7] The relations of principal and agent, like those of beneficiary and trustee, are fiduciary in character. An agent may not do anything which a trustee is forbidden to do, and may not act in his own name unless it is the usual course of business so to do. (Civ.Code, § 2322.) If a trustee acquires any interest adverse to that of his beneficiary in the subject of the trust he must immediately inform the latter thereof and a failure so to do is a fraud against the beneficiary. Civ. Code, §§ 2233, 2234; MacDermot v. Hayes, 175 Cal. 95, 103, 170 P. 616. Since at the inception of the transaction respondent was admittedly the agent of appellants he could not lawfully enter into a secret agreement whereby he would purchase more property than that selected by them with less money than they furnished and retain the excess property and money as his secret profit. Rezos v. Zahm & Nagel Co., 78 Cal.App. 728, 731, 246 P. 564; Mabry v. Randolph, 7 Cal.App. 421, 426, 94 P. 403; 3 C.J.S. Agency, § 144c, p. 24.

[8-10] It is of no consequence whether the word "trustee" or "agent" was spoken by the parties in their oral agreement or written in respondent's acknowledgment of the receipt of the money. The fiduciary relationship between the parties was brought into existence by their acts even though not expressed in apt words. When appellants' funds passed into respondent's hands for the specifically agreed purpose of purchasing a definite tract of land the confidential relationship was created and respondent was bound to exercise the utmost good faith in the use of the money. An agent is charged in full measure with the duty of honesty and loyalty toward his principal, not only in form but in substance. His obligation to his principal demands the strictest integrity and the most faithful service and precludes him from taking any advantage. Calmon v. Sarraille, 142 Cal. 638, 641, 76 P. 486; Rubidoex v. Parks, 48 Cal. 215, 219. An agent must disclose to his principal every fact known to him bearing upon the value of the property with which the parties are dealing, the concealment of which would lead to the injury of the principal. Thomas v. Snyder, 114 Cal.App. 397, 404, 300 P. 117.

[11] The duties of an agent are similar to those of a trustee and his acts are judged in almost the same degree of strictness as those of a trustee. Where the agent deals with his principal and obtains any benefit through the transaction the burden is upon the agent, as it is upon a trustee, to show that no unfair means of any kind were used by him in such dealings. Williams v. Lockwood, 175 Cal. 598, 601, 166 P. 587; Swan v. Smith, 102 Cal.App. 541, 544, 283 P. 829.

[12] Though respondent was appellants' agent when their relationship began he became their trustee when he took title to the property in his own name, using their money with which to make the purchase. (Civ. Code, sec. 853; Viner v. Untrecht, 26 Cal.2d 261, 269, 158 P.2d 3; Brown v. Spencer, 163 Cal. 589, 593, 126 P. 493; Kirk White & Co. v. Bieg-Hoffine Co., 6 Cal.App.2d 188, 191, 44 P.2d 439. One who wrongfully detains a thing is an involuntary trustee thereof for the benefit of the owner. (Civ. Code, sec. 2223.) A trustee may not use the trust property for his own profit (sec. 2229) and if he does so may be required by the beneficiary to account for all profits made by him (sec. 2237).

The facts which we have narrated abundantly demonstrate respondent's utter failure to observe the obligations that rested upon him and his violation of every rule of conduct imposed upon a fiduciary.

[13-16] The finding to the effect that appellants' $1,200 was not used by respondent in the purchase of the property but that he mingled their money with his own and used it for his own purposes does not support respondent's claim to ownership of any of the property for two reasons: (1) The court found that at all times after purchasing the property respondent ac-

knowledged that he had received the money from appellants for the purpose of procuring the land selected by them and admitted his consequential fiduciary relationship to them as to that property. His failure to admit or even his denial of such relationship as to the entire tract is of no significance in the result of this action. His acceptance and use of the money made him appellants' agent and trustee without an express acknowledgment of the trust on his part and imposed upon him the legal and equitable obligations of a fiduciary. He at no time, according to the findings, revealed to appellants the actual facts with reference to the amount paid for the property, or to the extent of the purchase made by him, or to the encumbrances against the property. In this he violated the rules of common honesty and straightforwardness, to say nothing of his fiducial duty, whether he be denominated an agent or a trustee. (2) When an agent is given funds with which to purchase a property for his principal and he purchases it for himself with his own funds the same rule applies as if he had made the purchase with the funds of his principal—he becomes the trustee of and is deemed to hold title for his principal just as if he had used the funds entrusted to him by the latter. Hellman v. Messmer, 75 Cal. 166, 170, 16 P. 766; Johnson v. Hayward, 74 Neb. 157, 103 N.W. 1058, 1059, 107 N.W. 384, 385, 5 L.R.A.,N.S., 112, 12 Ann.Cas. 800; Havner Land Co. v. MacGregor, 169 Iowa 5, 149 N.W. 617, 619; Allen v. Malone, 2 Iowa (Cole's Ed.) 591, 595. If it should be conceded (a concession that appellants do not grant and we find nothing in the record to warrant it) that respondent used his own money in the purchase of the property, he was nevertheless the agent of appellants, the money advanced by him would be deemed to be a loan, and his obligation to his principals would remain unchanged. Brown v. Spencer, 163 Cal. 589, 593, 126 P. 493; Schrager v. Cool, 221 Pa. 622, 70 A. 889, 891. See also Jackson v. Stevens, 108 Mass. 94, 97; McDonough v. O'Niel, 113 Mass. 92, 95.

**[17, 18]** 4. Respondent's right to reimbursement for expenditures made by him. The fraud and deception of respondent deprive him of the right to repayment of his expenditures for attorney's fees in the tax suit and for other purposes in connection with the property. Section 2273 of the Civil Code provides that a trustee is entitled to reimbursement out of the trust property of all expenses actually and properly incurred by him in the performance of his trust. This rule is applicable only when the trustee has conducted the affairs of the trust honestly, has dealt fairly with his beneficiary, and has not attempted to make a secret profit for himself out of the trust property or otherwise to deceive and defraud those who entrusted him with their business. An involuntary trustee who becomes such through his own fault is not entitled to reimbursement. Civ.Code, sec. 2275; Title Insurance & Trust Co. v. California Dev. Co., 171 Cal. 173, 220, 152 P. 542; Marsh v. Smith, 46 Cal.App. 692, 699, 189 P. 1037. The beneficiary "is under absolutely no obligation to repay these outlays." McArthur v. Goodwin, 173 Cal. 499, 505, 160 P. 679, 682.

It follows from the foregoing that appellants are entitled to judgment as prayed in their complaint and as originally ordered by the court for the recovery of the entire property purchased by respondent in his own name and the latter is not entitled to repayment of the amounts that he expended in connection with the fraudulent transaction.

**[19]** Respondent received $1,200 from appellants, asserting that the small tract selected by them could be purchased for that sum and falsely representing that it was free and clear of encumbrances. He paid $500 for the large parcel of land. The finding is that in his accounting he claimed to have paid $120 as commission. There is no finding that the commission was not paid, the evidence is not before us, and appellants do not dispute the claim. Allowing respondent his full due he is entitled to credit for $620 and appellants should recover the difference between that sum and the amount entrusted to him amounting to $580.

The conclusions of law are amended as follows: (1) By striking from paragraph 1 the word and Roman numeral "Paragraph

IV" and inserting in lieu thereof "Paragraph III"; (2) by striking out paragraphs 2, 3 and 4; (3) by inserting a conclusion that appellants are entitled to recover from respondent the sum of $580. The judgment is modified so as to conform with the conclusions of law as thus amended, and as so modified the judgment is affirmed. Appellants shall recover their costs on appeal.

MOORE, P. J., and McCOMB, J., concur.

81 Cal.App.2d 936

**GRAYBAR ELECTRIC CO., Inc., v. LOVINGER.**

**Civ. 15832.**

**District Court of Appeal, Second District, Division 3, California.**

Oct. 17, 1947.

**1. Limitation of actions 🔑110**

The section of federal Bankruptcy Act suspending operation of federal and state statutes of limitations, affecting bankrupt's debts provable under such Act, from date of filing of bankruptcy petition until 30 days after date of entry of order denying bankrupt's discharge, does not extend time for bringing action against bankrupt only from date of expiration of statutory limitation period during pendency of bankruptcy proceedings until 30 days after denial of discharge, but adds time between filing of bankruptcy petition and order denying discharge to such limitation period. Code Civ.Proc. § 337; Bankr.Act, § 11, sub. f, 11 U.S.C.A. § 29, sub. f.

**2. Limitation of actions 🔑114**

Suspension of operation of statute of limitations for given period adds equal period to statutory limitations period. Code Civ.Proc. § 337.

**3. Limitation of actions 🔑110**

An action for balance due on open book account and account stated, brought over 4 years after causes of action accrued, but within such period plus 11 months elapsing between date of filing of defendant's bankruptcy petition and that of referee's order denying discharge, was not barred by 4 years statute of limitations. Code Civ.Proc. § 337; Bankr.Act, § 11, sub. f, 11 U.S.C.A. § 29, sub. f.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by the Graybar Electric Company, Inc., against Andrew R. Lovinger for the balance due on an open book account and account stated. Judgment for defendant, and plaintiff appeals.

Reversed with directions.

George T. Goggin and Marvin Wellins, both of Los Angeles, for appellant.

Nat Rosin, of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

The question on this appeal is whether the four-year period within which the action had to be brought to avoid the bar of the statute under section 337, Code of Civil Procedure, was extended by virtue of section 11, sub. f, of the Bankruptcy Act. 11 U.S.C.A. § 29, subd. f. The trial court held that it was not so extended, that the action was barred and rendered judgment for defendant, from which plaintiff appeals.

The court found that as of August 6, 1940, defendant was indebted to plaintiff on an open book account in the sum of $29,086.19, and that an account was stated on that date establishing said indebtedness. The present action was instituted August 16, 1944, four years and ten days after plaintiff's causes of action were found to have accrued. It was further found that defendant filed a voluntary petition in bankruptcy in November, 1940, and that on October 3, 1941, he was denied a discharge by order made and entered in the bankruptcy proceeding. Plaintiff's claim was allowed in that proceeding for the full amount of the debt and he was paid from the bankrupt estate $6,092.44. The present action is for the balance of $22,919.16.

[1, 2] Section 11, sub. f, so far as here involved, reads as follows: "The operation of any statute of limitations of the United States or of any State, affecting the debts of a bankrupt provable under this Act, shall be suspended during the period from the date of the filing of the petition in bankruptcy (1) until the expiration of thirty days after the date of the entry of an order denying his discharge" etc.

Some eleven months elapsed between the date of the filing by defendant of his petition in bankruptcy and the order of the referee denying him a discharge. As plaintiff construes section 11, sub. f, this period should be added to the four-year statutory period for commencing the action, thus bringing the date of filing well within the extended period. Defendant construes section 11, sub. f, to mean that it applies to no causes of action except those as to which the statutory period would expire between the date of the filing of the petition and 30 days after the entry of the order denying a discharge. Under his theory, the Bankruptcy Act comes into operation only when the statutory period would otherwise expire, it operates only to extend the period for bringing the action from the date of expiration of that period to thirty days after the denial of the discharge, and the filing of the petition would not interrupt the running of the statute. He contends, therefore, that plaintiff's time was not extended under the Bankruptcy Act because the four-year period did not expire between the date of the filing of the petition and thirty days after the order denying the discharge.

It seems too clear for argument that if Congress had intended the Act to operate only upon claims which would otherwise be outlawed during the pendency of bankruptcy proceedings the section would have provided merely for an extension of time for bringing suit in such cases to a date thirty days after the denial of the discharge.

Defendant's construction is contrary to the plain wording of the act. When the operation of a statute of limitations is suspended for a given period the effect is to add an equal period to the statutory limitation.

"To suspend" means "to cause to cease for a time." Webster's New International Dictionary; Derrick v. City of Vallejo, 4 Cal.App.2d 25, 40 P.2d 949. "The suspension of a statute of limitations for a certain period is, in effect, 'time taken out,' for that period and adds the same period of time to the limitation provided in the statute." Hipkins v. United States, D.C. Md., 1 F.Supp. 505, 506. In Olds & Whipple v. United States, 22 F.Supp. 809, 819, 86 Ct.Cl. 705, the court had under consideration a Federal Revenue Act providing that the statute of limitations for bringing an action should be suspended under certain circumstances and the court said: "'Suspended' was here used in its common and general usage, meaning held in abeyance, temporarily inoperative, arrested, interrupted, stopped for a time. And we think it is clear that Congress intended by the language used that the limitation period specified in the statutes should simply be held in abeyance and should not run during the specified period and that at the end of such period the statute should again commence to run." This construction was followed in United States v. Markowitz, D. C., 34 F.Supp. 827. Cf. United States v. Havner, 8 Cir., 101 F.2d 161.

[3] The period between the filing of defendant's petition in bankruptcy and the order denying his discharge was to be added to the statutory four-year period, and the conclusion of law that the action was barred was in error. No other question is argued on the appeal. Upon the findings plaintiff was entitled to judgment.

The judgment is reversed and the trial court is directed to amend its conclusions of law and to render judgment for plaintiff in accordance with the views herein expressed.

WOOD, J., and VALLEE, J., pro tem., concur.

82 Cal.App.2d 13

## ALLEN et al. v. ALBERTS et al.

Civ. 15751.

District Court of Appeal, Second District, Division 2, California.

Oct. 22, 1947.

Hearing Denied Dec. 18, 1947.

**1. Trover and conversion ⚷40(4)**

Evidence supported finding that defendants, as assignees of lease of hotel, removed furniture and furnishings therefrom without lessors' consent in violation of lease, so as to be liable for conversion thereof.

**2. Customs and usages ⚷17**

Where lease specifically provided that all personal property and furnishings installed in leased premises should be part of leased property and belong to lessors, evidence of custom and usage relative to removal of supplies from hotel upon its sale was properly excluded.

◆

Appeal from Superior Court, of Los Angeles County; Frank G. Swain, Judge.

Action by George S. Allen and others against Dudley Alberts and others to recover damages for conversion of furniture, furnishings, and equipment located in hotel. From a judgment for plaintiffs, the defendants appeal.

Affirmed.

Macfarlane, Schaefer & Haun, of Los Angeles, for appellants.

Mark F. Jones and Irving S. Baltimore, both of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of plaintiffs in the sum of $5450.90 after trial before the court without a jury in an action to recover damages for the conversion of furniture, furnishings and equipment located in a hotel which plaintiffs' predecessors had leased to defendants Alberts' assignors, defendants appeal.

The evidence being viewed in the light most favorable to plaintiffs (respondents), the essential facts are:

Plaintiffs are the present owners of the California Hotel. Their predecessors in interest leased the hotel to one Sarber, which lease, with the consent of the lessors, was assigned to defendants herein. So far as material here the lease provided as follows:

"* * * Lessee agrees to keep and maintain said furniture, furnishings, equipment and/or fixtures in good order, condition and repair. Lessee agrees furthermore, when and as said furniture, furnishings and/or equipment shall be worn out or, by reason of wear or otherwise, not reasonably fit for use in the demised premises in connection with the conduct of the demised premises as a first-class hotel, that lessee will at his sole cost and expense replace the same with new and fully paid for furniture, furnishings, equipment and/or fixtures, as the case may be, of a like or better type and character, which said furniture, furnishings, equipment and fixtures shall immediately upon its installation become and be the property of lessor and shall be included in the furniture, furnishings, equipment and fixtures leased hereunder. Lessee agrees that none of the furniture, furnishings, equipment or fixtures now or hereafter installed in the demised premises shall be removed therefrom without the consent in writing of lessor first obtained, except and when and as separate pieces or portions of said furniture, furnishings, equipment or fixtures may become worn out or not fit for use in the demised premises in connection with the conduct therein of a first-class hotel, lessee may then remove the same provided that coincident with said removal the same must be replaced by new and fully paid for furniture, furnishings, equipment or fixtures, as the case may be, of a like or better type and character.

"Lessee expressly covenants and agrees that upon the termination of this lease, whether by the expiration of time or otherwise, he will immediately surrender and deliver up the demised personal property to lessor, his agents or attorneys, in the condition in which lessee is obligated to keep and maintain said personal property under the provisions of paragraph 42 hereof, excepting only damage by act of God which lessee could not reasonably have anticipated and guarded against."

Defendants without the consent of the lessors removed furniture, furnishings and equipment wrongfully from the demised premises, the value of such property being $5450.90.

The foregoing facts were embodied in the findings of the trial court.

Defendants rely for reversal of the judgment on two propositions which will be stated and answered hereunder seriatim:

[1] First: *There is not any substantial evidence to sustain the foregoing findings of fact.*

This proposition is untenable. An examination of the record discloses substantial evidence which together with the inferences the court may have drawn therefrom sustains each and every fact set forth above. For example, plaintiffs' exhibit 9 which was received in evidence shows the amount and value of the furniture removed from the hotel without the lessors' consent. The value of such missing furniture is substantially in excess of $5450.90. This exhibit alone constitutes substantial evidence to sustain the trial court's finding that the property removed from the hotel without the lessors' consent was of the value of $5450.90.

Further discussion of the evidence would serve no useful purpose since this court must disregard evidence introduced by defendants which conflicts with the evidence set forth above.

[2] Second: *The trial court committed prejudicial error in refusing to receive evidence of the custom and usage relative to the removal of supplies from a hotel upon its sale.*

This proposition is likewise without merit. The lease herein involved specifically provided that all personal property and furnishings installed in the premises should be a part of the leased property and belong to the lessors. Hence there was no necessity for introducing any evidence as to custom and usage since the agreement involved was specific and unambiguous.

As the record is free from error the judgment must be affirmed. It is so ordered. The appeal from the order denying the motion for a new trial is dismissed.

MOORE, P. J., and WILSON, J., concur.

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81 Cal.App.2d 811

## WHEELER v. CITY OF SANTA ANA.

**Civ. 3481.**

District Court of Appeal, Fourth District, California.

Oct. 15, 1947.

Hearing Denied Dec. 11, 1947.

**1. Administrative law and procedure ⇨305**
**Officers ⇨11**

The jurisdiction of Civil Service Commission is limited, and it can exercise only the power conferred on it or which is necessarily implied.

**2. Administrative law and procedure ⇨305, 417**
**Officers ⇨26(1)**

The power of Civil Service Commission is limited to the administrative functions conferred, and the rules adopted by commission have force of law when within power conferred upon it.

**3. Municipal corporations ⇨200**

Under municipal ordinance creating civil service board and authorizing board to provide rules and regulations for keeping of service records of fire department employees and classification of employees, but making no provision for setting up a pension plan or retirement system, board was without authority to adopt rule providing that injured employee receiving workman's compensation should be paid difference between regular salary and amount of compensation received.

**4. Municipal corporations ⇨200**

Where municipal civil service board was without authority under civil service ordinance to adopt rule authorizing payment to injured employees receiving workmen's compensation of the difference between regular salary and compensation received, injured fireman who was performing no services, but who had been awarded a life pension by Industrial Accident Commission, was not entitled to payments from city under the rule, in absence of adoption of any pension or retirement plan. Gen. Laws, Act 2592; Act 5233, § 764.1; Acts 5236, 6012.

**5. Municipal corporations ⚷59**

The exercise by city officers of powers in excess of their authority for a great length of time will raise no presumption of a grant to city of such powers.

**6. Estoppel ⚷62(2)**

Estoppels will not be invoked against the government or its agencies except in rare and unusual circumstances, such as when authority exists to make a contract but proceedings precedent thereto have been informally taken.

**7. Estoppel ⚷62(2)**

An estoppel cannot be invoked against the government where act or contract relied on to create estoppel is outside corporate powers of governmental agencies or officials.

**8. Estoppel ⚷62(5)**

The fact that municipal civil service commission erroneously assumed that it had power to adopt rule authorizing payment to injured employees receiving workmen's compensation of difference between regular salary and amount of compensation received, and that payments had been made under such rule, did not estop city from discontinuing such payments to injured fireman who had not been dismissed from the service, but who was performing no services for city.

◆

Appeal from Superior Court, Orange County; Raymond Thompson, Judge.

Action by Edward D. Wheeler against the City of Santa Ana for compensation claimed due as a city employee and for declaratory relief as to his rights in connection with his employment. From an adverse judgment, the plaintiff appeals.

Judgment affirmed.

Fred W. Reidman, and Forgy, Reinhaus & Forgy, of Santa Ana, for appellant.

George E. Bradley, of Santa Ana, for respondent.

GRIFFIN, Justice.

Plaintiff and appellant brought this action against defendant and respondent for compensation claimed due and prayed for declaratory relief as to his rights in connection with his active employment as a hose-man on the fire department of defendant city.

On August 19, 1940, plaintiff was injured in the course of his employment and on September 25, 1944, the Industrial Accident Commission issued its findings and award, awarding him $19.95 per week for 240 weeks, totaling $4788, and thereafter a life pension at the rate of $12.29 per week, based upon earnings of $140 per month.

Defendant city paid plaintiff the difference between his regular salary and the amount of compensation he received under the award until May 1, 1945, and on that date it declined to make any further payments.

Plaintiff had performed no services for defendant city since the date of his injury. No pension plan has been adopted by that city covering fireman and policemen under the general pension laws. Deering's California General Laws, 1944, Vol. 2, Act 5236 or Act 6012.

Section 764.1 of Act 5233, Deering's California General Laws, 1944, Vol. 2, p. 1963, being part of the Municipal Corporation Act governing cities of the Fifth Class, empowers a city of the fifth class to provide an employees' pension system, but said section goes on to provide the *"Requisites of System,"* among which requisites are the requirements that it shall be on a sound actuarial basis. It provides for contributions by both employees and city, and various other requirements.

At no time were deductions made by defendant city from plaintiff's salary on account of any pension plan, nor did plaintiff make any contribution toward a pension of any kind.

The Civil Service ordinance of defendant city, covering the police and fire departments, was adopted by the people by initiative in 1937, and was entitled "*An Ordinance * * * creating a Civil Service Board, providing for the manner and method of appointment: providing for the placing of Members of the Police Department, and the Fire Department, under Civil Service.*"

Then follow certain provisions in reference to procedure, and in section 8 thereof a "Trial Board is established and in section 13 it is provided that "No person in the Classified Civil Service shall be removed or discharged from his position or reduced in rank except for *inefficiency, misconduct,* or *insubordination.*" There is nothing in the ordinance setting up a pension plan or retirement system for employees. The ordinance provides that the civil service board shall "provide rules and regulations for the keeping of service records of the * * * fire department employees and for the classification of such employees. Such rules and regulations shall have the force and effect of law," and "shall formulate rules and regulations governing the selection and promotion of members of the Fire Department * * *."

The above-quoted portions of the ordinance contain the only express delegation of powers to the Civil Service Board. That Board then adopted rules and regulations, and a "Compensation Plan" for various salaried positions. Rule 5, section 3 (relied upon by plaintiff to support his claim), provides that:

"Whenever an employee receives Workmen's Compensation under authority of the Laws of the State of California, the sick leave with pay allowed to such employee shall begin with the first day he is absent from duty because of injury and continue until the first day for which he is paid compensation from the insurance fund. Deduction shall be made from his accumulated sick leave for the period of time he is paid full salary while absent from duty. *For the duration he receives Workmen's Compensation, he shall be paid the difference between his regular salary and the amount of compensation he receives.* No deduction shall be made from the accumulated sick leave for such payment." (Italics ours.)

It should here be noted that rule 5, section 3, contains other provisions in reference thereto. "*Leaves of Absence* * * * without pay may be granted by the Civil Service Board upon recommendation of the Department Head for a period not to exceed six months * * *." Then follows:

"The reinstatement of any employee at the end of a leave of absence shall depend upon a physical fitness of the employee evidenced by medical-physical examination and the approval of the Civil Service Board."

"Leaves of absence with pay may only be granted by the Civil Service Board upon recommendation of the Department Head concurred in by the City Council, for attendance in court, or attendance at professional or vocational meetings which relate to the work performed by the employee for the City of Santa Ana."

Then under the title "*Sick Leave*":

"Sick leave with pay may be granted by a Department Head with the concurrence of the City Council and the Civil Service Board for a total length of time not to exceed two weeks for a calendar year * * *. Leave for sickness shall be cumulative and deductible * * *."

"Any employee who is still absent from duty at the expiration of his accumulated sick leave shall be placed on *leave of absence status* (without pay) until his return to active duty. If an employee is physically unfit to return to his previous employment, as demonstrated by medical examination, at the termination of his absence because of illness, he may be demoted to a suitable position. If there is no position which he is physically able to fill *he may be dismissed* from the service."

It does not appear that plaintiff has ever been dismissed from service under this provision, or under section 13 of the ordinance.

Section 4 of Rule VI, under the heading *"Resignation,"* provides: "An employee shall be deemed to have resigned if he orally resigns and thereafter, at the next regular hour of such employment does not report for work, or if he does not report for work he will be deemed to have resigned, unless he presents a satisfactory excuse * * *," etc.

The court found generally the facts above enumerated and that plaintiff knew of rule 5, section 3, at the time of its adoption; that prior to his injury other firemen who had been temporarily injured, had been paid by the city the difference between their regular salaries and the amount of Workmen's Compensation benefit received by them during the period of their *temporary* disability; that the city paid plaintiff the difference between his regular salary of $140 per month and the amount of his award, from August 27, 1940, to May 1, 1945 (254 weeks), but that on May 1, 1945, it declined to make further payments.

It then found "That the only power and authority under which rules and regulations of the Civil Service Board were adopted or created, was the power and authority given under and pursuant to the said Civil Service ordinance * * *" which "ordinance does not grant power or authority, express or implied, to the said Civil Service Board to adopt or enact that portion of rule 5, section 3," relied upon by plaintiff and as above italicized. It concluded that that portion of said rule "has been at all times herein mentioned, and now is, in excess of the powers, express or implied, of the said Civil Service Board, and the same was and is therefore ultra vires and void," and it denied plaintiff's demand.

On appeal plaintiff argues that he has "never been removed or discharged" from his position as a member of the fire department; that the city is *estopped* to deny that the amount claimed due is a part of his compensation; and that therefore he is entitled to receive the difference between his regular salary and the amount of his permanent award as long as he receives Workmen's Compensation.

From an examination of the title and text of the ordinance submitted to the voters, it seems clear that the ordinance had reference to and was limited to the creation and establishment of Civil Service for members of the fire and police departments. There is nothing therein contained which sets up a pension system with a "sound actuarial basis," or which provides for "contributions of both employee and the city" to such fund, as contemplated under firemen's relief, health and pension plan, under Act 5236, supra, or Act 2592, Deering's California General Laws (1944) Vol. 1, p. 1081, and which would have any uniform application to all injured employees alike. Frisbee v. O'Connor, 119 Cal.App. 601, 7 P.2d 316.

[1, 2] It is a well-established rule that the jurisdiction of the Civil Service Commission is limited, and it can exercise only the power conferred on it or which is necessarily implied. Its power is limited to the administrative functions conferred, and the rules adopted by the commission have the force of law, when within the power conferred upon it. Livingstone v. MacGillivray, 1 Cal.2d 546, 36 P.2d 622; Bruce v. Civil Service Board, 6 Cal.App.2d 633, 45 P.2d 419; Haub v. Tuttle, 80 Cal.App. 561, 251 P. 925.

It was said in Frisbee v. O'Connor, supra [119 Cal.App. 601, 7 P.2d 317], that "If it may be said that there is a 'fair, reasonable and substantial doubt' concerning the existence of the power, such doubt must be resolved against the existence thereof."

[3] Plaintiff relies on such cases as Aitken v. Roche, 48 Cal.App. 753, 192 P. 464, where it was held that, where a pension system had been provided for, that the right to a pension was a vested one and entered into the contract of employment. Since the Civil Service Board had no power to establish a pension system, under the authority conferred, no such vested right was conferred upon plaintiff. Any person contracting with a county or municipal corporation is bound to recognize such limitation of power. County of Alameda v. Ross, 32 Cal.App.2d 135, 89 P.2d 460. It does not appear to us that it was the

intention of the voters, as expressed in the ordinance adopted, that plaintiff should be allowed full pay for the rest of his lifetime, less a deduction of any amount allowed under the Workmen's Compensation award, and not render any service to the city during that period. At least the power to confer such right, if it did exist, was not delegated to the Civil Service Commission by the City Council.

[4] Under this conclusion it will not be necessary to determine whether plaintiff is not now a member of the fire department, whether he has been placed on *leave of absence status* (without pay) or whether he is, by the provisions of the rule, subject to "dismissal from the service."

[5] As to the question of claimed estoppel, Haub v. Tuttle, supra, sets forth the rule here applicable, 80 Cal.App. at page 569, 251 P. at page 927.

"The fact that said commission has operated for a number of years under the interpretation appellants are contending for here cannot be held to affect the present legal situation, for the reason that the exercise of powers by city officers, in excess of their authority for a great length of time, will raise no presumption of a grant to the city of such powers." (Citing cases.)

In Frisbee v. O'Connor, supra, it was held that neither a municipal corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized by its charter or by some legislative act applicable thereto, and that all acts beyond the scope of the powers granted are *void*. (Citing cases.)

[6, 7] The general rule is that estoppels will not be invoked against the government or its agencies except in rare and unusual circumstances, such as when the authority exists to make a contract but the proceedings precedent thereto have been informally taken. In no event will such estoppel operate where the act or contract relied on to create the estoppel is outside the corporate powers of the governmental agencies or officials. Dillon on Municipal Corporations, 5th Ed. Vol. II, p. 1178, sec. 791; McQuillan, Municipal Corporations, Revised Ed. Vol. II, page 252, sec. 519; McCormick Lumber Co. v. Highland School Dist., 26 Cal.App. 641, 147 P. 1183; Sacramento County v. Southern Pac. Co., 127 Cal. 217, 59 P. 568, 825; Aebli v. Board of Education, 62 Cal.App.2d 706, 145 P.2d 601.

[8] Therefore, the fact that the Civil Service Commission erroneously assumed that it had the power to adopt that portion of rule 5, section 3, relied upon by plaintiff, which resulted in the illegal payment of money to persons not entitled thereto, would not operate as an estoppel against the city from discontinuing these payments.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

Hearing denied; SCHAUER, J., dissenting.

81 Cal.App.2d 965

## BEST v. FITZGERALD et al.

Civ. 15864.

District Court of Appeal, Second District,
Division 2, California.
Oct. 21, 1947.

Hearing Denied Dec. 18, 1947.

**1. Appeal and error 🔑907(3)**

Where appeal is upon the judgment roll alone, reviewing court must assume that there was substantial evidence introduced to support each of the material facts set forth in the judgment.

**2. Judgment 🔑948(2)**

The defense of res judicata may be raised on a motion to dismiss.

**3. Dismissal and nonsuit 🔑71**

A motion to dismiss may be supported by affidavits setting forth facts which tend to prove the grounds of the motion.

**4. Judgment 🔑720**

Where trial court found, supported by subtantial evidence, that causes of action had been fully litigated previously between the same parties, trial court properly granted defendant's motion to dismiss on the ground that alleged causes of action were res judicata.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Suit by Newton S. Best, as co-administrator of the estate of Emma S. Cone, deceased, and as an individual, against Gerald C. Fitzgerald, as co-adminstrator of the estate of Emma S. Cone, deceased and others, for declaratory relief, for an accounting and partition, and for general equitable relief. From a judgment predicated on orders sustaining the general demurrer of defendant Leonard A. Anderson to the complaint and granting his motion to dismiss, plaintiff appeals.

Affirmed.

Bertram S. Harris and Arthur E. Briggs, both of Los Angeles, for appellant.

Newlin, Holley, Sandmeyer & Coleman, of Los Angeles, for respondent Leonard A. Anderson.

McCOMB, Justice.

Plaintiff filed a complaint alleging three causes of action: (1) for declaratory relief, (2) for an accounting and partition, and (3) for general equitable relief. Defendant Anderson's general demurrer to the complaint was sustained and his motion to dismiss the action was granted. From a judgment predicated on the foregoing orders plaintiff appeals.

The undisputed facts are these:

Emma S. Cone died testate on March 22, 1937. By her will she specifically devised to defendant Anderson a life estate in and to a brick house and five acres of land surrounding the same located in Baldwin Hills and owned by decedent. She bequeathed the income from the residue of her estate to two sisters, to a brother, to said defendant, and to certain other persons for their respective lives.

Carl P. Coloneus, executor of decedent's estate, died on July 17, 1941, at which time there was on file in the probate estate proceedings his account denominated "Final Account of Executor" for the period from March 22, 1939, to August 1, 1940. Subsequent to his death his widow, as executor of his last will, prepared and filed in the Cone estate an accounting on behalf of the deceased executor for the period from August 1, 1940, to July 17, 1941.

Thereafter Newton S. Best and Gerald C. Fitzgerald were appointed as co-administrators with the will annexed of the Cone estate and as such administrators filed an accounting for the period from November 4, 1941, to December 15, 1942. Before these accounts were heard and acted upon, defendant Anderson filed written objections to all three of the accounts, claiming that he was entitled to all the proceeds from two oil wells located upon the five acres of land in which he had a life estate from the date of Mrs. Cone's death for the remainder of his lifetime. The administrators of the estate denied his claim and the issues were tried, resulting in findings of fact, conclusions of law, and three separate decrees. From these decrees the administrators filed appeals. While these appeals were pending the administrators agreed to a compromise with defendant Anderson, and agreed to abandon and dismiss the appeals. Thereafter a petition to have the court approve the compromise was regularly noticed and duly heard, and an order was made by the probate court authorizing and approving the compromise. No appeal was ever taken from this order and it has become final.

The issues raised by the three accounts and the objections thereto by defendant Anderson included all of the alleged causes of action set forth in plaintiff's complaint herein.

[1] The foregoing facts appear in the judgment entered by the trial court in the present action, which judgment in turn finds support in the affidavit of Clyde E. Holly filed with the motion to dismiss the present action. In addition, since the present appeal is upon the judgment roll alone, we must assume that there was subtantial evidence introduced to support each of the material facts set forth in the judgment.

[2, 3] In Olwell v. Hopkins, 28 Cal.2d 147, 149 et seq., 168 P.2d 972, our Supreme Court has held that the defense of res judicata may be raised on a motion to dis-

miss. Such a motion may be supported by affidavits setting forth the facts which tend to prove the grounds of the motion. (Cunha v. Anglo California Nat. Bank, 34 Cal. App.2d 383, 389, 93 P.2d 572.)

[4] Applying the foregoing rule to the instant case, since the trial court found, supported by substantial evidence, that the causes of action in the present complaint had been fully litigated previously between the same parties, its conclusion was correct in holding that the alleged causes of action set forth in the complaint were res judicata.

The judgment predicated upon the granting of defendant's motion to dismiss is affirmed.

MOORE, P. J., and WILSON, J., concur.

81 Cal.App.2d 745

## FOWLKES v. INGRAHAM.

Civ. 13579.

District Court of Appeal, First District,
Division 2, California.
Oct. 14, 1947.

Rehearing Denied Nov. 13, 1947.

**1. Attorney and client 🔑88**

The statute authorizing attorney to bind his client in any steps of action or proceeding by agreement filed with clerk or entered on minutes of court does not enlarge or abridge attorney's authority, but only prescribes manner of its exercise. Code Civ.Proc. § 283(1).

**2. Attorney and client 🔑88**

An attorney's general authority vests him with complete charge and supervision of procedure to be adopted in action to which client is party, conduct of trial, and all cognate subjects, if he does not impair, compromise or destroy client's cause of action or subject matter of litigation without client's consent.

**3. Attorney and client 🔑86**

An attorney of record may bind his client without special authority by stipulation waiving client's right of appeal from adverse judgment, but such waiver must be supported by consideration to be binding.

**4. Stipulations 🔑10**

Plaintiff's counsel's waiver of plaintiff's right to move for new trial and appeal from judgment on jury's verdict for less than amount sued for by stipulation of both parties' counsel for waiver of such rights satisfied requirement that waiver by defendant's counsel be supported by consideration to be binding. Civ.Code, § 1605.

**5. Attorney and client 🔑86**

Counsel for defendant administratrix of decedent's estate had implied authority to waive defendant's right to appeal from judgment on jury's verdict for plaintiff by oral stipulation with plaintiff's counsel.

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Appeal from Superior Court, Alameda County.

Action by Mary E. Fowlkes against L. Ingraham, administratrix of the estate of Ira Wise, deceased, for money due. Judgment for plaintiff, and defendant appeals. On plaintiff's motion to dismiss the appeal.

Motion granted.

Hugh S. O'Neill and J. W. O'Neill, both of Oakland, for appellant.

George Ingraham, of Hayward, for respondent.

DOOLING, Justice.

Respondent (plaintiff below) moves to dismiss the appeal. The action was one against the administratrix of a decedent's estate for $3835. The case was tried to a jury which brought in a verdict for plaintiff for $1500. After the jury was discharged and while the attorneys for both parties were still in the courtroom both attorneys stated that so far as they were concerned the case was finished. Four diamond rings had been introduced into evidence and the trial judge stated to counsel for both parties that since they had both expressed the opinion that nothing further was to be done in the case it might be well for the parties to arrange for the withdrawal of the rings so that the courtroom clerk would be relieved of the responsibility for their care. The judge further stated that he would make an order for the withdrawal of the rings "if counsel for plaintiff and defendant were willing to stipulate in open court to waive the right to move for a new trial in said action and waive the right to appeal in said action." Thereupon counsel for both parties stipulated orally in open court to waive the right to move for a new trial and to waive the right to appeal and, by direction of the court, this stipulation was entered in the minutes of the court. The rings were thereupon delivered to counsel for the plaintiff. The defendant and appellant administratrix was not present in court when the stipulation was made and was not consulted about it.

The stipulation was made by the attorneys in open court and entered in the minutes in compliance with the requirements of section 283(1) of the Code of Civil Procedure. The only question presented is whether an attorney has the implied authority to bind his client by a stipulation waiving the right of appeal.

[1, 2] It is settled that sec. 283, Code Civ.Proc., does not enlarge or abridge the authority of an attorney but only prescribes the manner of its exercise. Redsted v. Weiss, 71 Cal.App.2d 660 and cases cited at page 663, 163 P.2d 105, 107. The general authority of the attorney vests him "with complete charge and supervision of the procedure to be adopted, the conduct of the trial and all cognate subjects, provided only the attorney does not impair, compromise or destroy his client's cause of action or subject matter of the litigation without his client's consent." Witaschek v. Witaschek, 56 Cal.App.2d 277, 283, 132 P. 2d 600, 604.

Counsel for the respective parties are not in disagreement on the above rules but only on their application to the facts of this case, counsel for appellant insisting that the right of appeal is a substantive right which the attorney cannot waive without his client's express consent and counsel for respondent urging that the right of appeal is a procedural one falling within the implied authority of the attorney to waive.

[3, 4] The question is one which has never been squarely decided in California. The great weight of authority in other jurisdictions where the question has arisen supports the statement quoted by the court from 2 Enc.Pl. & Pr. p. 637 in Arthur D. Jones & Co. v. Spokane Valley Land & W. Co., 44 Wash. 146, 87 P. 65, that "the attorney of record may bind his client without special authority by a stipulation waiving the right of appeal." Smith v. Barnes, 9 Misc. 368, 29 N.Y.S. 692; People v. Stephens et al., 52 N.Y. 306; Leahy v. Stone, 115 Ill.App. 138; In re Heath's Will, 83 Iowa 215, 48 N.W. 1037; Sargeant v. Clark, 108 Pa. 588; Pike v. Emerson, 5 N.H. 393, 22 Am.Dec. 468; Mackey v. Daniel, 59 Md. 484. It is doubtless true as stated in some of these cases that such a waiver to be binding must be supported by a consideration. The reciprocal waiver by a respondent's counsel of her right to move for new trial and to appeal satisfies this requirement. Civ.Code, § 1605.

[5] In seeming accord with these authorities from other jurisdictions are Clemens v. Gregg, 34 Cal.App. 245, 167 P. 294 and Gordon v. Kifer, 26 Cal.App.2d 252, 79 P.2d 164. Opposed to them are dicta not necessary to the decisions in Wuest v. Wuest, 53 Cal.App.2d 339, 127 P.2d 934 and Redsted v. Weiss, supra, 71 Cal.App. 2d 660, 163 P.2d 105. In Wuest v. Wuest, supra, it appears that the parties joined in the stipulation with their attorneys (53 Cal.App.2d page 342, 127 P.2d 934) and the real question involved was the duress of the court exercised upon plaintiff to compel her to sign the stipulation. Cf. the same case on a later appeal, Wuest v. Wuest, 72 Cal.App.2d 101, 164 P.2d 32. In Redsted v. Weiss, supra, 71 Cal.App.2d at page 663, 163 P.2d 105, 107, this court repeated the dictum from the Wuest case only by way of illustration, since the question of the implied authority of an attorney to waive the right to appeal was in no way involved. We conclude that counsel for appellant had the implied authority to waive his client's right of appeal.

It may be noted that respondent's right to move for a new trial and to appeal have both been lost by lapse of time so that it is now impossible to put the parties in statu quo if appellant should be relieved from her attorney's stipulation.

The motion to dismiss the appeal is granted.

NOURSE, P. J., and GOODELL, J., concur.

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81 Cal.App.2d 871

## ROBERTS v. ROBERTS.

Civ. 15818.

District Court of Appeal, Second District, Division 2, California.

Oct. 17, 1947.

Hearing Denied Dec. 15, 1947.

**1. Divorce 🔑8**

In wife's suit to annul a foreign divorce decree and to set aside a property settlement executed by her, it was proper to join a count by wife for a divorce, though such count was triable only in event of the success of the count seeking to set aside the foreign divorce decree.

**2. Divorce 🔑62(1), 152, 168**

The jurisdiction of court to grant a divorce is determined by bona fide domicile of at least one of spouses, and where neither has established a statutory domicile in the state with honest intentions to reside there permanently, a divorce decree based on simulated residence of plaintiff only, is void and may be impeached collaterally by extrinsic evidence.

**3. Divorce 🔑327**

Wife's petition alleging that husband and wife had an actual and continuous domicile in California, that husband induced wife to visit Nevada solely to obtain a divorce, that wife was ill, that husband dominated her, and that she promptly returned from Nevada to California and resumed marital relations with husband for more than a year thereafter, sufficiently alleged invalidity of Nevada divorce and entitled wife to have the divorce set aside in California. Comp.Laws Nev. § 9460.

**4. States 🔑5**

In domestic concerns, each state is deemed to be an independent sovereignty, and, as such, it is its province to forbid interference by another state as well with the status of its own citizens.

**5. Divorce 🔑327**

Jurisdiction over divorce proceedings of residents of California by the courts of a sister state cannot be conferred by agreement of the litigants.

**6. Divorce 🔑329**

As protector of the morals of its citizens, it is the duty of a California court to prevent the dissolution of a marriage by the decree of a court of another jurisdiction pursuant to collusion of the spouses.

**7. Divorce 🔑327**

A divorce of California residents by a court of another state is not only void because of plaintiff's lack of bona fide residence in the foreign state, but it is void also for lack of the court's jurisdiction over the state of California, which is a party to every marriage contract of its own residents.

**8. Divorce 🔑327**

A judgment of divorce by a court of Nevada without first having, pursuant to its own laws, acquired jurisdiction over residents of California, is a void decree and may be impeached in California and its effect erased by showing that the Nevada court had no jurisdiction of the parties. Comp.Laws Nev. § 9460.

**9. Divorce 🔑152**

Collusion of the parties is sufficient to render a divorce decree voidable even though the court rendering the decree had jurisdiction.

**10. Divorce 🔑326, 327**

Generally, estoppel will not prevail to support either a divorce decree granted by a foreign court without jurisdiction of the parties or a decree obtained by the wife at the direction of her husband. Code Civ.Proc. § 1916.

**11. Divorce 🔑326**

Wife who was allegedly in ill health and was under domination of husband when she was induced by husband to leave California temporarily to obtain Nevada divorce decree, was not estopped to have divorce decree set aside in California. Comp. Laws Nev. § 9460; Code Civ.Proc. § 1916.

**12. Estoppel 🔑59**

Estoppel is to be applied against wrongdoers, not against the victim of a wrong.

**13. Estoppel 🔑52**

Estoppel does not operate to defeat positive law or public policy.

**14. Divorce 🔑152**

Where a divorce decree is void, it cannot be given validity by estoppel.

**15. Pleading 🔑214(2)**

Defendant, by demurrer to petition, confessed the truth of well pleaded allegations.

**16. Divorce 🔑326**

Wife was not guilty of laches precluding maintenance of action to set aside foreign divorce decree which she had allegedly been induced by dominating husband to obtain, where she resided with him as his wife after divorce for more than 14 months, and when husband drove her from home, she brought action in less than three months.

**17. Equity 🔑71(2)**

The doctrine of laches is not to be arbitrarily applied, and whether a delay is unreasonable must be adjudged by the circumstances which occasioned it, by the nature of the relief demanded, and by a determination that the rights of the defendant or others have not been prejudiced by the delay.

**18. Pleading 🔑204(7)**

Where a separate general demurrer was not lodged against count two of complaint, only the special demurrers thereto could be considered.

**19. Pleading 🔑8(11)**

In suit by wife to set aside property settlement agreement on ground that husband allegedly made fraudulent misrepresentations and that she was without independent advice, wife's allegation that sum of $1,000 accepted by her as her share of community property was less than the interest of the wife in the community estate, merely alleged a conclusion and was not sufficient to set out a cause of action, since it was necessary for wife to describe the property, allege its reasonable value, and set out facts disclosing the extent of her community interest.

**20. Pleading 🔑17**

A fact which constitutes an essential element of a cause of action cannot be left to inference.

**21. Pleading 🔑8(6)**

In suit by wife to set aside property settlement agreement on ground that husband allegedly made fraudulent misrepresentations and that she was without independent advice, wife's allegation that agreement was unfair and unjust to her and was against public policy and therefore void, was an inferential and argumentative statement and conclusion, and not a direct averment of material facts, as would state a cause of action.

**22. Pleading 🔑8(16)**

In suit by wife to set aside property settlement agreement on ground that husband allegedly made fraudulent misrepresentations and that she was without independent advice, wife's allegation that she was physically sick and in highly nervous state and was under the influence, control and dominance of the husband and not able to exercise independent judgment, was not a statement of ultimate facts but conclusions only and not sufficient to constitute a cause of action.

**23. Husband and wife 🔑279(2)**

In suit by wife to set aside property settlement agreement under which wife received $1,000, on ground that husband allegedly made fraudulent misrepresentations and that she was without independent advice, petition which failed to allege that wife had returned the $1,000 and which failed to explain why she did not return the $1,000, was demurrable.

**24. Pleading 🔑11, 72**

A litigant is entitled to prosecute his cause only by first pleading the nature of relief sought and the ultimate facts by which he deems himself to be entitled thereto under the law.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Suit by Rosalie Theresa Roberts against Lee Roberts to annul a foreign divorce, to set aside a property settlement agreement, and for a divorce. From a judgment of dismissal after plaintiff declined further to amend following the sustaining of a demurrer, the plaintiff appeals.

Judgment affirmed in part and reversed in part with instructions.

Hardy & Hardy and Carlos S. Hardy, all of Los Angeles, for appellant.

Reynolds, Painter & Cherniss and Louis Miller, all of Los Angeles, for respondent.

MOORE, Presiding Justice.

By her amended complaint appellant sued (1) to annul a decree of divorce granted to herself in the state of Nevada on the grounds that (a) such decree was obtained through her collusion with respondent and that (b) the Nevada court was without jurisdiction of the parties; (2) to set aside a property settlement agreement executed by her as having been effected by means of respondent's fraudulent representations and without independent legal advice; and (3) for a judgment dissolving the marriage of the parties. This appeal is from the judgment of dismissal after appellant had declined further to amend, a demurrer having been sustained.

### The Pleading Abridged.

[1] The third count of the pleading is for a divorce. It is in orthodox form and contains appropriate declarations as to (1) the marriage, (2) the lawful issue, (3) the ownership of community property, (4) respondent's acts of extreme cruelty, (5) appellant's need for support and respondent's ability to provide, and (6) appellant's residence in Los Angeles county for more than one year. The joinder of count three was correct practice although it was triable only in the event of the success of count one. Omitting the conclusions as surplusage the substance of count one is as follows:

### Count One.

I and II. The parties were married May 10, 1941, and were thereafter until October, 1944, husband and wife. With their one child, age four, they have resided continuously in Los Angeles county.

III. On August 30, 1944, they owned a home at Long Beach, the title to which stood in defendant's name. Large sums of community funds have been invested in the home and furnishings, the amount of which is unknown to plaintiff but is known to defendant.

IV. On and immediately prior to said last mentioned date defendant stated to plaintiff that although he loved her and their child and desired to do all in his power to provide for them, yet it would be better for him and his business and for the advancement of his financial affairs, and he would be able to do more for the support and care of plaintiff and their child, if he were not married to plaintiff; that she could go to Nevada and within less than two months obtain a divorce, gain a rest and return to their Long Beach home;

V. that if she would proceed at once to Nevada and secure a divorce he would give her $1,000 in cash, $300 as her allowance for three months and would pay all expenses of her trip and of her sojourn at Reno, including costs of court and attorney's fees; during her absence from Long Beach he would employ a nurse and housekeeper to care for the child at home; that immediately following the divorce plaintiff should return to their home and resume the care of the child as well as her marital relations and her position as defendant's wife in their home; that he would place the title of the home in the child and would have its life insured in favor of plaintiff.

VI. The birth of her child had impaired the health of plaintiff from which she had not recovered on said August 30; plaintiff was then in a weak physical state, highly nervous, mentally distraught by reason of her said infirmities and of defendant's persuasive statements, which facts were well known to defendant. By reason of such afflictions and distress plaintiff was wholly under defendant's control and dominance as a result of which she could not exercise an independent judgment with respect to said representations but by reason of her physical and mental condition believed his statements to be true and that her best interests would be served by a compliance with his requests.

VII. Plaintiff believed said statements to be true and to have been made in good faith; while in said condition of mind and body and under the control of defendant and believing in the truth and good faith of his statements and promises, on August 30, 1944, plaintiff orally promised to comply with all of defendant's requests, secure a Nevada divorce and return to their home as soon as the decree was obtained.

VIII. Whereupon defendant gave her $100 for one month's support and $100 for her attorney's fee, gave her a round trip ticket to Reno, and stated to her that she should hurry to Nevada, secure the divorce and return immediately to her home in Long Beach. Subsequently defendant paid her the two succeeding monthly payments of $100 each. At the time he gave her the ticket defendant gave plaintiff the name and address of a Reno attorney and told her to employ him upon her arrival there. Plaintiff was then without experience in legal matters.

IX. She was ignorant of the laws of Nevada and was not advised as to her rights; she believed it was best to rely upon defendant's statements. She was then under his control and unable to exercise an independent judgment.

X. While relying solely upon such statements and promises and while under defendant's control plaintiff, on or about September 1, 1944, left her Long Beach home and her child of two and a half years and entrained for Reno, where she arrived within three days and thereafter filed a complaint for divorce. Defendant promptly filed his written appearance in the proceeding. A decree was entered on October 20, 1944, purporting (1) to dissolve the marriage of the parties on the ground of extreme cruelty, (2) to award plaintiff custody of her child and (3) to direct respondent to pay her $50 monthly for the infant's support until she attains her majority. During plaintiff's sojourn in Reno she continued to be under the dominance of defendant and received his frequent letters directing her to hasten the divorce proceeding and to return home as soon as possible.

XI. In departing from Long Beach for Reno plaintiff did not intend to reside or to remain in Nevada permanently or for an indefinite period, but purposed to stay there only so long as was necessary to secure a divorce and then to return to her Long Beach home. She left Nevada on the very day the decree of divorce was granted, immediately returned to her said Long Beach home at which she resumed marital relations with defendant at his request, and there continued such relations until December, 1945. She resided in the home at the time of filing the amended complaint, June 11, 1946.

Count Two.

Count two by express declaration in its first paragraph adopts only that part of count one which alleges the marriage, the issue and the Los Angeles county residence of both parties.

II. While plaintiff was physically sick and mentally distraught, which was known to defendant, she was under the control and dominance of defendant on August 30, 1944, and by reason of said condition of health and of said control of defendant she was unable to exercise an independent judgment;

III. She then executed a property settlement agreement which purported to settle the property affairs of herself and husband, whereby she relinquished all interest in the home of the parties and in the movable property therein other than her own personal effects and accepted $1,000 as her share of the community property in satisfaction and discharge of defendant's obligation to support her. Such sum was less than plaintiff's interest in the community estate. She will credit such payment upon any sum awarded as her interest in said estate.

IV. Such agreement was prepared by attorneys selected by defendant and was executed by plaintiff without first having an opportunity to gain independent legal advice as to her rights against defendant relating to said community property and to her support by defendant. She was advised and urged by said attorneys and defendant to execute the agreement as being for her best interests. She was then upset and ill, inexperienced in such matters and was not informed of her right to independent legal advice as to her legal position and privileges. The agreement was unfair to plaintiff and was against public policy.

V. Following the execution of the purported agreement the parties continually engaged in marital relations in the family home until December 25, 1945, with the exception of the period of plaintiff's sojourn in Nevada.

The merits of the general demurrer to count one are to be tested by the allegations of fact with respect to (1) the jurisdiction of the Nevada court*, (2) appellant's conscious participation in imposing upon that court, and (3) the abuse of her confidence by respondent.

### The Merits of Count One

[2, 3] The jurisdiction of any court to grant a divorce is determined by the bona fide domicile of at least one of the spouses. Where neither has established a statutory domicile in the state with honest intentions to reside there permanently or indefinitely a decree of divorce by a court of such state based upon the simulated residence of the plaintiff only is void. Such decree may be impeached collaterally by extrinsic evidence. This is true notwithstanding either the recitals of such decree or the false testimony given by the plaintiff in support of the judgment. (Crouch v. Crouch, 28 Cal.2d 243, 249, 169 P.2d 897; Williams v. North Carolina, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577, 157 A.L.R. 1366). The allegations of count one emphasize the facts of (1) appellant's actual and continuous domicile in California, (2) her intention to visit Reno solely for the purpose of obtaining a divorce, (3) her illness and respondent's dominance over her at the time of her departure for and her sojourn in Nevada, (4) her prompt return to Long Beach and the resumption and continuance of the marital relation for more than a year thereafter. Since the Nevada court did not have jurisdiction to determine the cause its decree is void.

[4-7] In all domestic concerns each state of the Union is to be deemed an independent sovereignty. As such it is its province and its duty to forbid interference by another state as well as by any foreign power with the status of its own citizens. Unless at least one of the spouses is a resident thereof in good faith, the courts of such sister state or of such foreign power cannot acquire jurisdiction to dissolve the marriage of those who have an established domicile in the state which resents such interference with matters which disturb its social serenity or affect the morals of its inhabitants. Jurisdiction over divorce proceedings of residents of California by the courts of a sister state cannot be conferred by agreement of the litigants. As protector of the morals of her people it is the duty of a court of this commonwealth to prevent the dissolution of a marriage by the decree of a court of another jurisdiction pursuant to the collusion of the spouses. If by surrendering its power it evades the performance of such duty marriage will ultimately be considered as a formal device and its dissolution freed from legal inhibitions. Not only is a divorce of California residents by a court of another state void because

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* Section 9460, Nevada Compiled Laws provides: "Divorce from the bonds of matrimony may be obtained by complaint, under oath, to the district court of any county in which the cause therefor shall have accrued, or in which the defendant shall reside or be found, or in which the plaintiff shall reside, or in which the parties last cohabited, or if plaintiff shall have resided six weeks in the state before suit be brought, for the following causes, or any other causes provided by law: * * *

"Sixth—Extreme cruelty in either party."

of the plaintiff's lack of bona fide residence in the foreign state, but it is void also for lack of the court's jurisdiction over the state of California. This state is a party to every marriage contract of its own residents as well as the guardian of their morals. Not only can the litigants by their collusion not confer jurisdiction upon Nevada courts over themselves but neither can they confer such jurisdiction over this state.

[8] It therefore follows that a judgment of divorce by a court of Nevada without first having pursuant to its own laws acquired jurisdiction over one of the parties is a void decree and may be impeached in the state of the domicile and its effect erased by showing that the Nevada court had no jurisdiction of the parties. (Kegley v. Kegley, 16 Cal.App.2d 216, 220, 60 P.2d 482; Ryder v. Ryder, 2 Cal.App.2d 426, 433, 37 P.2d 1069. Such decree may always be attacked for lack of jurisdiction in the foreign court. (Crouch v. Crouch, supra, 28 Cal.2d 250, 169 P.2d 897.)

[9] It is equally well settled that the collusion of the parties is sufficient to render the decree voidable even though the court had had jurisdiction and respondent had not fraudulently induced her to institute the Nevada proceeding. (Ryder v. Ryder, supra.)

[10] The contention that appellant is estopped to plead the nullity of a void decree because (1) it was procured by her in an alien jurisdiction and (2) was the result of her instituting the action in another state in collusion with respondent is not supported. Generally, estoppel will not prevail to support either a decree granted by a foreign court without jurisdiction of the parties or a decree obtained by a wife at the direction of her husband. (Code Civil Proc., sec. 1916; Ryder v. Ryder, supra; Estate of Bruneman, 32 Cal.App. 2d 606, 608, 90 P.2d 323; Kegley v. Kegley, supra.) This rule is emphasized in the instant case by the fraudulent conduct of respondent in inducing appellant to procure a divorce and to visit Nevada for that purpose at his expense. In the Kegley decision whose facts parallel those at bar the appellant urged in support of his plea of estoppel Bisconer v. Billing, 71 Cal.App. 779, 236 P. 329; Eaton v. Wilkins, 163 Cal. 742, 127 P. 71 and Bruguiere v. Bruguiere, 172 Cal. 199, 155 P. 988, Ann.Cas.1917E, 122. The first two are distinguished by their facts and cast no light upon the issues here involved except that in the Bisconer case the court held that there can be no estoppel in pais against a plaintiff where he does not know the full truth of the facts constituting the basis of the alleged estoppel. In the Bruguiere case plaintiff's husband had visited Nevada for the purpose of obtaining a divorce. Although the decree granted him was void for lack of jurisdiction in the court, Mrs. Bruguiere contracted another marriage. After it had been annulled by the court of New York she subsequently sued her first mate for support and maintenance. Because she knew that the Nevada decree purported to dissolve her marriage and to give her freedom to effect a new marital alliance she was estopped to question the validity of the Nevada divorce. She was free to waive all questions of the effect upon her of such decree and accept the status it conferred upon her. The Bruguiere case and many others hold to the doctrine that a remarriage by a spouse who has acknowledged the validity of the void decree estops him from subsequently denying its validity. Because Mrs. Kegley had not remarried the court denied the plea of estoppel filed by her husband, annulled the Mexican decree and granted her a divorce although she had by her wilful appearance in the Mexican court confessed the cruelties alleged.

[11-14] Appellant's position is not different from that of Mrs. Kegley. While the latter's decree was granted by the court of a sister republic, she there confessed herself in the wrong. While Mrs. Roberts actually sued for the divorce in a sister state, she was persuaded to do so by the fraudulent inducements of her husband. "[He was] the prime mover in the fraud upon the Nevada court." In re Estate of Davis (Davis v. Davis), 38 Cal.App.2d 579, 585, 101 P.2d 761, 763, 102 P.2d 545. To apply the doctrine of estoppel against her would effectually guarantee the suc-

cess of every husband who is so base and so clever as to convince his wife that the welfare of herself and her child will be enhanced by the entry of a divorce decree against him in another state. Estoppel is to be applied against wrongdoers, not against the victim of a wrong. (Harlan v. Harlan, 70 Cal.App.2d 657, 662, 161 P. 2d 490; Davis v. Davis, supra.) It does not operate to defeat positive law or public policy. (Panzer-Hamilton Company v. Bray, 96 Cal.App. 460, 464, 274 P. 769.) Where a divorce decree is void it cannot be given validity by estoppel. (Garman v. Garman, 70 App.D.C. 4, 102 F.2d 272, 274, 122 A.L.R. 1317, citing Kegley v. Kegley, supra.) When misapplied the doctrine of estoppel may be a most effective weapon for the accomplishment of injustice. (19 Am.Jur. 602.)

[15] Respondent attacks count one as though it were purely a fraud action whereby he is accused of obtaining the goods of appellant by his false representations and promises and as though such averments had been made as a basis of recovery. Such is not the office of the allegations of respondent's fraudulent representations and of appellant's physical, nervous and mental infirmities. While the misrepresentations are not traversed and the causes of appellant's bodily and mental ills are not alleged at length, yet the declarations of the pleading show that respondent had the confidence of appellant and that she believed his statement that it was for her own best interest to do as he requested. Her mind and body had been weakened; she was mentally distressed and distraught by reason of her infirmities, and on account of such afflictions was incapable of exercising an independent judgment with respect to respondent's statements. By the demurrer he confesses that while she was debilitated as a result of childbirth and of his demands that she obtain a divorce he told her not only that his own financial interests and welfare would be advanced but also that the best interests of her child and herself would be served by his being divorced from her, and that such divorce quietly obtained in another state would not interfere with her marital relations or rob her of her position as his wife or of living in their Long Beach home. He confesses that he urged her to hasten her departure for Reno; that he supplied her with the name of an attorney residing there who would aid her in consummating the fraud; that he effected her departure within two days after he had gained her promise to go to Nevada to obtain a decree; and that he provided her with all funds necessary for her to accomplish his plans which were a fraud upon the courts of California as well as of Nevada.

Respondent contends that when a wife agrees with her husband that she will visit a foreign jurisdiction to obtain a decree of divorce based upon her simulated residence she cannot thereafter repudiate the decree thus obtained by her. In support of such thesis he cites and quotes from many authorities. By such authorities it is held (1) that in divorce cases, as in others, equity will not interfere with judgments obtained through collusion; (Hendricks v. Hendricks, 216 Cal. 321, 323, 14 P.2d 83; Bancroft v. Bancroft, 178 Cal. 359, 364, 173 P. 579, L.R.A.1918F, 1029; Ettlinger v. Ettlinger, 46 Cal.App.2d 628, 632, 116 P.2d 482; Lanktree v. Lanktree, 42 Cal.App. 648, 652, 183 P. 954; (2) that where evidence of the alleged coercion, duress or fraud could have been presented to the court or to an attorney of complainant's own choosing during the pendency of the action, seasonably to enable the court to protect the rights of the parties, equity will not disturb the judgment of such court (Hendricks v. Hendricks, supra; Godfrey v. Godfrey, 30 Cal. App.2d 370, 379, 86 P.2d 357; Thompson v. Thompson, 38 Cal.App.2d 377, 101 P.2d 160); (3) that a party who has obtained a decree of divorce upon simulated residence in a foreign jurisdiction is estopped from thereafter attacking the decree as invalid for want of jurisdiction in the court (Harlan v. Harlan, supra; In re Estate of Davis, 38 Cal.App.2d 579, 584, 101 P.2d 761, 102 P.2d 545; Seymour v. Seymour, 18 Cal. App.2d 481, 64 P.2d 168; 1 Freeman on Judgments, 5th Edition, sec. 1438; Rest. Conflict of Laws, sec. 112).

While a number of the cited authorities have already been discussed, neither they nor respondent's thesis are pertinent to the issues presented by count one. In each instance the petitioner who sought to have the foreign decree annulled was a free moral agent in procuring the divorce, or he had sat passively by and knowingly acquiesced in the action of his spouse in seeking the foreign decree, or had financed her litigation, or had enjoyed the fruits of such decree while acknowledging the validity thereof. Appellant here was the agent of respondent in her journey to Nevada and in all that she did while there in employing an attorney and in procuring a decree. No part of it was her wish; neither was it her deed. While weak and ill she was by fraud persuaded by respondent to consent to visit Nevada, to follow the directions of a Reno attorney designated by respondent who paid him, to remain there until a decree should be entered and then promptly to return to California. Respondent confesses these abominable facts. He is therefore without equity. With unclean hands he attempts to thwart the efforts of the person to whom he owes the highest duty but whom he has foully deceived to her detriment. By raising the equitable plea of estoppel he would silence her at the very threshold of the temple. Under the long established principles of equity he cannot shield his own perfidious wrongs by use of a plea designed to silence only those who have knowingly invited and accepted the causes of their unhappiness. His own estoppel is estopped. The judgment which she would have annulled by the superior court is the fruitage of respondent's contempt for good morals and of his disdain for the law of the state which protects him. His citing respected authorities and his chanting fine phrases concerning appellant's procurement of the divorce do not conceal his guilt of sending his own ill wife away from her home and her child to Nevada to obtain a divorce by committing perjury and by imposing upon the courts of that state, knowing that she would return to him immediately to resume the marital status. If the plea of estoppel will permit such a practice it were better that the very foundations of our jurisprudence should crumble into dust and a new structure for the support of righteousness be builded.

### Count One Not Barred by Laches

[16] Respondent contends that the filing of this action, April 19, 1946, to annul the Nevada divorce decree of October 20, 1944, is barred by laches, citing Rudy v. Slotwinsky, 73 Cal.App. 459, 465, 238 P. 783; Wattson v. Dillon, 6 Cal.2d 33, 42, 56 P.2d 220. So to hold would be error. Upon appellant's return from Reno following the entry of such decree she acted, and was treated, as the lawful wife of respondent until December 25, 1945. As such wife she was his constant companion for over 14 months; sat at his board and occupied his bed. His sudden decision at the Christmas season to drive her from the home and to stand firmly upon the Nevada decree must have administered a shock, requiring some time for her to adjust her senses to the predicament in which the new turn of affairs had left her. Allowing one month for her to reconnoitre the field, she filed the action within less than three months, a part of which time was of necessity consumed by counsel in a study of the case and in the preparation of her pleadings. Such delay is not unreasonable in view of the circumstances alleged. In the Wattson case, supra, the action to vacate a final decree was begun seven months after its entry, while in the Rudy case the action to set aside the decree was begun a year after the first judgment. And in neither of them was any such equitable ground for relief alleged as that by appellant herein in addition to the lack of jurisdiction in the Nevada court and the fraud upon the courts of California.

[17] The doctrine of laches is not to be arbitrarily applied. Whether a delay is unreasonable must be adjudged by the circumstances which occasioned it, by the nature of the relief demanded and by a determination that the rights of the defendant or of others have not been prejudiced by the delay. (Swart v. Johnson, 48 Cal.App.2d 829, 834, 120 P.2d 699.) It would be unreasonable to say that any right of respondent suffered prejudice by reason of appellant's not having filed her action at an earlier date.

It follows that count one does state a valid cause of action; that by treating its conclusions as harmless surplusage the special demurrers count for nought; that by confession of respondent the Nevada decree is void, and that the third count states a valid cause of action. In view of the foregoing the demurrers to the first and third counts should have been overruled.

### Count Two

As to the second count of the complaint appellant's position is not so favorable. By this cause appellant seeks to have annulled a contract of property settlement executed in this state. An attack upon that agreement is not to be aided by the invalidity of the divorce decree. Neither may it find support in count one except by such of the latter's allegations as were by adoption made a part of count two. Even though by the doctrine of judicial notice this court could determine that the nullity of the Nevada decree is to be read into count two, such fact would not necessarily so support the second count as to exempt it from the statutory rules of pleading by which it must be measured.

[18-20] Since a separate general demurrer was not lodged against count two, only the special demurrers thereto can be considered. (Lord v. Garland, 27 Cal.2d 840, 850, 168 P.2d 5.) Certain of its allegations are ambiguous, uncertain or unintelligible. To plead that the sum of $1,000 accepted by her as her share of the community property "was less than the interest of plaintiff in said community estate," does not state the extent of plaintiff's interest or the extent of her title in and to the property which she claims was the community estate. (California Trust Company v. Gustason, 15 Cal.2d 268, 273, 101 P.2d 74.) Not facts but only a conclusion is declared. In order to have alleged with certainty the detriment suffered by her in accepting $1,000 for her interest in the community estate it was necessary for her not only to describe the property and to allege its reasonable value but also to set out facts disclosing the extent of her community interest. (Burkett v. Griffith, 90 Cal. 532, 541, 27 P. 527, 13 L.R.A. 707, 25 Am. St.Rep. 151; Hencken v. City of Morgan Hill, 21 Cal.App.2d 438, 442, 69 P.2d 462. The allegations do not make it certain whether the property in question was acquired wholly with community funds or whether a definite portion of the purchase price had been paid by the defendant with his separate funds and a different proportion of the purchase price was paid with community funds. The allegation that $1,000 was less than plaintiff's interest is a mere conclusion; is only inferential and argumentative. Without the curing of such defect the special demurrer is fatal to the pleading. A fact which constitutes an essential element of a cause of action cannot be left to an inference. (Los Angeles v. Signoret, 50 Cal. 298; Johnson v. Fletcher, 97 Cal.App. 153, 156, 274 P. 1001.)

[21] The allegations of paragraph IV of the second count "that plaintiff was without any opportunity by her to receive independent legal advice as to her rights against the defendant relating to the community property of the parties and to her support and maintenance by him," and "that said purported agreement was unfair and unjust to her * * * and is against public policy and therefore void," are inferential and argumentative statements, conclusions and not direct averments of material facts. (Hauser v. Pacific Gas and Electric Company, 133 Cal.App. 222, 225, 23 P.2d 1068; Osborn v. Hoyt, 181 Cal. 336, 339, 184 P. 854; Baker v. Miller, 190 Cal. 263, 266, 212 P. 11.) No issue of fact is raised by such statements; no facts are alleged to show that the agreement was unfair. Instead of such declarations the pleading should contain averments showing the facts (1) whereby she was debarred from opportunity to obtain independent legal advice, (2) whereby the advice she received was not for her advantage, and (3) from which the injustice of the agreement could be derived. The same vice obtains in the allegation that "plaintiff was also under the influence, control and dominance of defendant." Such language is a conclusion. To have made such charge effective appellant should have declared the facts that might show whether his dominance was due merely to the conjugal relationship or to her fear of denying his wishes or to her fear of losing custody of her child. Also the allegations that

"had she been so informed and represented, she would not have entered into and executed the said purported agreement nor have accepted the consideration and benefits to her therein expressed; * * * said purported agreement * * * is unfair and unjust to plaintiff" are mere conclusions.

[22] While count two alleges that the agreement was prepared by counsel of respondent's selection "without any opportunity by her to receive independent legal advice," thereby implying that appellant was defrauded by respondent, yet there is no allegation that the advice given her was illegal or unwise. While the pleading sounds primarily in undue influence, it makes no averment that her illness rendered her incapable of understanding the transaction. Since there is no allegation of either fraud, menace or duress, the only attempt to plead an equitable cause is to be found in the language that she was "physically sick and in a highly nervous and mentally distraught state which was well known to defendant; * * * was also under the influence, control and dominance of defendant; that plaintiff was not, by reason of her said condition of health and by reason of said influence, control and dominance, able to exercise independent judgment." Such statements are not ultimate facts but conclusions only, and are not sufficient to constitute a cause of action. (In re Estate of Streeton, 183 Cal. 284, 289, 191 P. 16; Munfrey v. Cleary, 75 Cal.App.2d 779, 171 P.2d 750; In re Estate of Sheppard, 149 Cal. 219, 220, 85 P. 312.)

[23] The second count contains no allegation of an offer to restore the $1,000 paid appellant for her interest in the community estate. There is no allegation of fact to show that her share exceeds or is equal to $1,000. Her offer is not sufficient. There is no allegation by which it can be determined that if the agreement should be annulled she would in event of a valid divorce be entitled to any share of the community estate. The title to the property stands in respondent's name. On a trial it may develop that it is his separate estate. Since the action is for rescission and there is no explanation why she did not return or offer to return the $1,000 the special demurrer is fatal to count two. (Clanton v. Clanton, 52 Cal.App.2d 550, 554, 556, 126 P.2d 639; Hite v. Mercantile Trust Company, 156 Cal. 765, 767, 106 P. 102.)

Appellant has cited many authorities (Davis v. Davis, 49 Cal.App.2d 239, 121 P.2d 523; In re Estate of Boeson, 201 Cal. 36, 255 P. 800; Gaines v. California Trust Co., 48 Cal.App.2d 709, 121 P.2d 28; Norris v. Norris, 50 Cal.App.2d 726, 123 P.2d 847; Auclair v. Auclair, 72 Cal.App.2d 791, 165 P.2d 527; Andrew v. Andrew, 51 Cal.App.2d 451, 125 P.2d 47; Streeter v. Streeter, 67 Cal.App.2d 138, 139, 153 P.2d 441), that would serve to support a complaint where reliance is placed upon undue influence and upon a violation of the confidential relationship. They do not avail her as support for conclusions instead of ultimate facts.

[24] Appellant having declined further to amend her complaint to conform with the rules of pleading this court is without power to grant any relief as to the property settlement. A litigant is entitled to prosecute his cause only by first pleading the nature of relief sought and the ultimate facts by which he deems himself to be entitled thereto under the law. If after the court's ruling that his allegations are ambiguous or uncertain, or unintelligible, he declines to amend and there is no error in the order, affirmance thereof is the only answer to his appeal.

The judgment is affirmed in so far as it relates to the second count. As to the first and third counts it is reversed with instructions to overrule the demurrers as to them.

McCOMB and WILSON, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

**WHELPTON v. TAYLOR et al.**
**Civ. 7451.**
**Sac. 5884.**

District Court of Appeal, Third District, California.
Oct. 20, 1947.

**1. Appeal and error ⚷607(1)**

Rule that notice given by appellant to clerk designating papers or records on file which he desires incorporated in record on appeal, shall not be effective unless, within 10 days after notification from clerk of estimate of cost of preparing transcript, appellant shall arrange for payment thereof, is mandatory. Rules on Appeal, rule 5(c).

**2. Appeal and error ⚷607(1)**

Where appellant, on receiving clerk's first notification of estimate of cost of preparing transcript, mailed his check to clerk in payment of transcript, but thereafter appellant received a second estimate, which was dated February 5th, and appellant made no arrangements with clerk for payment of additional amount until after his receipt of notice of respondent's motion to dismiss appeal, which was mailed on September 2, appellant's appeal was dismissed for failure to comply with rule requiring payment for transcript within 10 days after notification from clerk. Rules on Appeal, rules 5(c), 10(a).

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Appeal from Superior Court, Glenn County.

Action by Marsden Whelpton against Roland M. Taylor, as administrator of the estate of E. F. Stella, deceased and others, wherein the named defendant filed a cross-action against the plaintiff to quiet title. From a judgment in favor of defendants on the complaint, and from judgment for the named defendant against plaintiff in the cross-action, the plaintiff appeals, and the named defendant moves to dismiss the appeal.

Appeal dismissed.

William M. Taylor, of Long Beach, for petitioner.

Arthur C. Fisher, of Los Angeles, for respondents.

ADAMS, Presiding Justice.

This is a motion to dismiss an appeal on the ground that appellant failed to make arrangements with the clerk of the lower court for payment for the clerk's transcript within the time provided by the Rules on Appeal.

Notice of motion to dismiss was filed in this court on September 4, 1947, and October 2nd was set as the hearing date. The notice was served upon counsel for appellant by mail, same having been posted in Los Angeles on September 2, 1947, addressed to appellant's counsel at Long Beach.

Movant's motion to dismiss is supported by a certificate of the clerk of the lower court which shows that judgment for defendant Roland M. Taylor, as Administrator of the estate of E. F. Stella, deceased, against cross-defendant Marsden Whelpton, quieting title to certain real property, was entered April 26, 1946, and that a judgment was entered on plaintiff's complaint in favor of defendants on June 28, 1946; that on or about July 25, 1946, Whelpton filed a notice of motion to set aside both judgments, which motion was denied September 6, 1946; that Whelpton filed notice of appeal on September 28, 1946; that he did not, however, make arrangements with the clerk for payment of the clerk's transcript, and had not done so at the date of said certificate which was May 28, 1947; that more than 10 days had elapsed since he had been notified, on February 5, 1947, of the clerk's estimate of the cost of preparing the transcript; and that no extension of time had been granted.

On October 1, 1947, Arthur C. Fisher, attorney for plaintiff and appellant, Marsden Whelpton, filed in this court an affidavit made on September 30, 1947, in which he set forth that on January 29, 1947, he received from the clerk of the lower court a notice of estimate of cost of clerk's transcript on appeal, copy of which he attached to his affidavit, and which fixed the clerk's estimate at $15; that he mailed his check for that amount to said clerk on January 30, 1947, and that said check was cashed by said clerk. His affidavit, however, further avers: "That affiant has just found in the file of the above-entitled action a subsequent communication from said County Clerk, a copy of which is hereto attached and expressly made a part hereof as though fully set forth herein and is marked 'Exhibit IV.' That affiant had not previously seen said communication, and has now transmitted to said County Clerk the sum of $20.00 mentioned in said communication, as being due on the revised estimate."

Said subsequent communication sent by the clerk was dated February 5, 1947, and advised Mr. Fisher as follows:

"When we first forwarded you an estimate on the cost of the clerk's transcript on appeal in the above entitled action we only estimated the cost of making up the papers mentioned in your notice and neglected to include the Judgment Roll which must be included, whether requested or not. I have requested a revised estimate from the court reporter and she now gives me the following figures:

| | |
|---|---|
| For original and one copy | $35.00 |
| Previously paid by Mr. Fisher | 15.00 |
| Still Due | 20.00" |

Mr. Fisher's letter to the clerk of this court, which accompanied the aforesaid affidavit, advised that he would like to submit the matter on said affidavit; and on the hearing of the motion to dismiss there was no appearance for appellant.

Rule 5 of the Rules on Appeal provides that an appellant shall give notice to the clerk designating the papers or records on file which he desires incorporated in the record on appeal, and also provides (c) that "The notice given by appellant under the foregoing provisions of this rule shall not be effective for any purpose unless, within 10 days after notification from the clerk of his estimate of the cost of preparing the transcript, with the exception of exhibits and affidavits which the respondent has directed to be copied, the appellant shall make arrangements with the clerk for the payment thereof."

From the showing made before this court it appears that appellant did, within 10 days after receiving the clerk's first notification of his estimate, mail his check to the clerk for payment of same. But, though he received the second estimate, which was dated February 5, 1947, he did not make any arrangements with the clerk for the payment of the additional amount $20 until after his receipt of notice of this motion to dismiss. It is therefore apparent that from January 30, 1947, when he mailed the first check, until just before he made his affidavit on September 30, 1947, he made no effort to ascertain whether the record on appeal had been transcribed and filed in the appellate court, and, apparently, had not even referred to his file or he would earlier have found therein the clerk's second notice, which he admits was in said file.

[1, 2] Rule 5(c) above quoted is mandatory and since appellant did not, within the time provided by the rule, make his arrangements with the clerk, even if the transcript on appeal were now filed in this court (which it has not been) it would "not be effective for any purpose." The conclusion seems to follow that the appeal should be dismissed under Rule 10(a) of the Rules on Appeal. See Barry v. Bowdle, 69 Cal.App. 2d 721, 160 P.2d 91.

Appellant has made no motion to be relieved of his default in failing to comply with Rule 5; and even had he done so it would be difficult to say that the delay was not attributable to inexcusable indifference and neglect on his part. See Leeper v. Ginsberg, 58 Cal.App.2d 591, 595, 137 P.2d 859; Caminetti v. Edward Brown & Sons, 23 Cal.2d 511, 514, 144 P.2d 570; Murphy v. Krumm, 21 Cal.2d 846, 849, 136 P.2d 8; Flint v. Board of Medical Examiners, 72 Cal.App.2d 844, at page 846, 165 P.2d 694, at page 695, and cases cited. In the case last cited the court said that "the burden is always upon an appellant to use reasonable diligence to perfect and prosecute his appeal. Where some step is required by the rules to be taken by an officer of the court and such officer delays unreasonably the appellant cannot sit by indefinitely and do nothing. He must exercise a reasonable amount of diligence to investigate any unwarranted delays and if necessary take steps to see that the legal duty is performed."

The appeal is dismissed.

PEEK and THOMPSON, JJ., concur.

82 Cal.App.2d 45

**THOMPSON et al. v. CITY OF LOS ANGELES et al.**

**Civ. 15592.**

**District Court of Appeal, Second District, Division 1, California.**

Oct. 23, 1947.

**1. Appeal and error 🔑1107**

On appeals involving injunctive decrees, the law in effect when appellate court renders its opinion must be applied.

**2. Evidence 🔑31**

Appellate court would take judicial notice of the provisions of city charter of Los Angeles.

**3. Municipal corporations 🔑206, 659**

City of Los Angeles had authority under its charter to construct, operate and maintain on strip of land between roadways of street overhead steel tower high tension electric transmission line in order to more efficiently distribute electricity to city and its environs.

**4. Municipal corporations 🔑600**

Construction, operation and maintenance by City of Los Angeles of overhead steel tower high tension electric transmission line on strip of land between roadways of street in residential zone was not unlawful, in view of amendment of city zoning laws so as to exempt electric power transmission lines from all zoning restrictions and like exemption granted by county to city.

**5. Injunction 🔑22**

Where electric power line has been constructed and has passed into public use, an injunction will not be granted to interfere with such use, where the rights of parties seeking injunction may be protected fully by action for damages.

**6. Appeal and error 🔑460(1), 1138**

Where plaintiffs failed to post bond necessary to continuance of temporary restraining order pending appeal from judgment refusing to enjoin construction and maintenance by city of high tension electric transmission line and as a result line was constructed and public use attached before appeal was heard, a prohibitory injunction interfering with such use would not issue, regardless of whether complaint stated a cause of action, and plaintiffs must be relegated to an action for damages.

* * *

Appeal from Superior Court, Los Angeles County; Warren Steel, Judge.

Action by Nedra C. Thompson and others against City of Los Angeles, a municipal corporation, and others to permanently enjoin defendants from constructing a section of overhead steel tower electric transmission line. Judgment for defendants and plaintiffs appeal.

Judgment affirmed.

Bernard Brennan, of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Gilmore Tillman, Chief Asst. City Atty., for Water and Power, Joseph F. Bosio, Rex B. Goodcell, Jr., and George K. Whitworth, Deputy City Attys., all of Los Angeles, for respondents.

WHITE, Justice.

Plaintiffs instituted this action to permanently enjoin defendants from constructing a section of overhead steel tower electric transmission line on and along a strip of land 30 feet wide and approximately 2.5 miles long, lying between the north and south roadways of 98th Street from Avalon Boulevard westerly to Western Avenue (the westerly terminus of 98th Street), and beyond approximately one-fourth mile to a point between Western and Van Ness Avenues, where the route of the line turns north. Said strip lies in the City of Los Angeles except for 0.6 mile between Vermont and Halldale Avenues, which is in unincorporated territory of the County of Los Angeles. Plaintiffs are residents and owners of property in the immediate vicinity of the section of the line involved in this litigation, which section is approximately 2.75 miles long and is part of the city's high tension line which directly interconnects certain receiving stations on the city's electric system. The line is to consist of steel towers with three twenty-five-foot steel cross arms on each tower. The towers are quadruped steel structures 135 feet high and 20 feet square at the base, supported by large concrete foundations. These towers are spaced about 600 feet apart.

The cause proceeded to trial on plaintiffs' third amended complaint. When plaintiffs' first witness was called and sworn, defendants objected to the introduction of any evidence by plaintiffs on the ground that said third amended complaint did not state facts sufficient to constitute a cause of action. This objection was sustained except as to the single issue of whether certain areas referred to as "islands" lying between the north-south roadways of 98th Street in the City of Los Angeles were zoned for residential purposes. Upon that single issue evidence was received and the court found that said "islands" were not so zoned, and in fact were unzoned. Judgment was entered in favor of defendants and plaintiffs appeal.

Appellants do not challenge the correctness of the finding that the "islands" within the city were unzoned, and the primary and single question presented by this appeal is: Does the plaintiffs' third amended complaint for injunction state a cause of action for injunctive relief?

[1] One of the asserted grounds for injunctive relief is that appellants will suffer irreparable damage, because, as it is alleged, the construction and operation of the overhead line as proposed will violate city and county zoning restrictions. However, during the pendency of this appeal, the city's zoning laws were amended to expressly exempt electric power transmission lines from all zoning restrictions, and a like exemption was granted by the Board of Supervisors of Los Angeles County to respondent city and respondent department under the procedure provided by the county zoning ordinance, expressly permitting the construction of the line here in controversy on and along that portion of the right of way situated within county territory. These matters were duly brought to the attention of this court by means of respondents' "Application to take additional evidence", which application was unopposed and was granted by us because of the rule that whatever may be the law applicable to appeals generally, the rule is well settled that on appeals involving injunction decrees, the law in effect when the appellate court renders its opinion must be applied. Dr. Miles California Co. v. Sontag Chain Stores Co., 8 Cal.2d 178, 179, 64 P.2d 726; American Fruit Growers v. Parker, 22 Cal.2d 513, 515, 140 P.2d 23; Diederichsen v. Sutch, 47 Cal.App.2d 646, 650, 118 P.2d 863; Bernard v. Weaber, 23 Cal.App. 532, 138 P. 941; Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal.2d 489, 527, 528, 45 P.2d 972.

[2] Respondent Department of Water and Power is a department of the city government of the City of Los Angeles, created by section 70 of the charter of said city, the provisions of which this court takes judicial notice. Tilden v. Blood, 14 Cal.App.2d 407, 413, 58 P.2d 381. By the terms of the city charter respondent board is given the power and is charged with the duty "to construct, operate, maintain, extend, manage and control works and property for the purpose of supplying the City and its inhabitants with * * * electric energy * * * and to acquire * * * and to hold in the name of the City, any and all property * * * that may be necessary and convenient for such purpose" (Sec. 220 (1)). Respondent Board of Water and Power Commissioners is the board having the control and management of said department (Sec. 71) and respondent General Manager and Chief Engineer is the chief administrative officer of said department (Sec. 80).

In further pursuance of the foregoing unopposed "Application to take additional evidence" there was brought to this court the affidavit of William S. Peterson, Assistant Chief Electrical Engineer of respondent Department of Water and Power of the City of Los Angeles, from which it appears without contradiction, that following the granting of the foregoing zoning exemptions by the City and County of Los Angeles, the line here in controversy was constructed and completed, as proposed, and is now and for some time has been energized and in continuous use and operation.

Appellants concede that the line is completed, recognize its public importance, and that it is a part of the city's "loop line" which "delivers electric energy to receiving stations which are located throughout the area of the City of Los Angeles", through which electricity is supplied to consumers; that the purpose of the "loop line" is "to more efficiently distribute electrical energy to the City of Los Angeles and its environs"; and that the completion of said "loop line" will "increase the stability and the efficiency of the distribution of electricity to the subscribers of the department's service".

[3, 4] In view of the foregoing provisions of Section 220 of the City Charter, it must be conceded that there was no absence of authority for the construction, operation or maintenance of the line, and in view of the above noted exceptions granted under both the city and county zoning ordinances, the argument that the line was unlawfully constructed or is being unlawfully operated or maintained must fail.

There is a further situation prevailing in this proceeding to which we should advert before applying a principle of law which we believe to be determinative of the question raised on this appeal. The judgment rendered herein contained a conditional restraining order, the provisions of which provided that the temporary restraining order whereby respondents were restrained and enjoined, until the entry of judgment herein, from constructing or erecting the overhead steel towers or foundations therefor, or constructing wires or cables or apparatus for transmitting electric energy, "is hereby continued in full force and effect pending the plaintiffs' appeal from the foregoing judgment and until the remittitur thereon shall have been issued", provided that within a specified time appellants herein post a bond. Appellants, however, waived their right and opportunity in that regard by failing to post the bond required as a condition to the continuance of the aforesaid restraining order, with the result that the line was constructed and public use attached.

[5] Resting upon the consideration of public policy, in conformity with which the rights of the citizen are sometimes abridged in the interests of the public welfare, the rule of law stated in County of Los Angeles v. Rindge Co., 69 Cal.App. 72, 81, 230 P. 468, becomes applicable. The rule in question, as applied to the case now under consideration, being that where the power line has been constructed and has passed into public use, an injunction will not be granted to interfere with the enjoyment of that use when the rights of appellants may be protected fully by an action for damages. Los Angeles Athletic Club v. City of Long Beach, 128 Cal.App. 427, 432, 433, 17 P.2d 1061; Chilberg v. City of Los Angeles, 54 Cal.App.2d 99, 102, 103, 128 P.2d 693.

[6] Therefore, regardless of whether the third amended complaint states a cause of action, under the facts here present a prohibitory injunction should not issue and appellants must be relegated to an action for damages.

For the foregoing reasons, the judgment is affirmed.

DORAN, Acting P. J., concurs.

YORK, P. J., deeming himself disqualified, did not participate in the hearing or decision of this cause.

81 Cal.App.2d 902

## STONE et al. v. LOS ANGELES COUNTY FLOOD CONTROL DIST.

## HOUSE v. SAME.

Civ. 15861.

District Court of Appeal, Second District, Division 2, California.

Oct. 17, 1947.

Hearing Denied Dec. 15, 1947.

**1. Judgment 🔑199(3)**
**Trial 🔑139(1)**

Where there was evidence of sufficient substantiality to have sustained a verdict for plaintiffs, court correctly denied defendant's motion for a nonsuit and for a directed verdict, and for judgment notwithstanding verdict.

**2. New trial 🔑71**

In considering a motion for a new trial, the court cannot rest on a conflict in the evidence but must weigh and consider the evidence for both parties, and determine for itself the just conclusion to be drawn from the evidence.

**3. New trial 🔑71**

If a judge is convinced that the verdict is clearly against the weight of the evidence, it is his duty to grant a new trial, even though there may have been some conflict in the evidence.

**4. Appeal and error 🔑977(3)**

Since the granting of motion for new trial rests completely within the trial judge's discretion, his order will not be interfered with, unless it appears that there has been a manifest and unmistakable abuse of discretion.

**5. Appeal and error 🔑854(6), 933(1)**

On appeal from an order granting a new trial, presumptions are in favor of the order as against verdict, and it will be affirmed if it can be sustained on any ground though reviewing court might have ruled differently in first instance.

**6. Appeal and error 🔑1015(3)**

If evidence is uncontradicted, a trial judge nevertheless may draw inferences from it opposed to those drawn by the jury, and it is only when, as a matter of law, there is no substantial evidence to support a judgment contrary to verdict of the jury that an appellate court will reverse order granting a new trial.

**7. Appeal and error 🔑717**

Where trial judge's opinion on motion for new trial appeared in transcript, it could be considered on appeal. Rules on Appeal, rule 5(a).

**8. Appeal and error 🔑717**

Though an opinion of the trial judge will aid an appellate court in ascertaining the process by which a judgment has been reached, the opinion will not be considered on appeal from an order granting a new trial in determiing whether verdict of the jury or findings of court are supported by evidence. Rules on Appeal, rule 5(a).

**9. Appeal and error 🔑854(1)**

A trial judge's order concludes the case and cannot be impeached by the judge's opinion, and the question that concerns the reviewing court is whether final decision, judgment or order is correct and not whether reasons expressed in the opinion are in harmony with result reached or whether they sustain the decision. Rules on Appeal, rule 5(a).

**10. Appeal and error 🔑854(6)**

Where trial judge's opinion recited that motion for new trial was granted on ground that evidence was insufficient to justify jury's verdict and that the verdict and judgment were against the law, order must be affirmed if it could be sustained on either of the two grounds.

**11. Levees and flood control 🔑36**

Where landowners in actions against county flood control district, to recover for damages resulting from overflow of waters from river allegedly because district removed dikes, groins and riparian growth from banks of river and replaced them with small stone blocks, admitted that some damage would have been caused by overflow of waters even if district had not replaced the old structures with stone blocks, measure of landowners' recovery was not the total damages suffered but was differential between damage that would have occurred in any event with former conditions unchanged and that which did occur.

**12. Appeal and error 🔑979(2)**

An appellate court will not review, compare or evaluate evidence unless there has been an abuse of discretion in granting a new trial.

**13. New trial 🔑70**

In actions by landowners against county flood control district for damages resulting from overflow of waters of river during storm, on ground that damages would not have been so great had not the district removed dikes, groins and riparian growth from banks of river and substituted small stone blocks, trial judge did not abuse his discretion under the evidence in granting district new trials.

**14. Levees and flood control 🔑36**

In actions by landowners against county flood control district to recover for damages resulting from overflow of waters of river during storm on ground that damages would not have been so great had not the district removed dikes, groins and riparian growth from banks of river and substituted small stone blocks, landowners could not recover such items as damage to books, clothing, furniture and other personalty and to floors and walls of buildings, where witnesses were in unanimous agreement that the land would have been inundated in any event though district had not replaced structure on river banks.

**15. Levees and flood control 🔑36**

County flood control district is obliged to do no more than to exercise ordinary care in the erection and maintenance of structures, and is not an insurer of safety of persons or against injury to them or against all possible damage that might be inflicted on private property from floods.

**16. Levees and flood control 🔑36**

County flood control district was not liable to landowners for damages from flooding caused by district's property that in itself was not dangerous either in its construction or in its intended use merely because it might appear that it could possibly have been made safer by other means.

**17. Levees and flood control 🔑36**

If act of county flood control district in removing dikes, groins and riparian growth from banks of river and replacing them with small stone blocks, did not result in a greater amount of damage to landowners from overflow of waters from river than would have been caused if there had been no change, district would not be liable to landowners.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Consolidated actions by Carl F. Stone and Lenore Ream Stone, and Lillian Candage House, and others against the Los Angeles County Flood Control District, a body corporate and politic, to recover for damages resulting from the overflow of waters. The jury returned a verdict for plaintiffs as to the defendant's liability and the trial of the cause then proceeded before the jury on the question of damages, and the jury returned verdicts in favor of the plaintiffs, assessing the damages of each separately. From an order granting the defendant a new trial, the plaintiffs appeal.

Order affirmed.

Henry M. Lee, Hill, Morgan & Farrer, Charles P. McCarthy, Harry J. McClean and Latham & Watkins, all of Los Angeles, for appellants.

Harold W. Kennedy, County Counsel, and Roy W. Dowds, Asst. County Counsel, both of Los Angeles, for respondent.

WILSON, Justice.

Eleven actions against respondent for damages resulting from the overflow of waters of the Los Angeles River during a storm in March, 1938, were consolidated and tried before a jury. By stipulation the actions were first tried upon the question of respondent's liability. At the close of the evidence on this phase of the case respondent made a motion for a nonsuit and a motion for a directed verdict, both of which were denied. The jury returned a verdict in favor of appellants and against respondent as to the latter's liability. The trial of the causes then proceeded before the same jury upon the question of damages sustained by the several appellants. The jury returned verdicts in their favor, assessing the damages of each separately. Respondent made a motion for judgment in its favor notwithstanding the verdicts which the court denied. Thereafter respondent presented a motion for a new trial. This motion was granted. The appeal is from the order granting a new trial.

[1-3] Since there was evidence of sufficient substantiality to have sustained a verdict in favor of appellants, the court was correct in denying respondent's motions for a nonsuit and for a directed verdict (Weck v. Los Angeles County Flood Control Dist., 80 Cal.App.2d 182, 181 P.2d 935, 940 and cases cited) and its motion for a judgment notwithstanding the verdict. (Kataoka v. May Dept. Stores Co., 60 Cal.App.2d 177, 181, 140 P.2d 467, and cases cited.) However, in considering a motion for a new trial the court is guided by a different rule from that which controls in passing on the motions above mentioned. It "cannot rest upon a conflict in the evidence, but must weigh and consider the evidence for both parties, and determine for itself the just conclusion to be drawn from it." If the judge is convinced that the verdict is clearly against the weight of the evidence it is his duty to grant a new trial even though there may have been some conflict in it. Green v. Soule, 145 Cal. 96, 102, 78 P. 337, 340; Imperial-Yuma, etc. Ass'n v. Shields, 74 Cal.App.2d 932, 935, 169 P.2d 671.

[4, 5] Since the granting of a motion for a new trial rests so completely within the discretion of the trial judge, his order will not be interfered with by the reviewing court unless it appears that there has been a manifest and unmistakable abuse of discretion. Jordan v. Schrieber, 74 Cal.App.2d 800, 805, 169 P.2d 394; Mazzotta v. Los Angeles Ry. Corporation, 25 Cal.2d 165, 169, 153 P.2d 338, and cases cited; Gallichotte v. California Mut. Building & Loan Ass'n, 23 Cal.App.2d 570, 576, 74 P.2d 73, 535. On appeal from an order granting a new trial all presumptions are in favor of the order as against the verdict and it will be affirmed if it can be sustained on any ground although the reviewing court might have ruled differently in the first instance. Mazzotta v. Los Angeles Ry. Corp., supra.

[6] If the evidence is uncontradicted a trial judge may nevertheless draw inferences from it opposed to those drawn by the jury and it is only when, as a matter of law, there is no substantial evidence to support a judgment contrary to the verdict of the jury that an appellate court will reverse the order granting a new trial. Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 307, 163 P.2d 689; Williams v. Field Transportation Co., 28 Cal.2d 696, 698, 171 P.2d 722.

The issue before us is not the simple question whether the evidence is sufficient to support the verdict. We must determine whether (1) there is a conflict in the evidence and if so (2) whether the conflict is such that we may hold that the court did not abuse its discretion in setting aside the verdict and ordering a new trial.

The allegations in the pleadings of the several appellants upon which they base their claims against respondent for damages are the same excepting only the allegations as to the specific damages to their respective properties. The facts alleged in the various complaints are set forth at length in House v. Los Angeles County Flood Control Dist., 25 Cal.2d 384, 153 P.2d 950, one of the cases in this consolidated group. The appeal in that case was from a judgment following the sustaining of a demurrer to the amended complaint without leave to amend. That decision does not determine any question presented on this appeal since it went no further than to hold that the amended complaint stated facts sufficient to constitute a cause of action.

Appellants alleged and the evidence showed that prior to the construction of the works asserted to have been defective and to have been the cause of the damage respondent had installed permeable dikes of piling and wire mesh along each side of the river and groins at right angles to the dikes. Trees, shrubs and other vegetation had grown along the banks of the river. The dikes, groins and riparian vegetation did not confine the water during a flood but they so restrained the flood waters that they flowed slowly over appellants' lands. There was a flood in 1934 which overflowed onto appellants' properties but by reason of the slow movement of the water there was no erosion. Between 1934 and 1938 the dikes, groins and riparian growth were removed and the bed and banks of the river were covered with sand and gravel over which small stone blocks were placed. When the flood occurred in 1938 the new installations were washed out, resulting in the overflow of the waters of the river and damage to appellants' properties.

Appellants' claim for recovery of damages is based on the allegation that the new installations were negligently planned, constructed and maintained, resulting in the taking and damaging of their property without compensation in violation of Section 14 of Article I of the Constitution of California.

[7-9] The opinion of the trial judge on the motion for a new trial appears in the transcript and is a part of the record on appeal. Rule 5(a) of Rules on Appeal, 22 Cal.2d 4. Appellants contend that the opinion contains inconsistent statements and that the trial judge inaccurately analyzed the evidence and incorrectly applied the law. We need not consider this contention. While an opinion of the judge of the trial court will aid the appellate court in ascertaining the process by which a judgment has been reached it will not be considered in determining whether or not the verdict of the jury or the findings of the court are supported by the evidence. Buckhantz v. R. G. Hamilton & Co., 71 Cal.App.2d 777, 781, 163 P.2d 756; In re Estate of Felton, 176 Cal. 663, 667, 169 P. 392; Goldner v. Spencer, 163 Cal. 317, 320, 125 P. 347; DeCou v. Howell, 190 Cal. 741, 751, 214 P. 444. The order when made by the court concludes the case and it cannot be impeached by the judge's opinion. The question that concerns the reviewing court is whether or not the final decision, judgment or order is correct and not whether the reasons expressed in the opinion are in harmony with the result reached or whether they sustain the decision. Buckhantz v. R. G. Hamilton & Co., supra.

Rule 5(a) makes the opinion a part of the record on appeal and thereby places it officially before the reviewing court for its consideration, but it does not modify the limitations found in the foregoing citations upon the effect to be accorded it. Redsted v. Weiss, 73 Cal.App.2d 889, 891, 167 P.2d 735; Southern California Freight Lines v. San Diego Electric R. Co., 66 Cal. App.2d 672, 676, 152 P.2d 470; Williams v. Kinsey, 74 Cal.App.2d 583, 601, 169 P.2d 487.

[10] Omitting any reference to the reasoning of the court the opinion recites that the motion was granted on two grounds: (1) Insufficiency of the evidence to justify the verdict of the jury and the judgment based thereon; (2) That the verdict and judgment are against law. If the order can be sustained on either ground we must affirm it.

Appellants maintain that the overflow in 1938 was greater and more violent than it would have been if the previously existing dikes and riparian growth had been permitted to remain. At the trial they conceded that their property was inundated and was damaged to some extent by the flood of 1934 before the dikes, groins and riparian growth had been removed. They further conceded that even though those structures had remained undisturbed in 1938 the flood in that year was of such volume and intensity that the water would have overflowed and covered their properties. They assert that in 1938 a greater amount of water flowed over their land and that it traveled with greater speed and caused much more damage than would have been the case if the former structures had been permitted to remain.

In response to a statement of counsel for respondent and a query by the court counsel for appellants admitted that respondent, if liable at all, was liable only for the difference between the amount of damage that would have occurred in 1938 if the old structures had not been removed and the amount actually suffered by appellants. Such is the law and we would so hold in the absence of such admission. The jury was so instructed by the court.

[11] Since, if respondent was liable for any amount, a question that we find unnecessary to discuss on this appeal, the measure of appellants' recovery is not the total damages suffered by them but is the differential between the damage that would have occurred in any event with former conditions unchanged and that which did occur, evidence was necessary from which the jury could determine (1) the amount of damages that would have been suffered by each appellant in 1938 if the conditions existing in 1934 had remained, and (2) the amount that each did sustain by reason of the flood of 1938. If the evidence showed that the damage actually suffered by any appellant was greater than it would have been if the old structures had not been removed and that the change in the restraining structures along the riverbed rendered respondent liable for damage, it devolved upon the jury to determine the difference and to render a verdict for such difference and no more.

[12, 13] An appellate court will not review, compare or evaluate evidence unless there has been an abuse of discretion in granting a new trial. We discover in the record no basis for finding that discretion was abused. It is trite to say that the trial judge saw the witnesses, considered their demeanor, their manner of testifying, and their candor or the lack of it, determined their credibility, and was the judge of the qualifications of expert witnesses.

There is evidence that the volume of the flood of 1938 was two and a half or three times the magnitude of that of 1934—one witness testified that it was four times greater. He stated that the peak discharge at one point was 58,000 second feet in 1938 and at the same point 14,000 second feet in 1934. The witnesses agreed that appellants' properties would have been inundated in 1938 in any event and that the effect of the piling, wire dikes and riparian growth would have been to decrease the velocity of the water but that those installations would not have confined the waters within the channel. Appellants' witnesses agreed that there would have been inundation and overflow but expressed the opinion that there would have been no erosion. There was evidence of qualified hydraulic engineers that erosion would have occurred and that the damage would have been the same if not greater if the old dikes and riparian growth had remained in place in 1938.

There was evidence that the piles were driven in 1930, that the average life of a pile is 10 years, and that the strength and effectiveness of those piles as a barrier was just about exhausted in 1938. One witness testified that the current could have torn through the wire fencing and eroded behind the piles taking out the brush and eventually resulting in failure of the structures to withstand the force of the water.

[14] In view of the unanimous agreement of the witnesses that the land would have been inundated in any event, such items as damage to books, clothing, furniture and other personal property and damage to floors and walls of buildings, would have been sustained regardless of the presence or absence of the old structures and therefore cannot be recovered. The record does not show whether the jury included such amounts in their verdict.

Many of the cases cited by appellants have no application to the determination of the instant case. In Hanlon Drydock & Shipbuilding Co. v. Southern Pac. Co., 92 Cal.App. 230, 235, 268 P. 385, it is said that where damage is suffered the guilty party is not to be relieved merely because the extent of the damage cannot be accurately measured, and that where exact computation cannot be made it must be left to the good sense of the jury to form from the evidence the best estimate of the basis of compensatory damages that can be made under the circumstances. In California Orange Co. v. Riverside Portland Cement Co., 50 Cal.App. 522, 528, 195 P. 694, the court said that if it is impossible to distinguish between the damages arising from the defendant's actionable injury and damage which had another origin, the jury should be left to make from the evidence the best possible estimate. Other cases containing similar language are cited. All of them are predicated on records containing evidence from which the damage could be estimated.

Cases are cited to the effect that where a defendant by his own wrong has prevented a precise computation, or by his misconduct has rendered accurate data unavailable, the jury may make a reasonable estimate based on relevant data, and that a defendant cannot complain that damages lack an exactness of measurement because he had not kept a complete record. Obviously such cases are foreign to the questions presented in this action. There is no contention that any act of respondent. wrongful or otherwise, prevented a computation of appellants' losses or that its failure to keep records had anything to do with their damages or with their ability to offer proof of the amounts.

Appellants state in their brief that 10 witnesses testified on their behalf that in their opinion appellants would have suffered no damage as a result of the flood of 1938 if the former protection had remained. These witnesses admitted that appellants' properties would have been inundated but assert that the waters would have had little velocity and no erosive force. Their brief also refers to the evidence of 10 witnesses for respondent who testified that the damage in 1938 would have been as great had the former protective works been in place as was actually suffered by reason of the failure of the new installations to restrain the waters from overflowing. There was evidence that the flood was of such volume that appellants' lands would have suffered from erosion if the former structures had remained. There was evidence that the old piling would have withstood the force of the flood, and there was evidence that because of their age the piles had but little strength and probably would have been broken down by the waters. There was evidence that the flood was so great that the earth into which the piles were driven would probably have been eroded and that they would have been washed away, and there was evidence to the contrary. There was evidence of expert witnesses that the new channel afforded better protection than the old pile channel and that the latter would have offered much less resistance to the flood in 1938 than did the rock revetted embankment, and there were expert witnesses who reached the opposite conclusion.

It thus appears that the evidence was conflicting upon every question involved in the case excepting that it was agreed by all witnesses that a flood occurred in 1938 and that appellants' lands were inundated.

Appellants stress the fact that the jury awarded damages to them in amount less than those to which they testified they had suffered as indicating that the jury followed the instruction of the court and rendered verdicts for the difference between the damage suffered and that which would have resulted if the former protective structures had remained. We find nothing in the record to sustain this contention. In fact, insofar as we have been referred to the evidence, the jury awarded less than appellants demanded because the evidence would not have sustained recoverable damages in the amount claimed. An example is where one of the appellants sought to recover $4,000 and the jury awarded only $1,000. The water covered the lower floor of his home to a depth of one and a half inches and he claimed the full cost of repairing the entire house, upper and lower floors, and painting it inside and outside, together with other excessive demands. Another appellant whose clothing and furnishings were damaged claimed the cost of the articles when new and not their value at the time of the flood. In allowing less than the damages testified to by appellants the jury merely deflated their demands to amounts that seemed more reasonable than those claimed but it nowhere appears that they heard evidence upon or attempted to calculate the difference between the losses actually sustained and those that would have been suffered by reason of the inundation that would necessarily have occurred if no change had been made in the protective installations.

Since it is conceded that had the dikes and riparian growth remained there would have been some damage in 1938 by reason of the overflow that would inevitably have occurred, the jury should have been furnished with evidence upon which they could have based their calculations. The first verdict finding respondent liable for damages was merely a determination that if, during the second phase of the trial, evidence should be introduced as to the amount of damages suffered by appellants they would be entitled to verdicts for such amounts as were supported by the evidence. Respondent asserts that no evidence was offered on the question and appellants have not referred us to any part of the transcript where such evidence may be found. Respondent points out testimony of its witnesses that the damage would have been the same whether the old or the new installations had been in place. One of its witnesses testified that there might have been a difference of 10 per cent.

In response to appellants' expression of uncertainty as to whether the actions must be retried upon the question of respondent's liability as well as upon the question of damages we advert to the conflict of the evidence as to liability which we have outlined, and to our statement in Weck v. Los Angeles County Flood Control District, 80 Cal.App.2d 203, 181 P.2d 935, 948: "No duty rested on the District to keep the water out of plaintiffs' lands, as contended by plaintiffs. The statute creating the District contained no mandatory direction to build public improvements of any particular character or design, or any improvement at all. Its failure to construct an impervious and indestructible wall along the Wash was not an act constituting the taking or damaging of private property for public use for which compensation would be required."

[15-17] The district is obliged to do no more than to exercise ordinary care in the erection and maintenance of its structures. It is not an insurer of the safety of persons or against injury to them (Belcher v. San Francisco, 69 Cal.App.2d 457, 463, 158 P.2d 996) or against all possible damages that might be inflicted on private property. Curci v. Palo Verde Irr. Dist., 69 Cal.App.2d 583, 588, 159 P.2d 674; House v. Los Angeles County Flood Control Dist., 25 Cal.2d 384, 392, 153 P.2d 950. It is not liable for damages caused by its property that in itself is not dangerous either in its construction or in its intended use merely because it may appear that it could possibly have been made safer by other means. Schmidt v. City of Vallejo, 122 Cal.App. 5, 11, 10 P.2d 107. Since it is admitted that in any event there would have been some damage in 1938, if the change in the protective installations did not result in a greater amount of damage in that year than would have been caused if there had been no change, respondent is not liable. United States v. Sponenbarger, 308 U.S. 256, 265, 60 S.Ct. 225, 84 L.Ed. 230, 237. Since the liability of respondent is thus delimited and since the evidence in the record before us as to its accountability is widely conflicting we cannot determine the question on this appeal.

We find no abuse of discretion in the granting of a new trial and the order is therefore affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

81 Cal.App.2d 792

## STICE v. STICE.

Civ. 15643.

District Court of Appeal, Second District, Division 1, California.

Oct. 15, 1947.

**1. Husband and wife 🔑257**

The entire profits realized by business acquired by husband before marriage, are not necessarily separate property of husband, and it is a question for the court to determine what portion of the profits arises from use of the capital and what part arises from the activity and personal ability of the husband, and the portion due to the personal ability of the husband is community property.

**2. Appeal and error 🔑1071(6)**
**Husband and wife 🔑257**

Where husband, about five years after marriage, was given a fourth partnership interest and later a third interest in his father's business, and he began working with his father at a salary which was ultimately $200 a week, and in addition profits of business were set up in an "earnings" account for each partner, and several years later when wife was granted separate maintenance, husband's account amounted to $107,700.51, court committed reversible error in not determining what part of that amount was community property.

**3. Husband and wife ⚿266**

A husband may give his wife any portion of his separate estate as her separate property, or a husband and wife may, by simple agreement, convert separate personalty into community property. Civ.Code, § 158.

**4. Appeal and error ⚿1008(1)**

Question whether husband by his acts in dividing partnership income between husband and wife for income tax return purposes, and by alleged statements to wife that everything they had was community property, converted one-half of his separate interest in partnership profits into community property by simple agreement, was for the trial court to determine in husband's divorce action, wherein wife was granted separate maintenance. Civ.Code, § 158.

**5. Appeal and error ⚿162(1)**

Wife was not estopped to attack judgment granting her separate maintenance and making a division of property in an amount unsatisfactory to wife, on ground that she accepted benefits of the judgment, where, though wife accepted a transfer of certain property, other property was not divided in accordance with judgment, and judgment made no disposition of one of most valuable items in dispute.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action for divorce by Tod Ellsworth Stice against Clara J. Stice, wherein the defendant filed a cross-complaint for separate maintenance naming Mary M. Johnston corespondent. From the judgment, in so far as it settled property rights of the parties, the defendant appeals.

Judgment reversed and cause remanded for further proceedings.

Albert G. Bergman, of Los Angeles, for appellant.

Hahn, Ross & Goldstone, of Los Angeles, for respondent.

DORAN, Justice.

The original action herein was one for divorce instituted by the husband. The defendant wife, who filed a cross-complaint, now appeals from the judgment, excepting that portion granting the wife separate maintenance and custody of the two children, boys aged about 6 and 3½ years respectively. The record discloses that the parties were married June 23, 1934, and that in 1939 the husband, Tod Stice, entered the service of the Earl O. Stice Company, a plumbing business established by the husband's father. According to respondent's brief, "In 1939 Earl O. Stice (the father) took Tod into his business (Rep.Tr. V. 1, p. 10) and made a gift to Tod of a one-fourth interest in the business (Rep.Tr. V. 1, pp. 11, 12, 13, 175, 181), which he later increased, also as a gift, to a one-third interest (Rep. Tr. V. 1, pp. 12, 13, 18, 19)." In this connection it may be noted that a similar interest was given by the father to another son, Gary Stice, and that the father retained the remaining interest in the business. Written agreements in reference to these gifts were signed by the father, the two sons, and the wives of the respective parties including Clara J. Stice, appellant herein. In the agreement of March, 1941, under which the interest of Tod Stice was increased to a one-third partnership interest, occurs the following provision: "It is the intent of this agreement that the interest of this company shall remain in the hands of Earl, Gary and Tod Stice, their beneficiaries or direct descendants, and the legally adopted children of Gary Stice. Interest shall divert to no one not bearing the surname of Stice." The respondent's brief states that "Clara Stice was the beneficiary under the will of Tod Stice."

After being taken into the firm Tod Stice drew a stipulated salary which began at $45 per week; this was later increased to $60, and ultimately to $200 per week. Respondent's full time was devoted to the business. In addition to this salary, at the end of each year the company profits were divided into three equal parts, which, however, were not withdrawn but set up in an "Earnings" account for each partner, reflecting the unwithdrawn, accumulated amounts. As of December 31, 1944, such accumulation credited to the earnings account of Tod Stice, respondent, amounted to the sum of $107,700.51, which the appellant wife asserts to be community property.

In reference to the wife's claim of community property, the major question involved herein, appellant's brief calls attention to the fact that, "Commencing with the year 1939, plaintiff, who had no other income or earnings than that derived from the partnership business, made income tax returns at the end of each year, to the California State and United States Governments, in which one-half of his earnings were claimed by his wife, defendant. (Rep. Tr. p. 1074, lines 1 to 23.) These income tax returns were made by plaintiff to show his withdrawal of $800 monthly during the year and to further show as his earnings the divided, but unwithdrawn profit of the partnership business, credited to his account. (Rep. Tr. p. 1002, lines 19 to 24; p. 149, lines 5 to 9). The income tax returns, as prepared, consisted of two separate returns; one for plaintiff and one for defendant wife. * * * After said returns were prepared plaintiff took the forms to be signed by defendant's wife, in which she claimed 'one-half husband's community income' and after he had first read them, asked defendant to sign the same. (Rep. Tr. pp. 1076, 1077, 1078.)" This is answered in respondent's brief by the statement that "In splitting his income for income tax purposes, Tod Stice, (as stated on cross-examination), 'did not indicate that she owned a half interest' * * * "; that "The allocation to the partners on the books of the company (of the accumulation hereinbefore referred to) was a matter of bookkeeping", and that the accumulation was not community, but separate property in which the wife had no interest.

Allegations of cruelty contained in the husband's divorce action were denied in toto by the wife, and the latter's cross-complaint for separate maintenance was based upon the husband's "continued and continuous course of amorous and adulterous relations and associations with one Mary M. Johnston, who is the wife of the brother of this defendant and cross-complainant", covering a period of two years or more. The husband's answer to the cross complaint admits that "he has embraced and kissed her (Mary M. Johnston)" but denies the alleged adultery. Likewise an answer filed by the corespondent denies adultery but admits "that for the past two years she has seen him and visited with him on many occasions, and that he has kissed her and caressed her".

The trial court found that the husband was not entitled to a divorce; that no adultery had been proven but that the husband's "conduct in meeting the said Mary M. Johnston and in hugging, embracing and kissing her did inflict mental suffering and anguish" upon the wife, entitling the latter to separate maintenance. The court awarded the sum of $100 per month for the support of the wife and $200 per month for the support of the children, together with attorney fees. Certain designated community property and joint tenancy property was ordered to be divided between the parties, and the court found "That the interest of Tod Ellsworth Stice in the Earl O. Stice Company, a co-partnership, is his sole and separate property." It is pointed out in appellant's brief that the trial court "made no findings as to the accumulated and unwithdrawn ownership of plaintiff (husband) in the and his earnings placed and credited to his unwithdrawn earnings account on the books of the copartnership, as to whether the same were community or separate property". As hereinbefore indicated, the nature of this unwithdrawn accumulation of $107,700.51 may be deemed the crucial question presented on this appeal.

It may be noted that the wife's cross-complaint had alleged "That said community property further consists of an interest owned by the plaintiff (husband) in * * * the Earl O. Stice Company", asking that the community property be awarded to the wife in entirety. The husband's answer to the cross complaint "denies that cross-complainant owns any interest, community or otherwise, in * * * the Earl O. Stice Company", and alleges that "the amount of money actually paid him each month for his services is $800.00 and that any accumulations in the Earl O. Stice Company cannot be withdrawn without the consent of all partners". Evidence concerning this matter was introduced by both parties. It will thus be seen that the nature of this not inconsequential accumulation, segregated each year in an "earnings" account under the husband's name, was a vital issue calling for a definite finding of fact and a proper conclusion of law based thereon. And in this connection it should be borne in mind that the husband's *interest* in partnership business received as a gift, and therefore separate property, is to be distinguished from *earnings* which have resulted, at least in part, from the husband's full time services devoted to the partnership business.

[1] "The general rule applicable in this class of case", as stated in 3 Cal.Jur.Supp. page 534, "is that where a husband or wife owned a business before marriage and continued to conduct it thereafter, the portion thereof attributable to the personal activity, ability and capacity of the person who conducted the business will be regarded as community property. The usual method of determining the value of a husband's interest in a business in which he was engaged at the time of marriage is to allow to the husband the usual rate of interest on the amount invested on the basis of a long investment, well secured." In Witaschek v. Witaschek, 56 Cal.App.2d 277, 281, 132 P.2d 600, 603, the rule is stated as follows: "It is settled by numerous decisions in this state that even though the husband's business has been carried on by him before marriage, and his profits after marriage are derived from the same business * * * yet the entire profits so realized are not necessarily separate property of the husband. The capital which the husband brings to the marriage partnership is his own separate property, but it is a question for the court to determine what portion of the profits thereafter arises from the use of this capital and what part arises from the activity and personal ability of the husband. *That portion of the income due to the 'personal character, energy, ability and capacity of the husband' is community property*". (Italics added.) In the late case of Cozzi v. Cozzi, August, 1947, 81 Cal.App.2d 232, 183 P.2d 739, 741, recognizing the same rule, the court says: "* * * It is not the profits of the business, but only the ascertained earnings of the defendant from his individual efforts in managing, laboring on and caring for such property, in the nature of salary, wages or the equivalent thereof, which would be community property".

The husband's interest in the plumbing business involved herein, was not acquired prior to marriage; it was a gift by the husband's father made in 1939, about five years after the marriage of Tod and Clara Stice, and thereafter Tod Stice devoted his full time, "activity, ability and capacity" to the conduct of this business. The record discloses that these were particularly prosperous years; that the business increased "tremendously". According to the testimony of Earl O. Stice, respondent's father, Tod Stice, who had entered the firm without experience, became more skillful and therefore more valuable, and "applied himself diligently * * * to the benefit of the business" during the years 1940, 1941, 1942, 1943, 1944 and 1945. It was, in fact, stipulated that when the husband "applied that skill, that would result in a benefit to the company". While the respondent's brief naturally seeks to minimize Tod Stice's value to the firm, the father's testimony quoted above, in respect to the son's value is material evidence on that question. Appellant's brief also suggests that "the fact that the partners continued to segregate and set aside Tod Stice's share of the earnings of the partnership, is in direct contradiction of the claim that he was worthless to the firm".

[2] It is not the purpose of this decision to determine the value of respondent's services to the firm nor to decide what part of the $107,700.51 accumulated in the husband's unwithdrawn "earnings" account shall be deemed to represent community property. In the language of Witaschek v. Witaschek, 56 Cal.App.2d 277, 282, 132 P.2d 600, 603, hereinbefore cited, it "became the duty of the trial court to apportion to the community such share of the husband's earnings as was due to the latter's industry and skill * * *". This, the trial court did not do. And a failure to find upon material issues is prejudicial error entitling appellant to a reversal. In re Estate of Pendell, 216 Cal. 384, 14 P.2d 506; Sturdevant v. Sturdevant, 3 Cal.App. 2d 443, 39 P.2d 433.

[3, 4] In this connection may also be noted appellant's contention that "the husband, by and through his acts, conduct, and the circumstances revealed by the record herein, by simple agreement, converted one half of his separate interest in the partnership profits into community property". As was said in Heck v. Heck, 63 Cal.App.2d 470, 474, 147 P.2d 110, 113, "A husband may give his wife any portion of his separate estate as her separate property, or a husband and wife may, by simple agreement, convert separate personal property into community property. Sec. 158, Civ.Code." In that case, as in this, the husband denied that the wife had any interest in a certain partnership; there as here, individual income tax returns had been prepared under the husband's direction, dividing partnership income between husband and wife. The court said: "Plaintiff testified that he did not give defendant any part of the partnership profits to be her separate property so it is not surprising that the trial judge construed the income tax returns as evidencing an agreement between plaintiff and defendant converting one-half of plaintiff's separate interest in the partnership profits into community property. None of these profits were withdrawn but remained with the partnership". Also, in the instant case the wife testified that the husband "always said that everything we had was community property—belonged to both of us", and that "he said it hundreds of times". The weight and effect of these items of evidence was, of course, a matter for the trial court to determine.

Appellant's contentions that the finding that the husband and corespondent did not commit adultery was against the evidence, and that the trial court erred in failing to award the wife separate maintenance upon the ground of adultery as well as cruelty, are answered by the familiar rule that it is not the province of the appellate court to weigh the evidence. The same may be said in reference to appellant's claims that other findings were against the evidence, such as that certain property should have been divided as community property rather than treating it as property held in joint tenancy. No abuse of discretion is shown in respect to the custody of the minor children.

[5] There is no merit in respondent's claim that "The appellant is estopped to attack the judgment by reason of having accepted the benefits of the judgment of the trial court". This contention is based upon the wife's acceptance of certain items of property shortly after the conclusion of the trial before the judgment was signed. Thus, joint bank accounts were divided; the proceeds of 100 shares of General Electric Corporation stock were divided; a Mercury sedan already in the wife's possession is alleged to have been "accepted" by reason of a transfer of $1,238.40 to the husband out of a joint savings account, representing the value of the automobile; and the occupancy by Mrs. Stice of the joint tenancy home and furnishings is cited as evidence that the wife is enjoying "the fruits of a judgment". Other property, such as stock in Twentieth Century Fox Film Corp., Kennecott Copper Corp. and Pan-American Airway, which under the judgment was to be divided, had not been so divided or "accepted" by the wife. Moreover, as hereinbefore indicated, the judgment made no disposition of one of the most valuable items, the accumulated earnings account of the husband. The cases cited by respondent are not applicable

to the state of facts disclosed by the record herein.

The judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

YORK, P.J., and WHITE, J., concur.

## SULLIVAN v. WELLBORN. *

Civ. 15787.

District Court of Appeal, Second District, Division 1, California.

Oct. 17, 1947.

Rehearing Denied Oct. 29, 1947.

Hearing Granted Dec. 15, 1947.

**1. Judgment 🔑801**

Where judgment annulling marriage adjudged that wife owned realty subject to a lien for $1,250 in favor of husband, but judgment gave husband no interest in realty, provided for no money judgment in favor of husband, and specified no procedure for enforcement of lien, and husband's attorney proceeded by way of execution on judgment, but an appellate court held that execution could not issue, superior court thereafter properly refused to foreclose the judgment lien in action by husband's attorney. Civ.Code, §§ 1428, 3302.

**2. Judgment 🔑535**

Statute providing that detriment caused by breach of an obligation to pay money, only, is deemed to be the amount due by the terms of the obligation, with interest, is inapplicable to a judgment which does not create such an obligation. Civ.Code, § 1428.

**3. Judgment 🔑855(1)**

Statute providing that an obligation arising from the operation of law may be enforced in the manner provided by law, or by civil action or proceeding, has no application to a judgment which does not create such an obligation. Civ.Code, § 3302.

**4. Appeal and error 🔑989, 1012(1)**

An appellate court will not attempt to weigh the evidence presented to the trial court, and power of the appellate court begins and ends with a determination as to whether there is any substantial evidence contradicted or uncontradicted, which will support the conclusion.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action to foreclose a judgment lien by S. A. Sullivan, a nominal party only, against Nada Truscott Wellborn, wherein Barry Sullivan was substituted as party plaintiff in lieu of S. A. Sullivan, and wherein the defendant cross-complained, seeking to recover for rents collected by the plaintiff. From a judgment in favor of the defendant, the plaintiff appeals.

Judgment affirmed.

Barry Sullivan, of Los Angeles, in pro. per., for appellant.

W. S. Weatherwax, of Los Angeles, for respondent.

DORAN, Justice.

The present action to foreclose a judgment lien for $1,250 was filed on March 1, 1945, in the name of S. A. Sullivan, a nominal party only; the defendant Nada Truscott Wellborn cross-complained, asking for certain rents collected by Barry Sullivan from tenants occupying the real estate involved herein. The trial court, on June 24, 1946, rendered judgment denying foreclosure and decreeing that Mrs. Wellborn owned the property "free and clear of any encumbrance of the said judgment lien." It was further adjudged that S. A. Sullivan, Barry Sullivan and D. E. McGregor "have no estate or interest or lien in or upon the said * * * real property and they and any person or persons claiming under them shall be and by these presents are, forever barred and enjoined from claiming any estate, interest, title or lien in, to or upon the said * * * property." The court also adjudged that Barry Sullivan, the real party in interest, held $1,445.90 collected as rents, "In trust for her (Mrs. Wellborn); that Barry Sullivan shall retain the sum of $301.75 and shall file a satisfaction of judgment in case No. D182069," and that should Sullivan not do so the clerk should enter such satisfaction. The judgment further ordered Barry Sullivan to pay Mrs. Wellborn the sum of $1,144.15, with interest.

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* Subsequent opinion 195 P.2d 787.

The present appeal constitutes a part of a long and involved series of litigations concerning certain real estate in Los Angeles County, which property appears to have been originally purchased with separate funds belonging to Nada Truscott Wellborn. The marriage between Mr. and Mrs. Wellborn was annulled on December 20, 1939, by a judgment in Superior Court action No. D182069, Robert H. Scott, Judge. It was there adjudged that Mrs. Wellborn owned the property in question, subject to a lien in the sum of $1,250 in favor of the husband, Charles Wellborn. That judgment, however, gave the husband no interest in the property, provided for no money judgment in favor of the husband, and did not specify any procedure for enforcement of the lien granted.

Barry Sullivan, as attorney for Charles Wellborn, then procured the issuance of an execution on this judgment and caused the same to be levied on the real property covered by the judgment lien; on July 1, 1940, the sheriff sold the property on execution sale to Charles Wellborn for $1,000, and after deduction for costs a partial satisfaction of said lien was entered in the sum of $948.25. The sheriff's deed was executed to Charles Wellborn on July 3, 1941; on October 3, 1941, Wellborn conveyed the property to D. E. McGregor who, on January 6, 1943, conveyed to S. A. Sullivan, a nephew of Barry Sullivan. It appears that McGregor and S. A. Sullivan were merely acting for Barry Sullivan, the real party in interest. The judgment lien had been assigned by Charles Wellborn to this same Barry Sullivan.

The record discloses that on July 3, 1941, Mrs. Wellborn, the respondent herein, filed a motion to quash the execution, levy and sale hereinbefore mentioned, which motion was heard by Judge George A. Dockweiler and denied. On appeal this order was reversed (Wellborn v. Wellborn, 55 Cal.App.2d 516, 131 P.2d 48, 52), the appellate court holding that "if no personal liability is imposed by the judgment declaring the lien, and the judgment makes no express provision for enforcement of the lien, execution will not issue and the judgment creditor can only enforce the lien by an independent action to foreclose." Thereafter Mrs. Wellborn filed a motion asking for a ruling of the Superior Court in conformance with the decision of the appellate court, quashing the execution, levy and sale, and such an order was duly entered by Judge Dockweiler on November 10, 1943. Barry Sullivan, as attorney for Charles Wellborn, then filed an appeal from this order, and on January 17, 1943, the appellate court affirmed the order quashing the execution, levy and sale. Wellborn v. Wellborn, 67 Cal.App.2d 545, 155 P.2d 99, 100. The court there said: "The sale was declared void by the judgment of the District Court of Appeal and that judgment is conclusive, whatever the consequences may be." The appellate court denominated the appeal as frivolous, and as ignoring the reversal on the previous appeal. Thereafter, the present action was filed by Barry Sullivan in the name of S. A. Sullivan to foreclose the judgment lien, resulting, as hereinbefore stated, in a denial of foreclosure.

As specified in the brief, appellant's real complaint is that the "judgment should have been to foreclose the judgment lien." This claim is in part predicated upon a statement of the Supreme Court in Sullivan v. State Bar, 28 Cal.2d 488, 495, 170 P.2d 888, which was a proceeding to review a recommendation of suspension from practice of Attorney Barry Sullivan for activities in connection with the Wellborn litigation. This opinion recites that after the decision in Wellborn v. Wellborn, 55 Cal.App.2d 516, 131 P.2d 48, vacating the execution, levy and sale as hereinbefore mentioned, "and with full knowledge of its conclusions, (Barry) Sullivan procured a deed executed by (D. E.) McGregor which conveyed to S. A. Sullivan the property which Wellborn had purchased at the execution sale. S. A. Sullivan, who was then in military service, is the nephew of Barry Sullivan." [28 Cal.2d 488, 170 P.2d 890] The local administrative committee had found that this conveyance "was procured by respondent only for the purpose of clouding title to the said property," the said S. A. Sullivan then being "a member of this country's armed forces protected by the Soldiers' and Sailors' Civil Relief Act [50 U.S.C.A.Appendix, § 501 et seq.]." Holding that the evidence did not clearly establish such nefarious purpose and that there was a possibility of an honest belief in the merits of Sullivan's appeal, alleged to be frivolous, the Supreme Court dismissed the disciplinary proceeding. The statement now relied upon by appellant is that found in 28 Cal.2d at page 495, 170 P.2d at page 893, of the opinion: "Foreclosure is the remedy which should have been invoked at the outset."

[1] There is no merit in this nor in any of appellant's present contentions. The remedy of foreclosure was not invoked by appellant at the outset, for some undisclosed reason. Instead, Barry Sullivan, an attorney learned in the law, saw fit to proceed by way of execution on a judgment which was other than a money judgment. Such procedure having been held invalid by the appellate court in 55 Cal.App.2d 516, 131 P.2d 48, which decision was later held binding in 67 Cal.App.2d 545, 155 P.2d 99, appellant sought the aid of an equity court by way of attempted foreclosure of the judgment lien, with the result now complained of: That foreclosure was denied and judgment rendered against Attorney Sullivan in favor of Mrs. Wellborn for rents collected and retained by Sullivan. Obviously, it must be assumed that at the foreclosure trial, appellant, an attorney at law, presented whatever law and evidence there was, pertinent to the issues involved, and that the same received due consideration. The record herein bears out such assumption.

[2, 3] Other than the assertion that the judgment rendered was wrong and that it should have been in appellant's favor with interest; that a set off should have been allowed; that "void judgments cannot be made valid," etc., no definite errors have been pointed out, and none are found to exist. Section 3302 of the Civil Code, providing that "The detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest," is obviously inapplicable to a judgment which did not create such an obligation. Civil Code Section 1428, stating that "An obligation arising from the operation of law may be enforced in the manner provided by law, or by civil action or proceeding," has likewise no possible application to the present controversy.

[4] Appellant's complaint that evidence of set-off introduced at the trial made it legally impossible for the court to render the judgment here appealed from is answered by the long established rule that an appellate court will not attempt to weigh the evidence which was presented to the trial court. As said in Juchert v. California Water Service Co., 16 Cal.2d 500, 503, 106 P.2d 886, 888, and many other cases, "It is elementary that * * * the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion * * *." The record herein discloses such substantial evidence, and in the words of the case just cited, "the reviewing court is without power to substitute its deductions for those of the jury or trial court."

The same rule is applicable to appellant's other contentions that in the judgment rendered, the trial court should have done something other than it did do. And, as stated in the respondent's brief, "this entire matter was under the jurisdiction of the court in its equity capacity, * * * it had all the facts before it and weighed all the circumstances during the entire proceeding, * * * made its findings accordingly and rendered its judgment in accordance therewith."

The records in this and the companion case of Wellborn v. Wellborn, 185 P.2d 410, together with the many different items of litigation commencing with the annulment action in 1939, reflect the truth of the appellate court's observation in Wellborn v. Wellborn, 67 Cal.App.2d 545, 548, 155 P.2d 99, 100, that "Undoubtedly plaintiff (Nada Truscott Wellborn) has been sorely harassed by unfounded litigation." The proposition that there must be an end to all litigation needs no citation of authority.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

## WELLBORN v. WELLBORN.*

Civ. 15850.

District Court of Appeal, Second District, Division 1, California.

Oct. 17, 1947.

Rehearing Denied Oct. 29, 1947.

Hearing Granted Dec. 15, 1947.

**1. Election of remedies ⚷5, 14**

Generally, a party having two or more coexisting modes of procedure and relief allowed by law on the same state of facts, one of which is inconsistent with the other, may not pursue both but must choose between them, and, when with knowledge of the facts he has clearly elected to proceed with one, he will be estopped from invoking the other.

**2. Judgment ⚷745**

Where judgment annulling marriage adjudged that wife owned realty subject to lien for $1,250 in favor of husband, but no personal liability was imposed on wife by judgment, and husband's attorney proceeded by way of execution on the judgment, and an appellate court held that execution could not issue, and thereafter attorney was unsuccessful in his action to foreclose judgment lien, order granting his subsequent motion to reinstate the judgment lien was erroneous, since the law cannot permit the existence of two inconsistent judgments.

**3. Execution ⚷280(1)**

Where judgment gave defendant a lien on realty awarded to plaintiff and, on application of defendant's attorney, execution was issued on judgment and realty was bid in by defendant, and defendant's attorney occupied premises, collecting a considerable sum in rents therefrom, and thereafter execution was held void, statute providing different procedures for purchasers at execution sales "evicted" or "failing to recover possession" in consequence of irregularities was not applicable. Code Civ. Proc. § 708.

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action to annul marriage by Nada Truscott Wellborn against Charles Wellborn, wherein the plaintiff obtained a judgment granting annulment and quieting title of realty subject to a lien for defendant for $1,250. Thereafter Barry Sullivan, attorney for the defendant, filed a motion to reinstate the judgment lien. From an order granting the motion, the plaintiff appeals.

Order reversed with directions to enter order denying motion.

W. S. Weatherwax and Lorrin Andrews, both of Los Angeles, for appellant.

Barry Sullivan, of Los Angeles, for respondent.

DORAN, Justice.

Reference is hereby made to the companion case of Sullivan v. Welborn, 185 P.2d 407, for a knowledge of such pertinent facts as are not herein stated.

The present appeal is from an order entered April 2, 1946, granting the "Motion of Barry Sullivan to expunge partial satisfaction of judgment and to reinstate judgment lien as of July 18, 1940." The motion was made by Barry Sullivan in propria persona "To erase the partial satisfaction of judgment entered on return of the Sheriff's certificate of sale and reinstate the judgment lien as of July 18, 1940 on the grounds that the execution sale has been adjudged to be void by order of this Court based upon the Appellate Court's opinion on file herein and on the grounds that the applicant is the successor in interest to the purchaser at said sale."

On December 20, 1939, a judgment was entered in the present case, annulling the marriage between Mr. and Mrs. Wellborn, decreeing that the wife, appellant herein, owned certain real estate, subject to a lien of $1,250 in favor of the husband, Charles Wellborn. Thereafter, on application of Barry Sullivan, Wellborn's attorney, execution was issued on this judgment; at the sheriff's sale the property was bid in by the husband for $1,000, and a partial satisfaction of the lien entered in the sum of $948.-25. Charles Wellborn assigned the lien to Barry Sullivan, and after receiving the sheriff's deed, conveyed the property to one D. E. McGregor who in turn conveyed to S. A. Sullivan, Barry Sullivan's nephew then in military service. McGregor and S. A. Sullivan apparently took title for and in behalf of Barry Sullivan, the real party in interest. An order denying the wife's motion to set aside the execution, levy and sale, was reversed by the appellate court (55 Cal.App.2d 516, 131 P.2d 48), for the reason that no execution could properly issue because no personal liability was imposed by the judgment. On the husband's appeal filed by Barry Sullivan, Wellborn's attorney, complaining of a subsequent order made in conformity with that decision, the appellate court held in 67 Cal.App.2d 545, 155 P.2d 99, 100, that "The sale was declared void by the (previous) judgment of the District Court of Appeal and that judgment is conclusive, whatever the consequences may be." The latter appeal was denominated as frivolous. Barry Sullivan then filed an equity action to foreclose the judgment lien, resulting in a denial of foreclosure, and a money judgment in favor of Mrs. Wellborn for certain rents which had been collected and retained by Sullivan. That judgment has this day been affirmed by this court in the companion case hereinbefore mentioned. After the trial court's decision denying foreclosure of the judgment lien, Sullivan then made a motion to expunge the partial satisfaction of this lien and to restore the lien, which motion was granted in another department of Superior Court from that which had heard the foreclosure case. Nada Truscott Wellborn now appeals from this order.

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* Subsequent opinion 195 P.2d 792.

Notwithstanding the nominal title of the instant case, it is apparent that Barry Sullivan who, in propria persona, made the motion resulting in the order now appealed from, is the actual respondent. This is the same Barry Sullivan, originally attorney for Charles Wellborn, who is the appellant in the companion case hereinbefore referred to. Moreover, the records indicate that the entire Wellborn litigation, commencing with the original annulment judgment in 1939, has, by reason of the various actions, motions, judgments, orders and appeals, heard before many different judges and courts, become unduly involved. This unfortunate, and apparently unnecessary complication, has naturally resulted in a certain obscurement of both law and fact, together with judgments and orders not always entirely consistent. Fundamentally, the issues in the instant appeal are part and parcel of those this day decided in the companion case, Sullivan v. Wellborn, 185 P.2d 407. Furthermore, it is deemed that the entire controversy with all possible ramifications thereof, was duly presented to and considered by the trial court in the foreclosure action instituted by Barry Sullivan. In that action the trial court, sitting as a court of equity, denied foreclosure, and in a comprehensive judgment, set the matter at rest for all time. The motion dealt with in the present appeal is merely another attempt to further complicate a matter already replete with complications.

In the appellant's brief attention is called to the fact that "in this case Barry Sullivan proceeded in an action in equity (foreclosure) first and pursued it to a definite conclusion, prior to the time he attempted to pursue his remedy at law (the present motion) * * * the court will readily ascertain from the findings of fact and conclusions of law set forth in case No. 499987 (the foreclosure action), that the question of the marginal entry of partial satisfaction of the said judgment * * * was a matter which was necessarily involved in the said proceedings in equity, and that the issue was definitely made thereon, conclusions of law predicated on said findings and judgment entered accordingly." The record in the foreclosure case discloses that the findings of fact adverse to Sullivan's claims were filed on March 8, 1946; on March 27, 1946, Sullivan filed the present motion seeking to reinstate the judgment lien. Appellant Mrs. Wellborn, concludes that "having made his election and having pursued the (foreclosure) matter to a conclusion, and having failed in his cause in case No. 499987, he (Sullivan) may not now be allowed to pursue a legal remedy. To permit him to do so would work a hardship on the appellant and would leave us with two diametrically opposed judgments standing in the records, with the result that there would be never-ending litigation." The respondent's brief offers no answer to, or explanation of this point.

[1] "It is a general rule," quoting from 10 Cal.Jur. 1, "that a party having two or more coexisting modes of procedure and relief allowed by law on the same state of facts, one of which is inconsistent with the other, may not pursue both but must choose between them and when, with knowledge of the facts, he has clearly elected to proceed upon one, he is thereby bound and will be estopped from invoking the other. * * * the judgment in the first remedy he pursues is conclusive between the parties, not only upon the matters actually litigated, but upon every ground of recovery." In addition to the doctrine of estoppel, applied or extended in the application of such rule, it said to rest "also upon one of the underlying or fundamental concepts of the reformed procedure, to wit, the prevention of a multiplicity of suits."

[2, 3] It seems obvious that the law cannot permit the existence of two inconsistent judgments or orders such as seem now to exist in the instant case—one holding that Barry Sullivan does not possess "any estate or interest in or upon" said real property, and that Sullivan and his associates are "forever barred and enjoined from claiming or asserting any estate, interest, title or lien in to or upon the said * * * real property"; the other—an order issued by a different judge, granting the "motion of Barry Sullivan to expunge partial satisfaction of judgment and to reinstate judgment lien." Cases cited by the respondent, for example, Smith v. Reed, 52 Cal. 345, are in no respect similar to the present situation; as appellant has pointed out, in the Smith case there was no intervening equity action. Nor does Section 708 of the Code of Civil Procedure, erroneously cited by respondent as Section 108, providing two different procedures for purchasers at execution sales "evicted" or "fail[ing] to recover possession" in consequence of irregularities, etc., affect the present situation in the least. In this connection it may be noted that, in place of being evicted or failing to recover possession, Sullivan occupied the premises, collected a considerable sum in rents therefrom, and retained the same. All of these matters have received due consideration in the foreclosure hearing. There is, in fact, no merit to any of the points raised in the respondent's brief.

The order appealed from, granting the motion to Barry Sullivan to expunge the partial satisfaction of judgment and to reinstate the judgment lien, is reversed with directions to enter an order denying such motion.

YORK, P. J., and WHITE, J., concur.

81 Cal.App.2d 830

**In re BAER'S ESTATE.**

**BAER v. BEGLEY et al.**

**Civ. 15896.**

District Court of Appeal, Second District, Division 1, California.

Oct. 16, 1947.

Hearing Denied Dec. 11, 1947.

**1. Appeal and error 🔑996, 1011(1)**

The finding of a trier of fact that property is separate or community, if based on substantial evidence, even though there be evidence in conflict therewith, or if based on evidence from which conflicting inferences may be drawn, is conclusive.

**2. Appeal and error 🔑1010(1)**

A determination by a trial court that the presumption raised by statute providing that whenever any property is acquired by a married woman by an instrument in writing presumption is that the property is her separate property, has been rebutted, is conclusive unless it is manifestly without sufficient support in the evidence. Civ.Code, § 164.

**3. Appeal and error ⚷996**

Inferences drawn by trial court from evidence, must be upheld so long as the inferences find reasonable support in the evidence given.

**4. Husband and wife ⚷262(1)**

Where title to property is taken in the name of the wife, husband's testimony that he did not intend to make a gift of his separate property or of his interest in community is sufficient to overcome presumption declared by statutes providing that whenever any property is acquired by a married woman by an instrument in writing, presumption is that the property is her separate property. Civ.Code, § 164.

**5. Husband and wife ⚷264**

Where wife won large sums of money in puzzle contest, money was placed in her name in bank, and subsequently a substantial portion of money was used to purchase securities taken in wife's name, evidence sustained finding that securities were community property rather than wife's separate property. Civ.Code, § 164.

**6. Husband and wife ⚷264**

Where the only evidence with respect to jewelry and furs possessed by wife at time of her death, indicated that they were purchased by the wife herself from community funds, trial court was warranted under the evidence in concluding that they were not gifts from the husband made with intent that they become the wife's separate property.

**7. Husband and wife ⚷263**

Where trial court found on substantial evidence that all securities standing in deceased wife's name were community property, rather than her separate property, cross-examination of husband concerning loans made by bank on security of stocks held in wife's name was properly denied as immaterial.

◆

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Proceeding in the matter of the Estate of Irene B. Baer, wherein Reginald W. Baer, as surviving husband of the deceased and administrator of her estate, filed his first and final account and petition for distribution, and wherein Ira Begley and Isabel Begley objected to the account and petition on ground that the property of the deceased's estate was the deceased's separate property of which they should receive one-half. From a decree in favor of Reginald W. Baer, Ira Begley and Isabel Begley appeal.

Decree affirmed.

Ogden, Crocker & Steelman, of Los Angeles, for appellants.

Benjamin P. Riskin, of Los Angeles, for respondent.

WHITE, Justice.

The appellants herein are the parents of the decedent, Irene B. Baer. The respondent, Reginald W. Baer, is the surviving husband of decedent and administrator of her estate. In his first and final account and petition for distribution respondent alleged that all of the property of the estate was community property of respondent and his deceased wife and prayed for distribution of the entire estate to him. He also sought credit for certain funeral expenses paid by him and for one-half of an alleged joint liability of decedent and respondent on two promissory notes. Appellants objected to the account and petition on the ground that the property of the estate was separate property of the wife, of which appellants should receive one-half. They also objected to the allowance of credit for funeral expenses and for the liability on the promissory notes, and further charged that certain other separate property of decedent had not been accounted for. The trial court sustained the account in all particulars and found that all the assets of the estate, with the exception of one small item not here in controversy, constituted community property. From the decree approving the account and directing distribution of all the estate (except one-half the one item above mentioned) to the respondent husband, the present appeal is prosecuted.

The property here involved consists of corporate stock, the certificates of which stood in the name of the wife alone at the time of her death. It appears that at the time of her marriage to respondent, in 1936, the decedent, Irene B. Baer, had no substantial estate of her own, while the husband's estate at that time approximated $27,000. Shortly after the marriage a private checking account was established in the name of the wife. This account was closed in March, 1943, and thereafter the husband and wife maintained a joint account. Over a period extending from 1939 through 1941 the decedent, through her own efforts and with the assistance of her sister and brother-in-law, acquired approximately $5,800 as her share of prize-money won in certain puzzle contests then being conducted by a Los Angeles newspaper. These funds went into her separate checking account and also in a separate savings account in her name. The husband exercised no control over these accounts and allowed his wife to use the funds therein as she saw fit. In the fall of 1941 an account was opened in the name of the wife with a stock brokerage firm with which the husband also maintained an account. The record of the wife's account showed 25 purchases of stock between November, 1941, and May, 1944. At the time of her death in May, 1945, there stood in the name of the wife alone certificates representing seven different issues of stock. The present controversy centers about whether such stocks were the separate property of the decedent or community property of decedent and her husband, respondent herein.

It is urged by appellants that the trial court should have found these stocks to be separate property of the deceased wife, for the following reasons:

"A. The source of said stocks was the separate property of the decedent.

"B. The said stocks were all in the name of the decedent, with the knowledge and consent of respondent.

"C. The course of conduct of the respondent establishes said property to be separate."

Under point "A" appellants argue that the testimony discloses that respondent husband, by his acts and conduct, indicated that he did not regard the earnings, or winnings, of the wife as community property, but relinquished to his wife the right thereto (Pacific Mut. Life Ins. Co. v. Cleverdon, 16 Cal.2d 788, 789, 791, 108 P.2d 405), and that such separate funds were the source of the stocks standing in decedent's name at the time of her death. Under point "B" appellants rely upon the presumption (Civ. Code, sec. 164) that "whenever any real or personal property * * * is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property." Under point "C" it is urged that the entire conduct of the parties strengthens the presumption that the stock was the separate property of the wife; and appellants further point out that the wife's stock represented a very small amount in comparison with the holdings of her husband in his own name and that the real property of the parties was held in joint tenancy.

[1, 2] In considering the contentions presented upon this appeal, it should be first noted that the finding of the trier of fact that property is separate or community, if based upon substantial evidence, even though there be evidence in conflict therewith, or if based upon evidence from which conflicting inferences may be drawn, is binding and conclusive upon an appellate court. "The sufficiency of the evidence is generally a matter for the trial court or jury, and the findings or verdict will not be lightly set aside. Following the general rule, a finding of a trial court that property is either separate or community in character is binding and conclusive upon the appellate court, if it is supported by sufficient evidence, or if it is based on conflicting evidence or upon evidence that is subject to different inferences. 3 Cal.Jur.Supp. 573. Further, a finding against a presumption is binding upon the appellate court (In re Estate of Cronvall, 220 Cal. 503, 31 P.2d 372), unless the evidence to rebut it is so weak and improbable that the finding is without substantial support. Olson v. Cornwell, 134 Cal.App. 419, 25 P.2d 879. It is finally in each case a question of fact for the court or jury to determine whether the evidence is sufficient to overcome the presumption. * * *" In re Estate of Trelut, 26 Cal.App.2d 717, 723, 80 P.2d 147, 150. A determination by a trial court that the presumption raised by section 164 of the Civil Code (that property

conveyed to the wife is her separate property) has been rebutted is conclusive upon an appellate court unless it is manifestly without sufficient support in the evidence. Williamson v. Kinney, 52 Cal.App.2d 98, 102, 125 P.2d 920, and cases therein cited. The language used in Re Estate of Walsh, 66 Cal.App.2d 704, 707, 152 P.2d 750, 752, is here pertinent: "In order to prevail on this appeal appellant must show not only that the evidence would support a finding that the property is separate, but must also show that it compels, as a matter of law, such finding—in other words, that the finding that it is community property is totally unsupported." It may be conceded that there was before the trial court ample evidence from which it could have found in favor of appellants. But before we can set aside the finding of the trier of fact upon the issue here presented, there must appear to be an entire failure of any substantial evidence to support such finding. In re Estate of Duncan, 9 Cal.2d 207, 70 P.2d 174.

Proceeding to a further consideration of the evidence, respondent husband testified that when they were first married he gave his wife a private checking account; that to the best of his knowledge she deposited her winnings in this account or in her own savings account; that he never asked her to turn the money over to him. He further testified:

"Q. You knew that she had the money under her control? A. I don't know whether it was there, or whether she had it in my bank, but I will tell you this: We added some money to it and we bought securities with most of it and she might have bought some wearing apparel out of it, so far as that is concerned. I don't know."

"Q. As far as you are concerned you exercised no control over those funds; is that correct? A. Not as far as demanding any; none whatever. * * *

"Q. And isn't it a fact that all of this money in this bank account in the name of Irene B. Baer was understood by the two of you to be her own money? A. We did not consider it that at all. * * *

"Q. As far as she was concerned, she could do anything with that bank account? A. She could spend it as she saw fit." The husband denied that he had ever told his wife, as testified to by other witnesses, that her puzzle winnings were to be her separate property.

With reference to the establishment of the stock brokerage account, the husband testified that the purchases and sales were handled by him; that he would present certificates to his wife for indorsement or would secure from her a power of attorney; that dividends received would be deposited in their joint account or used for current cash. In response to the question, "Mr. Baer, with the exception of the 100 shares of Equity Corporation of America, did you or did you not intend, by having the securities taken out in the name of Mrs. Baer, that they became her separate property?" respondent testified, "I meant them to be our community property." In explanation of his purpose in having the securities in the name of his wife, respondent testified, "Because I desired to have it that way so in case I should die she could dispose of the securities and would have immediate money to take care of my youngsters and herself until such time as my will could be probated."

[3] Summarized, the situation presented is one in which earnings of the wife, community property at the time of their acquisition, were placed in her name in a bank and subsequently a substantial portion of such earnings were used to purchase securities taken in the name of the wife. Although the husband exercised no direct control over the funds, he nevertheless directed and managed the purchases of securities made with the funds. The source of the securities was community funds. Did the husband relinquish his community interest in the funds? The husband testified that he did not intend to relinquish his community interest in the funds and intended that the securities should remain community property, and that they were taken in his wife's name for convenience to avoid probate in the event of his death. The inferences drawn by the trial court herein must be upheld so long as they find reasonable support in the evidence given. Williamson v. Kinney, 52 Cal.App.2d 98, 102, 125 P.2d 920.

[4, 5] Where title is taken in the name of the wife, the testimony of the husband that he did not intend to make a gift of his separate property or of his interest in the community is sufficient, if believed by the court, to overcome the presumption declared by section 164 of the Civil Code. Whitaker v. Whitaker, 137 Cal.App. 396, 399, 30 P.2d 538, and cases there cited. In Re Estate of Wilson, 64 Cal.App.2d 123, 148 P.2d 390, 392, a husband made a deed of gift to the wife of real property. Upon the death of the wife it was held that despite the deed, the property was community. The husband there testified that he did not intend a gift, but "wanted her to get it if anything happened to me. * * * It was * * * community property * * * to go to the one or the other." On appeal it was said: "It is now too well settled to justify more than the citation of the authorities that in spite of the mold into which a deed would seemingly press a title, either because of the intent with which the deed was made * * * or made and received * * * or because of an oral agreement between a husband and wife, carried into effect, * * * property which, measured by the deed, would not be community property, nevertheless may be just that. * * *" (Citing, among other cases, Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 965.)

[6] Appellants contend that certain articles of jewelry and furs of the wife constituted her separate property. The only evidence in the record to which we are referred indicates that these articles were purchased by the wife herself from community funds. The court was warranted under the evidence in concluding that the articles were not gifts from the husband made with the intent that they become the wife's separate property. In re Estate of Walsh, supra, 66 Cal.App.2d at page 709, 152 P.2d at page 753.

Whether the claims of respondent for contribution for one-half of the liability of husband and wife on two promissory notes should properly be allowed becomes moot in view of the conclusions above reached as to the main issue of the case.

[7] It is urged that the court erred in sustaining objections to questions asked by appellants' counsel on cross-examination of respondent. The court sustained an objection to a question designed to bring out the fact that respondent husband's account with the stock brokerage firm contained many more sales and purchases and involved much larger sums, than the account of the wife. The same ruling was made with respect to an attempt to show that at the time of the wife's death certain real property was held in joint tenancy and a question as to the husband's net worth. Evidence along these lines had theretofore been admitted, and it is not denied that the husband was "well-to-do" and that the wife had comparatively little, if any, assets at the time of the marriage. Appellants sought to go into the source of each individual item of securities appearing on the stock account of the wife. No useful purpose would have been so served, the husband having stated that he could not state in detail any individual transaction. Further testimony along this line would have thrown no light on the intent of the husband and wife. Additional evidence in this regard would have been, as stated by the trial judge, "an unnecessary repetition." Appellants further desired to question respondent husband "concerning each item on that loan account" (the loans made by the bank on the security of the stocks held in the wife's name) "and in particular to ask the purpose for which each loan was made, conversation that he had with his wife concerning them, and the disposition of the proceeds of each loan." The trial court properly held that such questions would be material only in the event that it appeared that the separate property of the wife (the stocks here in question) had been pledged to secure the loans. This issue having been resolved against appellants, and the court having decided that the property in question remained community property, inquiry into the purpose of the loans or the understanding between the husband and wife with respect thereto, would serve no useful purpose. In view of the respondent husband's testimony, heretofore adverted to, that it was intended that the property should remain community property, the pledging of the stock standing in the wife's name as security for a debt upon

which they were both liable is, if anything, corroborative of the husband's contention that it was their intent to hold their property as community regardless of the fact that it might stand in the name of the one or the other. The court, however, did not fully foreclose this line of inquiry. Appellants' counsel was advised by the court: "You may inquire of this witness what, if any, separate property of Mrs. Baer was used. We can assume that his answer would be there was none, in view of the previous testimony. I suppose it would be a matter of inquiry as to whether or not certain stocks that were standing in her name were deposited with the bank as security for these loans.

"Mr. Steelman (Counsel for Contestants and Appellants): I think that now shows on the record.

"The Court: Well, that is about as far as you can expect to go then. Anything more than that would probably be a mere conclusion of the witness."

Since the trial court found upon substantial evidence, that all of the securities were community property, inquiry into the use of the proceeds of the loans secured by the pledge of such property would have been futile.

The decree appealed from is affirmed.

YORK, P. J., and DORAN, J., concur.

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82 Cal.App.2d 49

## PEOPLE v. STEPP.

Cr. 2465.

District Court of Appeal, First District, Division 2, California.
Oct. 24, 1947.

Hearing Denied Nov. 20, 1947.

**1. Criminal law 🔑1036(1)**

Admission of evidence that defendant failed to make any denial when asked by police inspectors interrogating defendant and codefendant whether defendant wished to answer codefendant's accusation that defendant participated in robbery was not error which could be urged on appeal by defendant not objecting to admission of such evidence. Code Civ.Proc. § 1870, subd. 3.

**2. Criminal law 🔑781(7)**

In robbery prosecution against defendant who failed to deny codefendant's accusation of participation in robbery during police investigation, instruction that reaction of defendant was evidence to be considered and that accused must have been given a fair opportunity to deny accusation was proper.

**3. Robbery 🔑27(1)**

In prosecution against defendant charged with having aided and abetted codefendant in commission of robberies, instruction requiring a finding that property was taken by means of force or fear was proper.

DOOLING, J., dissenting.

Appeal from Superior Court, City and County of San Francisco; William F. Traverso, Judge.

Robert George Stepp was convicted for robbery, and he appeals from the judgment of conviction and from the order denying his motion for a new trial.

Judgment and order affirmed.

Alfred J. Hennessy, of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Defendant and one other were charged under two informations with two acts of robbery. The co-defendant pleaded insanity and at the time of defendant's trial was confined in the state hospital for the criminal insane. The two informations were consolidated as to the defendant Stepp and he was found guilty under both. This defendant rejected the terms of an order of probation and appealed from the order denying his motion for a new trial and from the judgment.

The co-defendant was shown to have held up a drugstore in August, 1946, and another on September 1 of the same year. In both instances he appeared alone in the drugstore using a gun later found in appellant's possession. In both instances he ran from the store to a waiting automobile which belonged to appellant. In both instances a man was waiting for him in the driver's seat and drove the car out of the neighborhood. The automobile and the gun used in these holdups were both identified as identical or similar to those found in appellant's possession.

After the arrest of the two defendants, and while two police inspectors were interrogating them, the co-defendant admitted that he had committed both robberies, that appellant was in on both of them, that they had used appellant's automobile, and that they had divided the loot between them. When appellant was asked if he had anything to say he answered: "I have nothing to say, I remain mute." No objection was made to this testimony, hence the only question is whether the evidence as a whole is sufficient to support the verdict.

The evidence of the conversation is found in the testimony of one of the police inspectors. He gave a full account of the conversation, the accusation made by the co-defendant, the inquiry made to appellant as to whether he wanted to answer, and the failure of appellant to make any denial. The latter took the stand and denied the entire conversation. On this conflict the jury found against him.

[1] On the appeal the appellant for the first time argues that the testimony was inadmissible. Cases are cited holding that similar circumstances did not call for a reply and others holding that instructions covering the subject of accusatory statements were improper. All these are beside the point. Section 1870, subd. 3, of the Code of Civil Procedure authorizes the admission of such testimony, and when it is admitted without objection there is no error on the part of the trial court which may be urged on appeal. This rule has been universally accepted and is not now open to argument. The portion of the majority opinion in People v. Simmons, 28 Cal.2d 699, 172 P.2d 18 which relates to the matter of accusatory statements is an interesting discussion of the question of the admissibility of such testimony, but what is controlling here is found in the concurring opinion where it is said: (28 Cal.2d at page 723, 172 P.2d at page 31) "It is conceded that on the trial defendant's counsel made no objection to the admission of the statements in evidence and no motion to strike or limit its effect was made. It is the rule that unless objection to it is made at the trial such evidence is beyond attack on appeal and may be considered in support of the judgment. People v. Lawrence, 143 Cal. 148, 76 P. 893, 68 L.R.A. 193; People v. Peterson, 66 Cal.App.2d 420, 152 P.2d 347; 2 Cal.Jur. § 82, p. 263; 8 Cal.Jur. § 516, p. 500; 4 Cal.Jur. 10-Yr. Supp. (1943 rev.) 909." Directly in point is People v. Peterson, supra, where it is said (66 Cal.App.2d at page 424, 152 P.2d at page 349): "But the testimony under consideration here was introduced without objection and no motion to strike or to limit its effect so as to exclude its application to appellant was made. Even if it be assumed that said statement constituted inadmissible hearsay, it is to be considered on appeal in support of the judgment when no objection or motion to strike or to limit its effect was made in the trial court. People v. Magusin, 120 Cal.App. 115, 7 P.2d 764; People v. Freer, 104 Cal.App. 39, 285 P. 386; People v. Lorden, 62 Cal.App. 501, 217 P. 117."

The evidence offered in support of an alibi was too weak to require comment. It is sufficient to say that the jury did not believe it.

[2] We find no error in the instructions. The jury was properly instructed that the reaction of the accused was the evidence to be considered, and that the accused must have been given a fair opportunity to deny the accusation.

[3] The instruction requiring a finding that the property was taken by means of force or fear fully covered the case made out by the State charging the appellant with having aided and abetted his co-defendant in the commission of the robberies.

Judgment and order affirmed.

GOODELL, J., concurs.

DOOLING, Justice (dissenting).

I dissent. My associates agree with me that, apart from the alleged admission by failure to deny the accusatory statement of the co-defendant Herron, the evidence is not sufficient to establish appellant's guilt beyond a reasonable doubt, and does no more than to create or arouse a bare suspicion of guilt. The evidence shows that the defendant Herron after each of the robberies fled in an automobile similar to that owned by appellant and when arrested appellant had in his possession the pistol used by Herron in the commission of the robberies. No witness identified appellant as the driver of the automobile nor was he otherwise identified as a participant in either robbery. The case is therefore one in which the evidence, apart from the alleged admission by conduct in the face of his co-defendant's accusation, is insufficient to support the conviction. People v. Seawright, 72 Cal.App. 414, 237 P. 796; People v. Enriquez, 39 Cal.App.2d 168, 102 P.2d 770.

In People v. Simmons, 28 Cal.2d 699, 172 P.2d 18, the majority of the Supreme Court deliberately engaged in a reexamination and reappraisal of the field covering the admissibility of accusatory statements and the conduct of a defendant in the face of such statements. Their conclusion is that the mere failure of a defendant to deny an accusation made in his presence is not under all circumstances admissible in evidence against him, because under certain circumstances the failure to deny an accusation cannot legally be construed as a tacit admission of its truth. Specifically, as applied to the facts of this case, the court expressly stated in the Simmons case that if a defendant refuses to affirm or deny his guilt because of a desire to stand on his constitutional right against self-incrimination his conduct in so doing constitutes no evidence of guilt and for that reason may not be placed in evidence. The majority opinion in that case says, 28 Cal.2d at page 719, 172 P.2d at page 29: "No violation of the privilege against self-incrimination can be sanctioned." The later case of People v. Spencer, 78 Cal.App.2d 652, 178 P.2d 520, expressly holds the accusatory statement and the conduct of the appellant in that case in refusing to deny it inadmissible on the ground that it there appeared that in refusing to deny appellant was standing on his constitutional right.

The testimony of police officer O'Leary in this case is that while under arrest appellant was confronted by Herron who accused him of complicity in the robberies, and on being asked what he had to say appellant replied: "I have nothing to say, I remain mute." This language in my judgment indicated an intention on the part of appellant to exercise his constitutional right against self-incrimination. The expression "I remain mute" is a term of art in criminal law sufficient to indicate that appellant had his constitutional rights in mind.

It is true that the evidence of the accusatory statement and appellant's reply were admitted without objection; but the very basis of the rule requiring their exclusion if it appears that a defendant in refusing to answer the charge was standing on his constitutional right is that such conduct constitutes no evidence of guilt. If it constitutes no evidence of guilt it adds nothing to the case against the appellant.

The appellant here has been convicted of a crime with no more substantial evidence than his failure to deny the accusation of a lunatic (it being an admitted fact that Herron was adjudged insane) and that while he was exercising his constitutional right against incriminating himself.

The judgment and order denying appellant's motion for a new trial should be reversed.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

## BARHAM v. BARHAM. *

Civ. 15770.

District Court of Appeal, Second District, Division 1, California.

Oct. 14, 1947.

Hearing Granted Dec. 12, 1947.

**1. Husband and wife ⚷31(2)**

Antenuptial agreement and other property agreements entered into in connection with a marriage are strictly construed.

**2. Divorce ⚷239**

In divorce action, evidence sustained decree adjudging that various property settlements between spouses were contracted solely with reference to a prior marriage and did not contemplate a separate marriage or second divorce and that agreements did not preclude award of support to wife in divorce action after a second marriage.

**3. Divorce ⚷249(6)**

Where wife was awarded divorce on ground of extreme cruelty, homestead could be selected from separate property of husband and could be assigned to wife for life rather than to wife for life or until her remarriage. Civ.Code, § 1238.

**4. Divorce ⚷252**

Where wife was granted divorce on ground of extreme cruelty, award to wife of all community property was discretionary.

**5. Divorce ⚷241**

Award of $600 per month by divorce decree to wife whose husband's income was $85,090.50 annually was not excessive.

**6. Divorce ⚷286**

In action for divorce of parties who had remarried after a previous divorce, testimony concerning relations of parties during period following first divorce and subsequent marriage offered to establish a claim to property accumulated between divorce and remarriage was not prejudicial to husband where wife was not awarded any property accumulated during that period.

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Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Arline C. Barham against Frank F. Barham for divorce and for declaratory judgment with respect to property settlement agreements wherein defendant cross-complained for divorce. From portions of interlocutory decree of divorce awarding plaintiff support, community property and homestead, defendant appeals.

Portions of decree appealed from affirmed.

A. C. Ritter, of Los Angeles, for appellant.

Walter H. Young, of Los Angeles, for respondent.

YORK, Presiding Justice.

The instant action was originally filed as a separate maintenance action by plaintiff wife as well as for declaratory relief. Defendant husband countered with a cross-complaint for divorce on the ground of extreme cruelty, whereupon plaintiff with leave of the court filed her first amended complaint for divorce in which she alleged extreme cruelty on the part of defendant. At the trial defendant did not oppose a dissolution of the marriage and offered no proof on his allegations of cruelty set up in the cross-complaint. Plaintiff made pro forma proof of her allegations of mental cruelty and was awarded a decree of divorce, whereupon the trial proceeded upon questions involving property only.

The record discloses that the parties were first married on October 8, 1928; that on August 12, 1940, an interlocutory decree of divorce was granted to plaintiff wife and that on January 13, 1942, the final judgment of divorce was entered dissolving the marriage of October 8, 1928. Thereafter, to-wit, on May 11, 1945, the parties remarried, neither having contracted a marriage in the meantime, and on July 31, 1946, the interlocutory judgment of divorce which is the subject of this appeal was granted.

The complaint herein asked for a declaratory judgment with respect to certain property settlement agreements previously entered into by the parties, it appearing that on October 1, 1928, prior to their first marriage, the plaintiff and defendant entered into an antenuptial agreement defining their respective property rights, and that from time to time during their first marriage and thereafter, they entered into several property agreements dated June 28, 1935, November 16, 1936, December 16, 1936, November 1, 1937, December 2, 1937, and August 24, 1943, each new one reaffirming and ratifying those preceding it. On August 12, 1940, when plaintiff was awarded her interlocutory decree of divorce of the first marriage, she presented those agreements which had been entered into up to that date, and they were approved by the court in that decree. The interlocutory decree herein adjudged that all of the aforementioned agreements, including that of August 24, 1943, "are valid, subsisting and in full force and effect and that the plaintiff is entitled to receive from the defendant by virtue of said agreements, the sum of $300.00 per month on the first of each and every month * * * that the said agreements are not binding on this court in awarding support to the plaintiff"; it being further adjudged that beginning August 1, 1946, and until her remarriage plaintiff should receive in addition thereto the sum of $600 per month for her support, as well as community property amounting to $11,101.01, consisting of $6,836.01 cash, war bonds valued at $3,365 and 100 shares of stock valued at $900 all of which was acquired during the period of the second marriage. The court also assigned to the plaintiff for the remainder of her natural life a portion of the homestead theretofore declared by her upon defendant's separate property known as the Santa Ynez Ranch.

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* Subsequent opinion 202 P.2d 289.

This appeal is prosecuted from those portions of said interlocutory decree awarding plaintiff $600 per month support, the community property and the homestead, above referred to.

The principal issue presented by this appeal is stated by respondent as follows: "Does a woman who remarries the same husband from whom she had been previously finally divorced, acquire by virtue of such remarriage, any rights to community property, support and homestead, under the second marriage in contravention to the provisions of an ante-nuptial and property settlement agreements entered into in consideration of, contemplation of, and concerning the first marriage?"

In this connection appellant urges that all of the agreements referred to were executed by the parties thereto "having in mind the fact that they might or might not be married or unmarried. They expressly recited that the agreements were binding *regardless of whether or not they were reconciled or living apart;* * * *. If, after the interlocutory decree in the first case, they had reconciled, the terms of the agreements were still binding on both parties. The new marriage created no different situation from that", moreover, "at the time plaintiff and defendant remarried their property rights were entirely settled between themselves by contract and the divorce decree which plaintiff had obtained." (Emphasis included.)

An examination of the ante-nuptial agreement of October 1, 1928, discloses a recitation therein to the effect that "Whereas a marriage is about to be solemnized between the parties hereto * * * and in anticipation of such marriage, the parties desire by an ante-nuptial agreement to fix and determine the rights of each of them in any and all property"; and in "consideration of said marriage" each party specifically waived any and all rights in and to the property of the other both during life and after death.

The agreement of June 28, 1935, made while the parties thereto were living separate and apart, was executed in consideration of mutual covenants and agreements therein contained for the purpose of "finally adjusting and settling all rights, present or future, including property rights, rights of second party to support and maintenance, and any other rights of whatsoever kind or nature arising out of the marital status of first and second parties, irrespective as to whether there may be a subsequent reconciliation, suit for separate maintenance or divorce". By the terms of paragraph seventh of this agreement, the parties specifically recognized the possibility of a reconciliation, and agreed that "notwithstanding resumption of former relations, reconciliations or subsequent separations" the monthly payments agreed to be paid by husband to wife "shall continue as in this agreement provided."

Each of the various property settlement agreements subsequently executed by the parties was denominated "amendment to agreement"; that of August 24, 1943, made after the entry of the final decree of divorce in the first action, being headed "Fifth Amendment to Agreement"; each and all of them reaffirming and ratifying the antenuptial agreement and the agreement of June 28, 1935, and all of them purporting to limit the rights of respondent in the property of appellant.

While appellant argues that the second marriage constituted "a reconciliation or a resumption of former relations" as contemplated by the language used in the various contracts, the record discloses that it was not so understood. At the trial of the instant action, the following questions were propounded to respondent: "Now, before you and he were married (the second time) did you have any conversations with Dr. Barham about signing any new written agreements?" To which she replied: "Yes. He wanted me to sign a paper saying that he was to have the entire use of his salary and I wasn't to have anything to say about that * * *. And I said no, that I thought we had signed too many agreements already and that marriage was supposed to be trust and fifty-fifty and if it wasn't then I didn't think it was going to be much of a marriage, and so I refused to sign the papers.

"The Court: This was before the second marriage? A. Yes.

"Q. By Mr. Young: Now, did you have any conversation with Dr. Barham about the three hundred dollars a month that he was paying you at that time? A. Definitely, Mr. Young. He told me that I was to have that for my own personal use, that it wouldn't be touched for anything else.

"Q. Did he tell you that is what the situation would be after the marriage? A. Absolutely, That was a promise. * * *

"Q. Now, was anything said at that time as to what he would do about the ownership of the Santa Ynez Ranch? A. Yes.

"Q. This was before the marriage? A. Before we were married; if I would marry him * * * he would put the place in joint tenancy and if I died before he did it would be left to him and if he died before I did it would be left to me. * * *

"Q. How soon after you and he were married was it that you went to live at Santa Ynez? A. The day we were married."

The deposition of appellant introduced at the trial herein recites the following: "Did you have any conversation with Arline C. Barham immediately prior to marrying her regarding the signing of an ante-nuptial agreement? A. Yes. * * *

"Q. Now, isn't it a fact, doctor, that shortly before marrying her in May of 1945 you asked Arline C. Barham to sign an ante-nuptial agreement? A. I believe so.

"Q. All right, what did she say to you when you asked her to sign an ante-nuptial agreement in May, 1945? A. She said she had signed so many, she didn't want to sign any more, and I said, 'All right'."

[1] From the foregoing, it definitely appears that both appellant and respondent looked upon their remarriage as a new venture and that it was undertaken without qualification as to property rights of either. Moreover, the several contracts executed in connection with the first marriage must be strictly construed (Jones v. Lamont, 118 Cal. 499, 502, 50 P. 766, 62 Am.St.Rep.251); it being a definite doctrine of the law that "courts will not enlarge the language of a postnuptial agreement 'so to deprive either spouse of such rights unless there is a clear and unmistakable intention to barter them away, and, to reach such conclusion, the contract must not be of doubtful interpretation but must, by express terms or by necessary implication, clearly so provide'. Girard v. Girard, 29 N.M. 189, 221 P. 801, 803, 35 A.L.R. 1493." In re Estate of McNutt, 36 Cal.App.2d 542, 549, 98 P.2d 253, 256. Even a casual examination of the agreements here in question discloses that the parties thereto were contracting with respect to the marriage of October 8, 1928, and to subsequent separations and reconciliations in connection with that marriage alone, and did not at that time contemplate a second marriage and a second divorce.

[2] In the circumstances, the record herein amply supports the interlocutory decree of divorce which adjudges that the agreements entered into between the parties hereto "on October 1, 1928, June 28, 1935, November 16, 1936, December 16, 1936, November 1, 1937, December 2, 1937, August 24, 1943, are valid, subsisting and in full force and effect and that the plaintiff is entitled to receive from the defendant, by virtue of said agreements, the sum of $300.00 per month on the first day of each and every month"; and which also adjudges that "the said agreements are not binding on this court in awarding support to the plaintiff."

[3] With respect to the awards made to respondent in the instant action, appellant contends that the award of the homestead was improper because it was taken from the husband's separate property, had a value of $50,000 and was given to the wife for life instead of for life or until her remarriaged.

Section 1238, Civil Code, provides that a homestead may be selected from the separate property of the husband. And, as stated in Greenlee v. Greenlee, 7 Cal.2d 579, 583, 61 P.2d 1157, 1159: "Subdivision 4 of section 146 of the Civil Code provides that in divorce actions, if the homestead has been selected from the separate property of either, it shall be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the innocent party. * * * The limited period for which the court may assign to the innocent party the homestead selected from the separate property of the other has been held to be for the period of the natural life of the former. Strupelle v. Strupelle, 59 Cal.App. 526, 531, 211 P. 248; Neary v. Godfrey, 102 Cal. 338, 36 P. 655; Hutchinson v. McNally, 85 Cal. 619, 24 P. 1071." See, also Litt v. Litt, 75 Cal.App.2d 242, 245, 170 P.2d 684.

The homestead property here in question was originally built by appellant for respondent, and, as heretofore mentioned, they returned there to live on the day of their remarriage, appellant having promised prior thereto "to put the place in joint tenancy."

[4] It was stipulated at the trial that there was an accumulation of community property during the period of the second marriage consisting of a bank balance of $6,836.01, War Bonds having a present valuation of $3,375, and 100 shares of stock valued at $900. The divorce having been granted to respondent on the ground of extreme cruelty, it was within the discretion of the trial court to award her all of the community property.

[5] Appellant urges that "Assuming for the argument that the lower court had power to award plaintiff additional moneys for her support other than those specified in the agreement, nevertheless the award of $900 per month was erroneous and excessive and an abuse of discretion." Also, that in making such award, the court was unduly influenced by inadmissible testimony concerning the relations of the parties during the period following the first interlocutory decree in August, 1940, and their subsequent remarriage on May 11, 1945.

At the time the award was made, the annual income of appellant was $85,090.57, of which $67,200 was salary, and the monthly support awarded to respondent was only $600 per month, the remaining $300 of the so-called award of $900 being paid to respondent under the property settlement agreements. In her affidavit for support, respondent stated that her monthly expenses were 830, which included salaries for the gardener and housekeeper employed at the Santa Ynez Ranch. Moreover, the record shows that appellant always considered that the monthly payment of $300 under the agreements was for respondent's personal expenses. Under the existing circumstances, it cannot be said that the award of $600 to a wife whose husband earns an annual income of $85,000 is excessive.

[6] With respect to the testimony the admission of which appellant claims resulted in prejudice to him, respondent's counsel explains in his brief that this was offered in an attempt "to establish a claim to property accumulated between the divorce and remarriage on the principle that their relationship was the same as in the so-called 'putative wife cases'." However, since the

court did not award respondent any property accumulated during said period, the admission of such testimony was not prejudicial to appellant and did not influence the trial court in making the awards herein, as is evidenced by the comment of the trial court in its ruling on appellant's motion to strike out such testimony, i.e., "I don't think we will strike it at this time. I don't think it will make any particular difference whether it is in the record or not. The farther we go in it the less all of those collateral, small issues seem to matter in the case as a whole."

For the reasons stated, those portions of the interlocutory decree of divorce appealed from are affirmed.

DORAN and WHITE, JJ., concur.

81 Cal.App.2d 857

## PEOPLE v. CHAPMAN.

Cr. 2477.

District Court of Appeal, First District, Division 1, California.

Oct. 17, 1947.

Hearing Denied Nov. 14, 1947.

**1. Criminal law ⇨1130(2)**

A statement in brief that evidence is insufficient to sustain verdict without some reason given therefor is mere recital of specifications without argument and may be passed by an appellate court without comment.

**2. Criminal law ⇨1144(13)**

Where sufficiency of evidence has been determined by jury and subsequently on motion for new trial by trial court, without an analysis of legal insufficiency of the evidence an appellate tribunal may assume that the assigned errors in such respect are directed only against weight of the evidence.

**3. Criminal law ⇨1114(1)**

Fact that a layman defendant in a criminal case represents himself on appeal does not require appellate tribunal to examine record for error that has not been raised on appeal or to discover whether some late decision may be of avail to defendant.

**4. Infants ⇨20**

Evidence sustained conviction of lewd and lascivious acts against a child under 14 years of age. Pen.Code, § 288.

**5. Criminal law ⇨1159(2)**

Where evidence was not inherently improbable but as read in print it appeared to be convincing to moral certainty and beyond a reasonable doubt, appellate court would not interfere unless error appeared in record and indicated that trial court or counsel had prejudiced substantial rights of defendant.

**6. Criminal law ⇨1030(1)**

If specified error involved a ruling or order by trial court, an objection should have been presented, and in absence thereof it would be held that substantial rights of defendant were not jeopardized as a matter of law. Pen.Code, § 1259.

**7. Infants ⇨20**

Photograph of nude female was properly admitted in evidence as corroborative of other evidence substantiating offense of contributing to delinquency of minor, where 12-year-old prosecutrix testified as to defendant exhibiting picture to her. Welfare and Institutions Code, §§ 700, 702.

**8. Criminal law ⇨1202(4)**

Where defendant was charged with being an habitual criminal, and pleaded not guilty but admitted prior convictions, reading to jury allegations of prior crimes with which defendant was charged, but omitting allegations referring to prior convictions, was not error. Pen.Code, §§ 644, 809, 917, 969½, 988, 1016, 1017.

**9. Criminal law ⇨1114(1)**

An appellate court is limited to record on appeal.

**10. Criminal law ⇨1202(4)**

Even if prior convictions alleged in support of habitual criminal charge were improperly read to jury after defendant had admitted suffering the alleged convictions, defendant's failure to object thereto was a waiver of alleged error. Pen.Code, §§ 644, 969½, 1025.

**11. Witnesses** ⚿337(5)

The right of impeachment of witness by showing prior conviction of an offense is available notwithstanding that prior convictions, are admitted in conformity with Penal Code. Pen.Code, § 1025; Code Civ. Proc., § 2051.

**12. Criminal law** ⚿1169(3)

Admission by defendant on cross-examination removed prejudice from any error that might have occurred in referring to a prior conviction in presence of jury previous to reception of impeaching testimony. Pen.Code, § 1025; Code Civ.Proc. § 2051.

**13. Criminal law** ⚿199

Where an offense cannot be committed without necessarily committing another offense, the latter is an "included offense" within rule making conviction or acquittal a bar to subsequent prosecution for included offense.

See Words and Phrases, Permanent Edition, for all other definitions of "Included Offense".

**14. Criminal law** ⚿193½, 200(1)

The "offense" of contributing to delinquency of a minor is "included" in the offenses of statutory rape, and lewd and lascivious conduct against a child under 14 years of age, so that an acquittal or conviction of offense included in greater offense bars subsequent prosecution for greater offense. Pen.Code, §§ 261, subd. 1, 288; Welfare and Institutions Code, § 702.

**15. Criminal law** ⚿200(7)

Statutory rape committed upon a child under 14 years of age is punishable as lewd and lascivious acts against the child, but defendant cannot be punished twice for same act as constituting both statutory rape and lewd and lascivious conduct. Pen. Code, §§ 261, subd. 1, 288.

**16. Criminal law** ⚿200(7)

Where charges of statutory rape, lewd and lascivious acts against child under 14 years of age, and contributing to delinquency of minor were all based upon same acts, conviction on charge of lewd and lascivious acts was affirmed, but conviction on other two charges was reversed on ground that such charges constituted "included offenses." Pen.Code, §§ 261, subd. 1, 288; Welfare and Institutions Code, § 702.

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Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Bert Chapman was convicted of statutory rape and of lewd and lascivious acts against a child under 14 years of age and of contributing to delinquency of a minor, and he appeals.

Judgment of conviction affirmed in part and reversed in part.

Bert Chapman, in pro. per.

Fred N. Howser, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen., for respondent.

WARD, Justice.

Defendant was charged in an amended information containing three counts with violating section 288 of the Penal Code, section 261(1) of the Penal Code and section 702 of the Welfare and Institutions Code. The counts are alleged as different offenses of the same class and connected in commission with each of the other alleged separate causes of action. The same victim, a female child of the age of twelve years, is named in all counts, and the acts in violation of the respective statutes are alleged to have been committed on the same date. The section 288 count is primarily based upon feeling the private parts of the minor female. The second count alleges an act of sexual intercourse with the same child, and the violation of section 702 of the Welfare and Institutions Code in the third count sets forth among other things that the private parts of the same female child were touched with the private parts of the defendant.

The amended information also charged convictions of and servitudes for three prior felonies by which reference were made a part of each count. The defendant entered a plea of not guilty to each offense charged and admitted the three prior convictions. The defendant, represented by legal counsel, was tried, but the jury disagreed and was discharged. On the second trial the record indicates that there was some confusion in the selection of either new counsel or the retention of the previous trial attorney. The new counsel withdrew. The defense was conducted by the counsel of the previous trial, the public defender, and without objection defendant was permitted to appear in propria persona. This practice is questionable. The jury found the defendant guilty on each count. A motion for a new trial was presented and denied, whereupon the court adjudged and decreed that the sentences imposed should run concurrently on each count.

The original trial attorneys filed a written notice of appeal from the judgment rendered and from the order denying a new trial. Thereafter the defendant in propria persona filed a separate notice of appeal from the same order and judgment. The brief is signed: "Bert Chapman, Appellant, In Pro Per." There is no appearance by an attorney.

The appeal is based upon the following alleged errors: "I. The trial court is guilty of prejudicial misconduct in reading the information including the three prior convictions alleged therein to the jury, two (2) times: In view of prior convictions being admitted at arraignment. II. The trial court was guilty of misconduct in permitting counsel for the people to cross-examine appellant concerning prior convictions in view of the fact that appellant had admitted said prior convictions on arraignment. III. The evidence does not sustain the verdict." In support of the third point the brief simply states: "[from] the reading of the entire transcript it will be seen that the evidence does not support the verdict."

[1, 2] A statement in a brief that the evidence is insufficient to sustain a verdict without some reason given therefor is a mere recital of specifications without argument and may be passed by an appellate court without comment. People v. Weiskopf, 60 Cal.App.2d 214, 140 P.2d 201. It has been held that when the sufficiency of the evidence has been determined by a jury and subsequently on motion for a new trial by a court, without an analysis of the legal insufficiency of the evidence an appellate tribunal may assume that the assigned errors in this respect are directed only against the weight of the evidence. People v. Carlson, 73 Cal.App.2d 933, 167 P.2d 812.

[3] A layman who is unacquainted with procedure on a criminal appeal and possesses only a smattering knowledge of the law involved but represents himself on appeal, usually overlooks debatable points that would be readily recognized by one trained in the law. The fact that a defendant in a criminal case represents himself on appeal does not require an appellate tribunal to examine the record for error that has not been raised on appeal or to discover whether some late decision may be of avail to the appellant. In this particular case the court, on account of the poorly prepared brief filed by the appellant has concluded that the best interests of justice demand that it ignore the general rule that it refuse to consider points not raised in the briefs.

[4-6] The minor girl in this case lived with her father who worked during hours that permitted the girl of her own volition to be away from home without restraint. She visited with the defendant about ten times. He entertained her at his residence, gave her money and provided food, including candy and ice cream. Without relating the details, it is sufficient to say that the appellant's conduct in kissing, hugging and fondling the minor child, and feeling her private parts, was in violation of either Penal Code section 288 or section 702 of the Welfare and Institutions Code. On several occasions rape was attempted without success on account of physical impediment, but on the last two visits of the girl to defendant's bedroom, with the assistance of artificial means actual rape occurred. The girl was physically examined and scientific tests made not only of the female parts, but of certain pieces of cloth used immediately after the rape, which satisfied the triers of the facts of the truth of the charge. The defendant admitted that the girl had visited his residence. Some of these visits were corroborated by other witnesses. The evidence is not inherently

improbable. On the contrary, as read in print it appears to be convincing to a moral certainty and beyond a reasonable doubt. Under such circumstances an appellate court is not permitted to interfere unless error appears in the record and indicates that the court or counsel has prejudiced the substantial rights of the defendant. If the specified error involved a ruling or order, an objection must have been presented; otherwise in this respect the substantial rights of the defendant as a matter of law have not been jeopardized. Penal Code, sec. 1259.

[7] A search of the record indicates that some objection was made during the trial relative to the introduction of a photograph of a nude female. Appellant does not mention this point on appeal. The girl testified that appellant stated that it was her picture. Assuming that it was not, still the exhibition of the photograph to the minor girl in conjunction with other acts might have had a tendency to bring her within the class of delinquents denounced in Welfare and Institutions Code sections 700 and 702. However, the photograph was not made the basis of the third count. The picture was introduced as an exhibit in the case, based upon the testimony of the girl given on the trial. A certain conversation given as testimony by an inspector of police as to what the girl said to the inspector in the presence of the defendant was stricken from the record upon the theory that whatever the girl said to the inspector about the picture was met by a denial from the defendant. No error appears in this respect. The picture was corroborative of other evidence substantiating the offense set forth under Welfare and Institutions Code, section 702.

[8, 9] Appellant urges that on two occasions the court or the clerk stated in the presence of the jury that the defendant had suffered three prior convictions. From the reporter's transcript appellant quoted: "The Court read the information to the jury." There should be added, as appears in the clerk's transcript, "and stated the Defendant's pleas of Not Guilty to each offense charged." At the outset of the court's instructions there appears the following statement: "Now, I will again read to you the information containing the charges against this defendant. (Thereupon the Court read the information to the jury.)" The record does not disclose that the data pertaining to prior convictions was read to the jury. If the court merely read to the jury the allegations of the crimes with which the defendant was charged, and omitted the allegations referring to prior convictions, no error was committed. People v. Schunke, 47 Cal.App.2d 542, 118 P.2d 314; People v. Douglass, 87 Cal. 281, 25 P. 417. An appellate court is limited to the record on appeal. People v. Silva, 2 Cal.App.2d 616, 38 P.2d 481. There is no proof in this case that the prior convictions were read. An information in form similar to an indictment (Penal Code, sec. 809) sets forth an accusation in writing which charges a public offense (Penal Code, sec. 917). On arraignment the accused is asked if he pleads guilty or not guilty to the crime alleged in the information or indictment. Penal Code, sec. 988. The accused may also interpose pleas of former conviction or acquittal, once in jeopardy or not guilty by reason of insanity to the charge outlined in the information or indictment. Penal Code, secs. 1016, 1017. There is no provision for a plea to a recitation in the indictment or information of guilty or not guilty of an alleged prior conviction.

The purpose of establishing the fact that an accused on trial has been convicted of an act punishable by imprisonment in this state and that such person has suffered servitude for such conviction is to fix the punishment (Penal Code, sec. 644) in the event of conviction of the offense set forth in the indictment. The charge of a prior conviction only requires that the defendant admit that he did or did not suffer a conviction and servitude for such offense. The refusal to admit or deny the alleged prior conviction is equivalent to a denial. Penal Code, sec. 969½.

[10] If the defendant pleads not guilty and answers that he has suffered the alleged previous conviction, it is not necessary to prove previous conviction. Penal Code, sec. 1025. Alluding to such conviction may be reversible error, but failure to object is

waiver of the error. People v. Porter, 123 Cal.App. 618, 11 P.2d 894. If the priors were read to the jury after defendant had admitted suffering the respective alleged convictions, the record does not disclose that any objection was interposed.

[11] There is no common purpose between Penal Code, sections 1025 and 644, and Code of Civil Procedure, section 2051. The purpose of the Penal Code sections has been stated heretofore, while the Code of Civil Procedure section may be used only to impeach a witness, including a defendant, if he testifies, upon the theory that he has been convicted of a felony. This right of impeachment under the provisions of Code of Civil Procedure, section 2051, is available notwithstanding that a prior conviction is admitted in conformity with Penal Code, section 1025. People v. Arnold, 116 Cal. 682, 48 P. 803; People v. Peete, 28 Cal.2d 306, 169 P.2d 924; People v. Murray, 42 Cal.App.2d 209, 108 P.2d 748, accord 8 Cal. Jur. 647 and note 103 A.L.R. 357.

[12] On cross-examination the defendant as impeaching evidence admitted the priors. It has been held that such admission cures any error that may have occurred in referring to a prior conviction in the presence of a jury previous to the reception of the impeaching testimony. At least it has been held such reference is not prejudicial. People v. Booth, 72 Cal.App. 160, 263 P. 987; People v. Jeffries, 47 Cal.App.2d 801, 119 P.2d 190; People v. Jones, 78 Cal.App. 554, 248 P. 964; People v. Dutton, 41 Cal.App.2d 866, 107 P.2d 937.

People v. Richardson, 74 Cal.App.2d 528, 169 P.2d 44, cited by appellant, is not in point. In the Richardson case the defendant *denied* the prior convictions as alleged in the information. It was necessary to prove the prior convictions. There was offered in evidence, in addition to the necessary proof, a record of arrests without conviction on felony and *misdemeanor* charges. This was prejudicial to the rights of the defendant in the Richardson case. Such facts do not appear in the present case.

Appellant states that this case is merely one of veracity between the defendant and the girl "And more particularly so when it is considered that no cooberation [sic] of the youngsters story of the actual act was proved." Thereupon it is urged that the alleged misconduct of the trial judge should be considered more serious than in an ordinary case of this character. The statement of appellant is not correct. There was no misconduct on the part of the trial judge, and the girl's testimony was corroborated in a convincing manner by evidence seldom found in the character of crimes alleged in the information.

In People v. Greer, 30 Cal.2d 589, 184 P.2d 512, the defendant was charged with violating Penal Code sec. 288, Penal Code sec. 261(1) and Welfare and Institutions Code sec. 702. He was convicted on the Welfare and Institutions Code section 702 and the jury disagreed on the Penal Code charges. The defendant was sentenced on the section 702 conviction and subsequently placed on retrial on the Penal Code sections. Defendant pleaded double jeopardy, but the trial court refused the offer of proof. This refusal was held error. On the second trial the defendant was convicted on Penal Code sections 288 and 261(1) and duly sentenced, the sentences to run concurrently with each other and the section 702 sentence.

[13, 14] People v. Greer, supra, at page 596, of 30 Cal.2d, at page 516 of 184 P.2d, sets forth: "The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense. * * * Statutory rape (section 261(1)) and lewd and lascivious conduct (section 288) are offenses against minors under 18 and 14 years of age respectively, whereas section 702 protects minors under 21. Consequently, the age groups covered by sections 261(1) and 288 of the Penal Code are necessarily included within the age group covered by section 702 of the Welfare and Institutions Code. * * * Since every violation of sections 261(1) and 288 is also a violation of section 702, the offense defined in the latter is an offense necessarily included in the offenses defined in sections 261(1) and 288. * * * We are holding, not that these offenses are identical, but that every violation of sections 261(1) and 288 necessarily constitutes a violation of section 702 and that therefore the offense defined in section 702 is an offense necessarily

included in the offenses defined in sections 261(1) and 288.

"In the first trial, therefore, it was not necessary for the district attorney to charge a violation of section 702 to obtain a conviction of defendant for committing that offense. He could have charged statutory rape and lewd and lascivious conduct, and the jury, under proper instructions, could have returned a verdict of guilty of contributing to the delinquency of a minor. * * * Had the jury done so, defendant would necessarily have been acquitted of the greater offenses. * * * Instead, he is now convicted of both the included and the greater offenses. He has been subjected to more than an additional trial. The trial court has ordered that he serve overlapping sentences, for he has already been imprisoned for contributing to the delinquency of a minor, and his present sentence runs concurrently with his previous one only as to time not yet served. * * *

"The prosecution cannot avoid the consequences of a conviction of a necessarily included offense by charging the included offense in a separate count, on the theory that a conviction under such circumstances constitutes a conviction of a separate offense. * * *

"Although the offense of contributing to the delinquency of a minor is necessarily included in the offenses defined in sections 261(1) and 288 of the Penal Code, defendant could be convicted of all three offenses if separate acts served as the basis of each count. Indeed, defendant can be convicted more than once under the same statute, so long as he is prosecuted for separate acts. The doctrine of included offenses is applicable only when the same act is relied upon for more than one conviction. * * *

"* * * It is obvious that the necessary elements of lewd and lascivious conduct could be stated without stating the necessary elements of statutory rape."

[15] The court in the Greer case discusses the history of section 288 and concludes that the section as amended (Stats. 1937, p. 1562) does not authorize double punishment for the same act or acts, and holds that statutory rape is an offense included within the terms of sec. 288. The court said at page 603 of 30 Cal.2d, at page 521 of 184 P.2d: "Now statutory rape committed upon the body of a child under 14 years of age can be punished as a lewd and lascivious act. It cannot, however, be punished twice, as statutory rape and as lewd and lascivious conduct." It further said at page 604 of 30 Cal.2d, at page 521 of 184 P.2d: "The prosecution may charge both crimes in the same information. The jury must be instructed, however, that, as in the case of necessarily included offenses, there can be only one verdict of guilty."

The Greer case does not determine that the accomplishment of statutory rape (sec. 261(1) includes a lewd and lascivious act as set forth in section 288, but "*Instead, the crime of statutory rape is included within section 288 by that section's own terms, and the rape forms the basis for the prosecution under section 288.*" (Emphasis added) People v. Greer, supra, at page 603 of 30 Cal.2d, at page 520 of 184 P.2d.

[16] In the present case the acts alleged in the three counts are not identical, but the offenses alleged in Welfare and Institutions Code, sec. 702, are included in Penal Code sections 261(1) and 288; and, following the holding in People v. Greer, supra, the rape offense (261(1) is included in the lewd and lascivious offense set forth in section 288.

People v. Greer, supra, is the latest expression by the highest—the Supreme Court—of this state upon the legal points involved. Such views are binding on this court.

The judgment of conviction and the order denying the motion for a new trial insofar as it covers the first count—a violation of Penal Code, sec. 288—in the amended information are, and each of them is, affirmed. The judgment and the order denying a new trial insofar as they refer to counts II, an alleged violation of Penal Code, sec. 261(1), and count III, an alleged violation of the Welfare and Institutions Code, sec. 702, are and each of them is reversed, and the trial court is directed to proceed in accordance with the views herein expressed.

We concur.

PETERS, P. J., and BRAY, J., concur.

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## REDDING v. CITY OF LOS ANGELES et al.

Civ. 15858.

District Court of Appeal, Second District, Division 2, California.

Oct. 17, 1947.

Rehearing Denied Nov. 4, 1947.

Hearing Denied Dec. 15, 1947.

**1. Mandamus 🔑72**

The writ of mandamus may not be employed to effect a desired decision contrary to the opinion of an official or board vested with discretionary power.

**2. Mandamus 🔑154(5)**

A complaint alleging that Board of Rights upon which Los Angeles city charter has conferred discretionary power to determine whether a police officer has been guilty of neglect of duty, heard evidence offered by officer and derived its decision therefrom does not state a cause of action for a writ of mandamus to compel board to reverse decision and restore officer to his position.

**3. Mandamus 🔑76**

Under provision of Los Angeles charter giving Board of Rights jurisdiction to determine whether a police officer has been guilty of neglect of duty, court, in mandamus proceeding, cannot substitute its judgment for that of board in absence of a showing of abuse of discretion by board.

**4. Mandamus 🔑154(5)**

Petition for writ of mandamus to compel city to restore former police officer to his position, disclosing that officer was granted military leave but that he did not present himself within 90 days from his release for restoration to police duty, was insufficient. 50 U.S.C.A.Appendix, § 1472.

**5. Municipal corporations 🔑185(2)**

Police officer's service with merchant marine was not service with a branch of the "armed forces" within meaning of provision of Los Angeles city charter allowing a policeman to enter active service in the armed forces without detriment to rank or seniority.

See Words and Phrases, Permanent Edition, for all other definitions of "Armed Forces".

**6. Municipal corporations 🔑53**

The federal statute providing for reemployment by private employers of persons who enter the service of the merchant marine, in the absence of adoption of an appropriate supplementary statute by California Legislature, is not binding on city of Los Angeles. 50 U.S.C.A.Appendix § 1472.

**7. States 🔑21**

The public policy of a state with respect to any matter can be expressed only by an act of its own Legislature.

**8. Municipal corporations 🔑185(14)**

Where former policeman forfeited his right to be on the police force, chief of police was without authority to restore him, and in order for officer to regain membership on the force he was required to pursue route followed by any citizen who seeks such a position.

**9. Constitutional law 🔑70(1)**

Unless city charter provides for an exception to be made in manner of employing one who has been discharged from his position in city government, courts cannot supply such provisions.

**10. Constitutional law 🔑70(1)**

While courts may annul a statute which violates fundamental law, they cannot declare as law that which they might conceive would be a wholesome statute.

**11. Municipal corporations 🔑217(3), 218(11)**

An executive officer of the city of Los Angeles cannot, in disregard of city's civil service laws, either restore an employee or appoint him to the position from which he, for cause, has been discharged.

**12. Administrative law and procedure 🔑223**
**Municipal corporations 🔑185(12)**

Where Board of Rights was vested with full power to determine guilt of police officer of neglect of duty and acted in conformance with statutory procedure, superior court had no power to inquire whether grounds upon which discharge was based were well founded; its power being confined to a determination of whether board acted within prescribed rules or violated the Constitution or general laws.

**13. Municipal corporations ⚷185(1)**

Where police officer obtained a military leave to enroll in Coast Guard under charter provision requiring that he again report for duty within 90 days after disenrollment, and officer, after leaving Coast Guard, without applying for further leave, enlisted in merchant marine and placed himself in a position from which he could not return within requisite 90 days, dismissal was justified for neglect of duty.

**14. Municipal corporations ⚷185(1)**

Discipline within the ranks of a city police force must be enforced and undivided allegiance to the public interest maintained even at the expense of freedom of action of an individual officer to serve in a larger field.

**15. States ⚷4**

Declaration in Merchant Marine Act that one of the reasons for fostering merchant marine is that it should be capable of serving as a naval and military auxiliary in time of war or national emergency is not binding upon state of California as though it were a declaration of public policy of such state. Merchant Marine Act of 1936, § 1, 46 U.S.C.A. § 1101.

**16. States ⚷4**

The United States and the state of California are separate sovereignties, each dominant within its own sphere, and the state, by virtue of the fact that it gives full support to national government in conduct of a war, does not automatically adopt public policy of nation as its own.

**17. Army and navy ⚷5**

Members of the merchant marine are not units of the armed forces of the United States. Merchant Marine Act of 1936, §§ 1, 1001, 46 U.S.C.A. §§ 1101, 1251; 50 U.S.C.A.Appendix, § 1472.

**18. Municipal corporations ⚷185(6)**

Under the maxim that the law does not require the performance of an idle act, Board of Rights, hearing charge of neglect of duty against a Los Angeles police officer, having knowledge that officer was then in employment of merchant marine and was absent from the United States, was not required to search for officer throughout the city of Los Angeles before mailing a copy of the charges to officer at his last known address.

**19. Municipal corporations ⚷185(1)**

A Los Angeles police officer has no discretion to determine himself whether he is neglecting his duty as a member of the police force by serving in the merchant marine without express leave, such discretion being vested in chief of police and board of rights.

**20. Municipal corporations ⚷185(4)**

Police officer, who was removed by chief of police and Board of Rights for accepting employment with merchant marine without express leave, could not complain of lack of full, fair, and impartial hearing by Board of Rights while officer was out of of country where, upon his request, a rehearing was granted and a complete hearing accorded with his counsel present.

**21. Mandamus ⚷154(5)**

Pleaded facts in mandamus proceeding to compel restoration of Los Angeles police officer to his position after discharge for neglect of duty in failing to return to police force after disenrollment from Coast Guard established that he had been accorded a full, fair and impartial hearing by Board of Rights.

**22. Administrative law and procedure ⚷302**
**Constitutional law ⚷277(2)**

While under Los Angeles charter a police officer's position as a member of the police force is a substantial property right of which he may not be deprived arbitrarily or summarily, where officer was accused of neglect of duty, notified of charge and fairly tried in conformance with charter provisions, all requirements of due process of law were fulfilled, and he was properly removed.

**23. Municipal corporations ⚷180(1)**

The Los Angeles charter provision that a police officer's position as a member of the force is a substantial property right of which he shall not be deprived arbitrarily or summarily does not contemplate that an officer becomes an owner of the office in the same sense that he owns a chattel.

**24. Officers** ⚷75

An incumbent official's right to his office perishes with order for his discharge when order results from an adherence to statutory procedure required for his dismissal for cause.

**25. Municipal corporations** ⚷185(4)

The purpose of charter provisions against summary removal of municipal employees is to give employee some reasonable permanency of tenure so that he might be free from fear of losing his means of subsistence, and to give the public benefit of increased efficiency resulting from experience.

**26. Constitutional law** ⚷277(2)

A Los Angeles police officer's right to his position will be protected by due process of law in the broadest sense of the term, but such officer may not, during his tenure in disregard of express regulations, embark upon free adventure into other fields of employment.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Proceeding in the matter of the petition of William H. Redding for a writ of mandamus against the City of Los Angeles and others to compel respondents to restore petitioner to his position as a member of the police force of Los Angeles. From a judgment of dismissal following the sustaining of a general demurrer to the petition, petitioner appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., and George William Adams and John F. Feldmeier, Deputy City Attys., all of Los Angeles, for respondents.

MOORE, Presiding Justice.

Appeal from a judgment of dismissal pursuant to a favorable ruling on a general demurrer to appellant's petition for a writ of mandamus to compel respondents to restore him to his position as a member of the police force of Los Angeles.

### Contents of Appellant's Pleading.

The pleading alleges that petitioner has been an officer of the police force of which he became a member on April 1, 1925; that he was continuously such officer until September 6, 1942, when he was granted military leave to enlist in the United States Coast Guard. The city's charter provides for a police department for the purpose of enforcing its police, safety, and other regulations not in conflict with the general laws. By section 17 of such basic law every officer called into active service in the "armed forces" of the United States during time of war "shall during the period of such service, and for a period of ninety days from and after his discharge or release from such service, be considered as being on leave of absence." Such leave shall be designated military leave, but its benefits shall not inure to any person who may be dishonorably discharged from the service to which he was called. "Every such officer or employee returning to the service of the city from military leave within the time hereinabove designated shall be restored to the same rank and position held by him at the time of the commencement of his military leave, or to such other rank and position to which he would be * * * entitled under the provisions of section 125 of this charter[1] * * * it being the intent of this provision to provide for the reemployment of persons absent on account of military leave without prejudice on account of their absence * * * during the period of such leave."

Appropriate allegations declare the existence of war between the United States and Japan, the President's declaration of the national emergency, its present existence and Japan's surrender, and the necessity for the government to transport food, clothing, medicine, arms, ammunition, all war material and soldiers from the Pacific Coast and other places to points at which they were required. To accomplish such ends the merchant marine enrolled such available men as had enjoyed experience in shipping, of whom appellant was one, having served in the Navy for three years. Such experience rendered his services desirable in the merchant marine whereby he could better promote peace and safety for the citizens of the United States and the city of Los Angeles than by his service in any other capacity.

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[1] This section provides for the manner and order in which persons shall be suspended and restored by the Board of Civil Service Commissioners. Suspension for personal delinquency and restoration "shall be based upon seniority as hereinafter provided."

Petitioner was disenrolled from the Coast Guard on December 9, 1942, and enrolled in the merchant marine with which he was continuously employed until March 29, 1946. Upon his release he received from the administrator of the War Shipping Administration a certificate pursuant to Public Law 87 that he had completed a period of substantially continuous service in the merchant marine since January 9, 1943. It certified that petitioner is eligible to be relieved from any further consideration for classification under the Selective Service System.

While petitioner was serving in the merchant marine, August 3, 1943, defendant Chief of Police, C. B. Horrall, accused petitioner of neglect of duty in that having been granted military leave to enter the Coast Guard Reserve and having been disenrolled therefrom December 9, 1942, he failed to return to active duty within the statutory limit of 90 days; that "no copy of the accusation had been served personally and he had no knowledge of the hearing and was not represented." The defendants Eaton, Clark and Collins, acting as a Board of Rights, found petitioner guilty of the charges and recommended his removal from the department without prejudice. Thereupon the chief discharged appellant.

On February 7, 1946, and while petitioner was still serving in the merchant marine, he applied for a rehearing. His application was granted by the Chief; a new Board of Rights was appointed, consisting of defendant Lawrence, Mesloh and Steed. At a hearing on February 27, 1946, petitioner personally appeared, represented by counsel. All witnesses called by both parties gave their testimony. In addition to the facts above recited the petition recites in detail petitioner's testimony of his service rendered on the two armed transports, the "Eugene Skinner" and the "Ball's Bluff"; of his transfer to the latter which operated in the south seas and Indian Ocean from December, 1944, to January, 1946; and of his entry into different ports where he reported to the Navy, and his report to the police department immediately upon leaving the last named vessel. Defendant Reed, assistant chief of police, testified before the Board that he had received a letter from petitioner in 1943 stating that he had been detained and that he would be unable to return, and requesting that the personnel bureau be informed. The testimony of Reed was in no respect contradicted except by Paul E. Harrison, a personnel officer, who denied having received any communication from petitioner after he was disenrolled from the Coast Guard, but stated that petitioner's wife telephoned the bureau after a letter had been sent advising petitioner of their information, and that he had advised her that although appellant had been disenrolled over 90 days, he might still return to his office. Harrison testified also that the police department had very few men with licenses from a maritime commission as qualified officers. Petitioner testified without contradiction that at all times within the 90-day period after December 9, 1942, he was unable to return to Los Angeles by reason of his duties and lack of transportation.

The board having found appellant guilty of neglect of duty, defendant Reed served upon him a notice of his removal from the police force. There was no evidence of neglect of duty other than his failure to return within 90 days after his disenrollment from the Coast Guard.

### Vice of the Pleading.

[1, 2] Respondents maintain that since appellant had no statutory right to a leave of absence the judgment of the Board of Rights and the action of the Chief of Police cannot be judicially reviewed, the complaint having alleged no abuse of discretion. In support of such contention it is suggested that section 202 of the charter confers upon the Board the power to hear and determine

a question of fact and that such power and the Board's decision cannot be controlled by the courts. It is a rule of wide acceptance that the writ of mandamus may not be employed to effect a desired decision contrary to the opinion of an official or a board vested with discretionary power. Bank of Italy v. Johnson, 200 Cal. 1, 31, 251 P. 784. Since the charter confers discretionary power on the Board of Rights to determine whether a police officer has been guilty of neglect of duty, a complaint which alleges that such Board heard the evidence offered by appellant and derived its decision therefrom does not state a cause of action for a writ to compel respondents to reverse their decision and to restore appellant to his position. Dierssen v. Civil Service Commission, 43 Cal.App.2d 53, 59, 110 P.2d 513.

[3, 4] Appellant by his petition asks the court to substitute its judgment for that of the Board of Rights which was by the charter given jurisdiction to determine whether a police officer has been guilty of neglect of duty. Charter of Los Angeles, sec. 202. Clearly this cannot be done in the absence of a showing of abuse of discretion by the administrative board. Shewbridge v. Police Commission, 64 Cal.App.2d 787, 793, 149 P. 2d 429. Such showing is absent from the petition at bar. It discloses that appellant was granted military leave to enlist in the Coast Guard, a division of the armed forces, and that although he disenrolled therefrom in December, 1942, he did not present himself within 90 days from his release for restoration to police duty, but delayed doing so until January, 1946; that during the interim he was not with the armed forces but was a member of the merchant marine. In view of the alleged failure of appellant to return to his post within the time prescribed, of the language of section 17 of the charter and of Public Law 87, it cannot with accuracy be said that the Board abused its discretion.

The charter section merely allows a police officer to enter active service in the armed forces during war time without detriment to his rank and seniority provides that upon application within 90 days after his discharge he shall be restored to his position. Unless it can be said that his enrollment in the merchant marine and his service there was a compliance with section 17 and was as a matter of law the same as serving with the armed forces, the Board of Rights did not abuse its discretion in finding appellant guilty of neglect of duty in failing to return to his position within ninety days.

[5-7] Public Law 87, 50 U.S.C.A.App., § 1472, was not violated by the Board. That statute was enacted in June, 1943, for the purpose of making service in the merchant marine more attractive. Section 1472 designates three classes of persons to be affected, viz., those in (a) federal employment, (b) private employment, (c) state employment. The Act distinctly provides that those who shall have left the employment of the federal government or of a private employer to serve in the merchant marine shall be restored to their positions of like seniority, status and pay. But no such provision was made for those who left the service of a state or of a political subdivision thereof. As to them it merely "declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay." To emphasize its meaning subsection (b) provides that an employee of the federal government or of a private employer shall be considered as having been on furlough during his period of service in the merchant marine, but it does not make a similar requirement, as indeed it could not, for employees of a state or of its political subdivisions. In order to make such act binding upon the city of Los Angeles the adoption of an appropriate statute by the California legislature was essential for the reason that the public policy of a state with respect to any matter can be expressed only by an act of its own lawmaking body. 11 Am.Jur. 814; 5 Cal.Jur. 670, 711; In re Jones, 56 Cal.App.2d 658, 660, 665, 133 P.2d 418; Allen v. Lelande, 164 Cal. 56, 57, 127 P. 643; Twin City Pipe Line Company v. Harding Glass Company, 283 U.S. 353, 357, 51 S.Ct. 476, 75 L.Ed. 1112, 83 A.L.R. 1168; Baker v. United States, Cir., 27 F.2d 863, 875. It is true that on August 8, 1946, section 1472 was further liberalized by the Congress for the benefit of employees of the federal government and

of private employers. However, no change was made for the benefit of those who had left state employment to serve in the merchant marine. 50 U.S.C.A.Appendix, § 1472.

[8-12] Moreover, appellant having by due process of law forfeited his right to be on the police force, the Chief of Police is without authority to restore him. In order for him to regain membership in that organization he must pursue the route followed by any citizen who seeks to become a police officer. Unless the charter provides for an exception to be made in the manner of employing one who has been discharged from his position in the city government the courts cannot supply such provision. Cronin v. Civil Service Commission, 71 Cal.App. 633, 643, 236 P. 339. Courts may annul a statute which violates the fundamental law but they cannot declare as law that which they might conceive would be a wholesome statute. Neither can an executive officer of Los Angeles in disregard of its civil service laws either restore an employee or appoint him to the position from which he, for cause, has been discharged. Since the Board of Rights was vested with full power to determine the guilt of appellant and acted in conformance with a statutory procedure, the Superior Court had no power or authority to inquire whether the grounds upon which the discharge was based were well founded. Its power was confined to a determination of whether the Board acted within the prescribed rules or violated the constitution or general laws. Nider v. City Commission of Fresno, 36 Cal.App.2d 14, 23, 97 P.2d 293; State ex rel. Beebe v. City of Seattle, 159 Wash. 392, 293 P. 459, 460; State ex rel. Wolcott v. Boyington, 110 Wash. 622, 188 P. 777, 779. Nor can such power of that court be enlarged by its conclusion that the decision of the Board of Rights was incorrect. Shewbridge v. Police Commission of the City and County of San Francisco, 64 Cal.App.2d 787, 793, 149 P.2d 429.

[13, 14] Conceding, arguendo, appellant's contention that the Superior Court had jurisdiction to order his restoration to the police force if the court should determine there was not sufficient cause for his removal, we are brought to a consideration of the act charged as constituting a neglect of duty. The allegation is that he obtained a military leave and used it to enroll in the Coast Guard; that after a brief service there he responded to what he deemed a call of his country to join the merchant marine, which was then in "urgent need" of men experienced in shipping, to the end that he might better promote peace than by any other service. But there is no allegation that he could not have returned to the police force within 90 days after leaving the Coast Guard or that he applied for further leave in order to serve the merchant marine during the war. In distain of the constituted authorities in December, 1942, he embarked upon the "Eugene Skinner" from which three months later he notified the police department of his occupation and location. By his wilful action he placed himself in a position from which he could not return within the 90 days. Such conduct on the part of individuals in a law enforcement organization consisting of thousands of men will render its cohesion impossible and its constant efficacy for maintaining order and enforcing the law impracticable. No person is above the law even though his violation thereof is prompted by a desire to serve the state at greater peril or more effectively than by a strict compliance, and notwithstanding that his act results in his rendering invaluable services. A police force constitutes the very first line of defense against insidious forces gnawing at the vital of the republic and against the forces of terror and brigandage. Discipline within its ranks must be enforced and undivided allegiance to the public interest maintained even at the expense of freedom of action to serve in a larger field. See Doyle v. Kammeraad, 310 Mich. 233, 17 N.W.2d 165, 168; Coane v. Geary, 298 Ill.App. 199, 18 N.E.2d 719, 722; Perez v. Board of Police Commissioners of the City of Los Angeles, 78 Cal.App.2d 638, 178 P.2d 537.

[15-17] Appellant emphasizes the language of the Merchant Marine Act of 1936. Title 46 U.S.C.A., Chap. 27, § 1101. It is declared by the cited section that one of the reasons for fostering the merchant marine is that "[it should be] capable of serving as

a naval and military auxiliary in time of war or national emergency." Such declaration of congressional sentiment is not binding upon the state of California as though it were the declaration of her public policy. The United States of America and the state of California are two separate sovereignties, each dominant within its own sphere. While this state gives its full support to the national government in the conduct of a war, it does not by virtue of that fact automatically adopt the public of the nation as its own. The above quoted language is a part of subchapter I of the Act which is entitled "Declaration of Policy." Section 1101 is such subchapter in its entirety. It contains no provision which makes the merchant marine a part of the military or naval forces but is confined to the declaration that "it is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine * * * capable of serving as a naval and military auxiliary in time of war * * *." Not only does the quoted section fail to make members of the merchant marine units of the armed forces, but no federal statute has been enacted to effect such purpose. Had it ever been the intention of Congress to confer upon the members of the merchant marine the same status as soldiers it is unlikely that it would have adopted section 1251 of the Act which "encouraging the practice and procedure of collective bargaining * * * concerning rates of pay * * * or working conditions." Neither soldiers nor seagoing sailors nor even naval gun-crews on merchant vessels were ever privileged to bargain collectively. They are an arm of the executive branch of the government and can make no demands upon the sovereignty. On the contrary, the merchant marine is a voluntary organization whose functions and services are exclusively civilian in nature and may be terminated at the will of an enrollee. In re Goodell, 185 Misc. 897, 57 N.Y.S.2d 754.[2] Some three years prior to the Goodell decision the Attorney General of New York in an opinion requested by the New York Tunnel Authority held that employees of the merchant marine are not entitled to the benefits of that state's Military Law, Consol. Law, c. 36, in the matter of leaves of absence to employees engaged in military duty. He stated that unless the merchant marine shall be made a part of the Navy or a Naval auxiliary, or shall be otherwise organized as a public military force, public employees engaged in the merchant marine are not entitled to a statutory leave of absence from their public positions. Opinions of Attorney General, New York, 1942, p. 395.

The case of Rapaport v. Civil Service Commission, 134 Cal.App. 319, 25 P.2d 265, does not support appellant's contention that the accusation filed against him was insufficient. In that case an assistant physician was charged (1) with having accepted pay for his medical service and (2) neglect of duty in failing to visit two wards which had been assigned to him. Appellant emphasizes the court's language that "the mere failure to perform a certain act, with nothing more, does not constitute either a neglect of duty in fact or in law." 134 Cal.App. at page 323, 25 P.2d at page 267. But since there were no rules governing the conduct of assistant physicians or forbidding them to accept compensation from an employee of the hospital no unlawful conduct was charged. There is no parallel in the cited case to that here under consideration. Appellant was accused of disregarding a specific charter inhibition and the charge was established.

### The Board of Rights Had Jurisdiction.

Appellant contends that the Board of Rights did not acquire jurisdiction to try and determine his case. This contention is based upon the fact that the notice of the filing of the accusation was mailed to his "last known address"; that "no showing was made to the Board that due diligence had been exercised to find him"; that "his removal was summarily ordered without giving him a hearing"; that "his right to the office was a property right not to be taken from its possessor except in such manner and for such reasons as would justify taking property." The answer to such contention is readily found in the provisions of the charter and in court decisions.

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[2] The decision discloses that the New York legislature in 1944 so amended its Military Law as expressly to include employees of the merchant marine, thereby conserving their civil service tenure.

[18-20] Section 202 of the charter provides that the right of an officer of the police department is a substantial property right; that he shall not be deprived of it arbitrarily; that he shall not be deprived of his office except for "good and sufficient cause shown upon a finding of *guilty* of the specific charge * * * assigned as cause * * * therefor after a full, fair, and impartial hearing before the Board of Rights." Subsection 4 of section 202 provides that "service of any notice, order or process mentioned in this section, other than service of subpoena, may be made either by handing the officer or employee a copy thereof personally or by forwarding such copy by registered mail to his last known address of record with the Police Department if after due diligence he cannot be found." Appellant's complaint that no showing was made to the Board of the exercise of due diligence to find him has a triple answer: (1) He states in his brief that "it was known to the Chief of Police and to members of the trial board that he was outside of the United States and therefore that a communication mailed to his last known address could not and would not reach him." The petition alleges that the chief of police and the trial board knew that appellant was then in the employment of the merchant marine and was absent from the United States. Surely, appellant does not intend to imply that the Board of Rights, despite such knowledge, should before trying him on the accusation have required a search to be made throughout the city of Los Angeles! The law does not require the performance of an idle act. (2) But appellant deems himself to be aggrieved in that there was no need "for his removal while he was still out of the country." By such argument he indicates that he, rather than the chief of police or the Board of Rights, should determine whether he was neglecting his duty as a member of the police force by his serving in the merchant marine without express leave. No provision is to be found in the charter authorizing a police officer to exercise his own judgment in the matter of absenting himself from the city or in accepting other employment. The chief of police is the delegated official to make such decision, with no limitations other than the decision of a Board of Rights to be made after a "full, fair and impartial hearing." (3) Upon his request a rehearing was granted and a complete hearing was accorded with his counsel present.

[21] That the first hearing was fair and impartial is conclusively established by the pleaded facts (1) that the chief of police deferred filing the accusation for seven months and 24 days after appellant left the Coast Guard; (2) that credible witnesses testified to, and appellant makes no attempt to conceal, the date of his disenrollment from the Coast Guard, his employment by the merchant marine and his absence in the far reaches of the Pacific Ocean. (3) His second hearing was fair and impartial in that it was granted as a matter of grace and all evidence offered by appellant was admitted and considered.

[22-25] That appellant's right to his position as a member of the police force was a "substantial property right of which he shall not be deprived arbitrarily or summarily" (Charter of Los Angeles, sec. 202) is not questioned. The answer to such claim is found in the fact that he was accused, notified and fairly tried in conformance with the charter provisions. Such procedure fulfills all the requirements of due process of law. Wulzen v. Board of Supervisors, 101 Cal. 15, 20, 35 P. 353, 40 Am.St. Rep. 17; Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111, 292, 28 L.Ed. 232. It was not intended either by the citizens of Los Angeles or by the legislature that by the employment of a person as a member of the police force he thereby becomes "owner" of the office in the same sense that he owns his horse or his home. See Boyd v. Pendegast, 57 Cal.App. 504, 506, 207 P. 713; 46 C.J. 932. Not only may the law provide for the removal of an incumbent official but the latter's right to his office perishes with the order for his discharge when it results from an adherence to statutory procedure required for his dismissal for cause. In re Carter, 141 Cal. 316, 319, 74 P. 997. The philosophy underlying the theory of such property right is the employee should have some reasonable permanency of tenure to

the end that his mind might be free from fear of losing his means of subsistence, enabling him to devote his life to the public service, and that in the enjoyment of such right the officer will be protected against summary removal. People ex rel. Schumann v. McCartney, 34 App.Div. 19, 53 N.Y.S. 1047. His protection against being arbitrarily removed from office is designed for the public good as well as for his own. The public is entitled to the increased efficiency which results from experience. No official or board may by summary order divest a city employee of his career office. Garvin v. Chambers, 195 Cal. 212, 225, 232 P. 696; People ex rel. Schumann v. McCartney, supra. Only after a judgment convicting him of neglect of duty by a board may the head of the department discharge him.

[26] While a police officer's right to his position will be protected by due process of law "in the broadest sense of the term" (Ekern v. McGovern, 154 Wis. 157, 142 N.W. 595, 619, 46 L.R.A.,N.S., 796), he may not during his tenure, in disregard of express regulations, wrap his title to the office in the silken folds of his dreams and embark upon free adventure.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

30 Cal.2d 763

## LONG BEACH CITY HIGH SCHOOL DIST. OF LOS ANGELES COUNTY v. STEWART et al.

L. A. 19452.

Supreme Court of California, in Bank.
Oct. 24, 1947.

**1. Eminent domain** ⚷221

In assessing damages for land taken by eminent domain, jury should consider whether land is available for particular uses under existing zoning ordinances.

**2. Eminent domain** ⚷130

The compensation to be awarded for land taken by eminent domain is the market value of the land for any use to which it is adapted and for which it is available and the effect upon value of the property of a probability that a law prohibiting or restricting a particular use will be modified in near future may be considered.

**3. Eminent domain** ⚷262(5)

In action by high school district to condemn realty formerly used as farm land but recently zoned by city as residential district, instructions were not prejudicially erroneous as limiting jury's consideration of value to use to which property might be put under existing zoning ordinance.

**4. Trial** ⚷296(11)

Instruction excluding consideration of possible future uses under altered circumstances in assessing damages for land taken by eminent domain referred to speculative uses with which instruction as a whole was concerned and was not objectionable in view of other instructions authorizing consideration of such future uses as might reasonably be expected.

**5. Eminent domain** ⚷202(4)

Testimony as to money value of land taken by eminent domain for industrial purposes was inadmissible, particularly where witness had testified that he had not given matter sufficient study to determine fair value for such purposes.

**6. Evidence** ⚷474(18), 501(7)

Owner and occupant of realty taken by eminent domain was qualified to express opinion as to its market value, and he was also entitled to state the reasons for his opinion, regardless of whether he was an expert witness within meaning of statute. Code Civ.Proc. § 1872.

**7. Appeal and error** ⚷1170(7)

Error in not permitting owner to state reasons for his estimate as to market value of realty taken by eminent domain was not prejudicial, where such estimate was entirely out of harmony with all other evidence and, in absence of suggestion of rational basis therefor apparently constituted mere wishful guessing and new trial would probably result in smaller award. Const. art. 6, § 4½.

SCHAUER, SHENK and CARTER, JJ., dissenting.

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Condemnation action by Long Beach City High School District of Los Angeles County, a political subdivision of the State of California, against Irwin Stewart and others, to condemn defendants' realty for use as a junior high school. From an interlocutory judgment assessing defendants' damages, Irwin Stewart, William Henry Stewart and M. Pearl Coyle appeal.

Judgment affirmed.

Prior opinion, see 167 P.2d 515.

Dechter, Hoyt, Pines & Walsh, of Los Angeles, and Houser & Houser and J. Everett Houser, all of Long Beach, for appellants.

Harold W. Kennedy, County Counsel, and Ernest R. Purdum and Jesse J. Frampton, Deputy County Counsels, all of Los Angeles, for respondent.

SPENCE, Justice.

In this proceeding to condemn land for a new junior high school, defendants Irwin Stewart, William Henry Stewart and M. Pearl Coyle have appealed. After a careful review of the entire record we have concluded that the trial court committed no reversible error, and that the judgment should therefore be affirmed. Irwin Stewart is the only defendant on whose behalf points have been presented in appellants' brief and on oral argument. Therefore, for convenience, he will hereinafter be referred to as appellant.

The property condemned consists of five parcels, totaling 18.60 acres, on the outskirts of the City of Long Beach. Appellant, at the time proceedings were instituted, owned Parcel No. 1, consisting of 15.28 acres. The judgment appealed from awards him $20,000 for his property. The entire property was acquired by him in 1905 for the sum of $150 per acre, and he has resided on Parcel No. 1 and has used such parcel for farming operations continuously since that time. In 1906 he built thereon a frame dwelling house, a barn, storeroom, and shed. Later a garage was added and a small repair shop, operated by appellant's son, was housed behind the dwelling house in a structure measuring 28 feet by 32 feet. These improvements are of comparatively small value, the highest estimate made by any witness being $2,500, and that was by appellant's own expert. Parcels Nos. 2, 3, and 4 are of lot size. Parcel No. 2 is improved with a stucco dwelling owned by defendants Luman F. Rose and Isabell M. Rose, husband and wife. Parcels Nos. 3 and 4 are vacant lots, approximately 75 feet by 155 feet, which appellant had conveyed to his son, defendant William Henry Stewart, and to his daughter, defendant M. Pearl Coyle. Parcel No. 5 is a six-foot strip of land.

Since appellant's acquisition of the property in 1905, the surrounding tracts on three sides of the entire rectangular strip, including the long north and south sides, have been developed as residential subdivisions. On the fourth or west side is located the Union Pacific Railroad right-of-way. There has been no industrial development in the vicinity and the only business development, consisting of stores and a beer parlor, is distant 800 feet to one-half mile from appellant's parcel. In 1941, this property, together with the surrounding area, was zoned into a single family residence district. Thereafter the shop of appellant's son was operated under a "nonconforming use permit."

The issues as to public necessity and suitability of the property for the junior high school were determined in respondent's favor by the court sitting without a jury. Thereafter a jury awarded appellant $20,000 as compensation for the taking of his property, and it is this latter portion of the judgment that he attacks upon the present appeal.

Appellant contends: (1) the jury was erroneously instructed to limit their consideration of value to the use to which the property might be put under existing zoning ordinances; (2) the testimony of appellant's expert witness was erroneously limited to statements as to value of the land for residential purposes; and (3) the court erred in refusing to permit appellant to testify as to the reasons for his opinion as to value.

[1] Appellant first claims that there was error in the instructions given to the jury. He says: "We can state briefly that the error was in the introduction of the idea of 'availability' as a basis for values." In other words, appellant claims that in fixing the market value of the land, "adaptability" for any use should be considered by the jury but that "availability" should not. Such is obviously not the law, for the jury should consider whether the land is or is not available for particular uses under existing zoning ordinances, as such "availability" does affect market value.

Los Angeles City High School District v. Hyatt, 79 Cal.App. 270, 249 P. 221, 222, was an action in eminent domain for the acquisition of property for school purposes. Upon appeal, it was insisted that the consideration of zoning restrictions to which the property in question was subject was "an unjust handicap to appellant in fixing the award of damages." In denying the validity of the objection, the court stated on page 272 of 79 Cal.App., at page 222 of 249 P.: "There might be many considerations which if removed would enhance the value of real property, but when they exist they should be observed. It was the duty of the trial court to consider all conditions having any bearing upon valuations."

City of Beverly Hills v. Anger, 127 Cal. App. 223, 15 P.2d 867, was an action by plaintiff city to acquire land for public park purposes. Upon appeal, the chief attack was directed toward the admission in evidence of a zoning ordinance which restricted the use of the lots to construction of one-family dwelling houses. It was asserted that "the city may not take advantage in condemnation proceedings of the decreased valuation of lots which is caused by the enacting of a zoning ordinance, but, upon the contrary, that the market value should be estimated on the basis of any reasonable use to which the land may be adapted." At page 226 of 127 Cal.App., at page 868 of 15 P.2d. To the contrary, the court stated on pages 227 and 228 of 127 Cal.App., on page 869 of 15 P.2d that the "enacting of a zoning ordinance which is adopted by a city in good faith and which actually does affect the market value of real property is nevertheless competent evidence in behalf of the city in a subsequent suit for condemnation of the property for public use."

The same principle was enunciated in City of Beverly Hills v. Anger, 110 Cal. App. 626, 294 P. 476, where it was further indicated at pages 629 and 630 of 110 Cal. App., at page 478 of 294 P., that if there is testimony that demonstrates with "plausibility" a prospective use for purposes other than that to which the land is restricted, the jury might be instructed that if it finds in accordance with defendants' evidence, then "in view of the supposed changes of conditions, the city council in the exercise of its discretion might modify, as indicated, its zoning ordinance, and that in estimating the market value the jury might consider this possible change of the ordinance and the reasonable influence on market value, of such possibility."

In Central Pacific Railroad Co. v. Pearson, 35 Cal. 247, 248, this court gave consideration to the matter of "availability" when it was insisted that the value of certain land was enhanced by reason of potential wharf privileges. The court said, 35 Cal. 247, at page 262: "The testimony in relation to the value of wharf privileges on the shore of the Sacramento river, where the tide ebbs and flows, given for the purpose of enhancing the value of some of the land sought to be appropriated, was also improperly received, for the obvious reason that the party claiming the compensation had no wharf franchise. The mere fact that the party might at some future time obtain from the State a grant of a wharf franchise if allowed to remain the owner of the land, is altogether too remote and speculative to be taken into consideration. The question for the Commissioners to ascertain and settle was the present value of the land in its then condition, and not what it would be worth if something more should be annexed to it at some future time. Gould v. Hudson River Railroad Company, 6 N.Y. 522."

The following appears from the opinion of the Supreme Court of Washington in Bellingham Bay & B. C. R. Co. v. Strand, 4 Wash. 311, 30 P. 144, at page 146: "The contention is that all, or nearly all, of the witnesses that testified as to the value of the property taken were allowed by the court to include in their estimate of said value certain prospective rights to the lands below the line of ordinary high tide in the waters of Puget sound. That the witnesses were allowed so to do is clear from the record, and we must therefore decide whether or not this prospective contingent right was a proper element to be taken into consideration in determining the value of the property taken. We think that it was not. At the time these proceedings were instituted there was no law in force giving to the littoral proprietor any rights whatever in said tide lands, and, under the decisions of this court in regard to the rights of littoral proprietors in such lands, the respondents had no valuable rights therein. It was left entirely to the legislature to say whether or not they should have any recognition as such littoral proprietors. Under these circumstances, any value which was placed upon the property taken, by reason of any rights which might or might not be bestowed upon it by legislation, was too remote to constitute an element of value in proceedings of this kind; * * *".

A similar holding by the same court is found in City of Seattle v. Byers, 54 Wash. 518, 103 P. 791, 792. This was a proceeding to condemn for a street, land that lay between a street and a cul-de-sac. The opinion recites that appellants "attempted to show that, if the cul-de-sac known as 'Seventh Avenue' should at some indefinite time in the future be vacated by the city, appellants' land would become much more valuable, as they would then, by reason of their present ownership, secure additional property now included in the cul-de-sac. This evidence was speculative, being based upon the remote possibility of a future occurrence, and could not properly be considered in estimating value."

[2] The underlying principles upon which the authorities are based are summarized in Nichols on Eminent Domain, 2d Ed., Volume 1, as follows: "* * * the compensation awarded when land is taken by eminent domain is the market value of the land for any use to which it is adapted *and for which it is available.*" (Sec. 220, p. 671; emphasis added.) It is also said: "When however a particular use of property is prohibited or restricted by law, but there is a *reasonable probability that the prohibition or restriction will be modified or removed in the near future, the effect of such probability upon the value of the property may be taken into consideration.*" (Sec. 219, p. 669; emphasis added.)

The rules thus enunciated appear to be common sense rules which should govern in fixing market value in cases involving zoning ordinances. In other words, the general rule is that present market value must ordinarily be determined by consideration only of the uses for which the land "is adapted and for which it is available." The exception to this general rule is that if the land is not presently available for a particular use by reason of a zoning ordinance or other restriction imposed by law, but the evidence tends to show a "reasonable probability" of a change "in the near future" in the zoning ordinance or other restriction, then the effect of such probability upon the minds of purchasers generally may be taken into consideration in fixing present market value.

[3] We find no prejudicial error in the instructions to the jury in the instant case as they are in substantial accord with the foregoing rules. The jury was instructed on a number of occasions that in determining market value, it might take into consideration not only existing possible uses or wants of the community but such as might reasonably be expected in the immediate future. Instruction No. 26 read: "You should estimate the compensation to the owner by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future. You should also give consideration to all pertinent circumstances including the location and surroundings of the property, its accessibility to roads and railroads, and other factors affecting the use or uses to which it could reasonably be put." Instruction No. 28 informed the jury as follows: "You are instructed that in fixing the market value on July 21, 1944, of the property of defendants desired by the Long Beach City School District, you should consider all of the uses to which the property is suitable and available, having regard not only to the existing business or wants of the community, but also those that may reasonably be expected in the immediate future." The jury was further told in Instruction No. 24 that "in making inquiry as to the purposes for which the property is suitable, you must not be concerned with the fact that the property has not previously been used for such purposes."

[4] The only wording found in the instructions which might give appellant any semblance of cause for complaint is the last portion of Instruction No. 21. That instruction read: "It is not proper to take into consideration speculative or conjectural uses or enterprises or the profits which might reasonably result therefrom. Such matters must be totally excluded from your considerations. You are not to consider uses which are remote or speculative only in their nature and you should not consider possible future uses under altered circumstances which may or may not arise." As seen from a reading thereof, that instruction is addressed to speculative, conjectural, and remote uses. The "future uses" which "may or may not arise," when interpreted in context with the remainder

of the instruction, appear to mean uses of a conjectural or speculative nature. Any misunderstanding by, or misleading of, the jury seems impossible in view of the explicit way in which it was instructed on other occasions that consideration could be given to such uses as might reasonably be expected.

Furthermore, in the present case, unlike the situation presented in the first Beverly Hills case, supra, 110 Cal.App. 626, 294 P. 476, there is nothing whatever in the record tending to show any "reasonable probability that the prohibition or restriction will be modified or removed in the near future." Neither industry nor business has been invading the residential development in the involved area. The zoning ordinance classifying the property as residential was enacted only three years before the condemnation proceedings were started, and it clearly appears that the ordinance is in line with the natural development in such area. Nor is there the slightest suggestion that the ordinance was enacted for the purpose of defeating appellant in his just claims for compensation or that it was not enacted in the utmost good faith. In the words of the second Beverly Hills case, supra, 127 Cal.App. 223, 231, 15 P.2d 867, 870, it would be "speculative to assume that a change in the provisions of the zoning ordinance is likely to occur."

Appellant next contends that the trial court erred in limiting the testimony of appellant's expert witness.

Appellant's expert, a licensed real estate broker and appraiser, gave as his opinion on direct examination that the "fair market value" of Parcel No. 1, including the improvements, was $17,500. He valued the improvements at $2,500, leaving $15,000, or approximately $980 per acre, as the value of the land. In making such estimate, he had "regard to the needs of the district existing at the time or which may reasonably exist in the immediate future," and he took into consideration "all the factors which I believe would have any bearing on the value of the subject property." He later testified on direct examination that the highest and best use for which the land is naturally adapted is "industrial purposes." The record shows the following further proceedings:

"Q. Taking this same tract you have testified to, involved in this case—these parcels involved in this case—what is your opinion of its value for an industrial purpose being higher than or less than you would for residential single family homes? A. Considerably higher.

"Q. How much higher? A. I don't know. I haven't given it sufficient study to determine its fair value for industrial purposes. I confined my opinion to its use as single family residential district, being a single family residential subdivision, on account of the ordinance which is now in force, which is restricted to that use.

"Q. Yes. A. I would say to be ultra conservative, at least double the amount.

"[By respondent's attorney] Just a minute. I object to any statement of value which is assumed to be upon property if it should be considered from the standpoint of an industrial site. Certainly he cannot make any statement as to the exact value for any such purpose if he has given it no study. * * *

"The Court: I will sustain the objection."

[5] It will thus be noted that the witness was being interrogated concerning the value of the land in terms of money "for an industrial purpose." Such evidence was clearly inadmissible. As was said in Sacramento Southern Railroad Co. v. Heilbron, 156 Cal. 408, at page 412, 104 P. 979, at page 981: "It is seen, therefore, that this court by its latest utterances has definitely aligned itself with the great majority of the courts in holding that damages must be measured by the market value of the land at the time it was taken, that the test is not the value for a special purpose, but the fair market value of the land in view of all the purposes to which it is naturally adapted; that, therefore, while evidence that it is 'valuable' for this or that or another purpose may always be given and should be freely received, the value in terms of money, the price, which one or another witness may think the land would bring for this or that or the other

specific purpose is not admissible as an element in determining that market value, for such evidence opens wide the door to unlimited vagaries and speculations concerning problematical prices which might under possible contingencies be paid for the land, and distracts the mind of the jury from the single question—that of market value—the highest sum which the property is worth to persons generally, purchasing in the open market in consideration of the land's adaptability for any proven use." See, also, Joint Highway District No. 9 v. Ocean Shore Railroad Co., 128 Cal.App. 743, 755, 18 P.2d 413.

In Lewis on Eminent Domain, 3rd Ed., Volume 2, it is said: "* * * the proper inquiry is, not what is the value of the property for the particular use, but what is it worth in the market, in view of its adaptation for that and other uses." Sec. 706, p. 1233.

Nevertheless before objection was made, appellant's expert had already testified that "its value for an industrial purpose" was at least double the amount to which he had previously testified as its "fair market value"; and this despite the fact that he had apparently believed such consideration to be of so little importance in determining "fair market value" that he had not "given it sufficient study to determine its fair value for industrial purposes." That testimony of value for a particular use was not stricken, and its presence in the record probably accounts for the jury's action in awarding to appellant the sum of $20,000, which was $2,500 in excess of the amount declared by appellant's expert to be the "fair market value." Regardless of the existence of any zoning ordinance prohibiting the use of the land for industrial purposes, no claim of error could be successfully predicated upon any ruling which allegedly excluded evidence of value in terms of money for any particular use.

Appellant's final contention is that the trial court erred in not permitting appellant to give his reasons for his opinion as to market value. Appellant gave his opinion that his land was worth $5,000 per acre. His counsel then said: "Now, your Honor, I don't want him to answer this, but I want this for the record. What do you base this upon?" Objection was made that this was not a proper question on direct examination, and the trial court sustained the objection. During the discussion, appellant's counsel said: "I guess that's right. That is all."

[6] Appellant, by virtue of ownership and residence on his property for a number of years, qualified as a person entitled to express an opinion as to its value. Spring Valley Water-Works v. Drinkhouse, 92 Cal. 528, 535, 28 P. 681; LeBrun v. Richards, 210 Cal. 308, 319, 291 P. 825, 72 A.L.R. 336. Appellant contends that he not only was entitled to testify as to value but that he was an "expert witness" within the meaning of section 1872 of the Code of Civil Procedure, which, since 1937, provides: "Whenever an expert witness gives his opinion, he may, upon direct examination, be asked to state the reasons for such opinion, and he may be fully cross-examined thereon by opposing counsel."

We do not believe that it is necessary to determine whether appellant was technically an "expert witness" within the meaning of said section, for in any event we are of the opinion that the trial court erred in sustaining the objection. It is a general rule that an opinion is worth no more than the reasons upon which it is based. In re Redfield's Estate, 116 Cal. 637, 48 P. 794; Eisenmayer v. Leonardt, 148 Cal. 596, 84 P. 43; Winthrop v. Industrial Accident Commission, 213 Cal. 351, 2 P.2d 142; Estate of Finkler, 3 Cal.2d 584, 46 P.2d 149; Estate of Wright, 7 Cal.2d 348, 60 P.2d 434; Messner v. Board of Dental Examiners, 87 Cal.App. 199, 262 P. 58; American Trust Co. v. Dixon, 26 Cal.App.2d 426, 78 P.2d 449; Mark v. Industrial Accident Commission, 29 Cal.App.2d 495, 84 P.2d 1071; Estate of Buthmann, 55 Cal.App.2d 585, 131 P.2d 7; 32 C.J.S., Evidence, § 567, page 380. It has long been the rule in will contests that non-expert witnesses may give their opinions on the issue of competency, but it has been consistently held that "it is not the mere opinions which are of importance but the reasons given in support of such opinions." See Estate of Buthmann, supra, 55 Cal.App.2d 585, 591, 131 P.2d 7, 10, and cases there cited. While there are circumstances in which an opinion, given without a statement of reasons, may be properly considered by the trier of the facts (Lumbermen's Mutual Casualty Co. v. Industrial Accident Commission, 29 Cal.2d 492, 500, 501, 175 P.2d 823), the weight to be ordinarily given to such opinions depends entirely upon the reasons given in support thereof. Accordingly, we hold that appellant should have been permitted to state the reasons for his opinion on market value. If there is any language in County of Los Angeles v. Signal Realty Co., 86 Cal.App. 704, 261 P. 536, which would tend to indicate that an owner of property cannot give the reasons upon which his opinion as to market value is based, such language cannot be approved.

There now remains the question of whether the error of the trial court in excluding evidence of appellant's reasons for his opinion requires a reversal of the judgment. This question must be determined in the light of the entire record. Appellant concedes that his estimate of $5,000 per acre "was greatly in excess of prices quoted by other witnesses and standing by itself appears ridiculous * * *". The record bears out this statement. Expert witnesses, whose qualifications are conceded by all, were produced by both parties. These experts were asked to give their estimates of the "market value" of appellant's land and not a single estimate of the "market value" given by any expert, including appellant's own expert, was in excess of approximately $980 per acre. In testing the opinions of these experts on cross-examination, the witnesses were examined at length concerning sales in the vicinity. This evidence covered numerous sales made both before and after the enactment in 1941 of the ordinances zoning that area into a single family residence district. This evidence showed that the property in the area had sold at prices ranging from $600 to $700 per acre, and there was no evidence of any sale at any time of land in that general area at a price in excess of $700 per acre. Appellant's estimate of $5,000 per acre as the market value of the land was therefore more than five times the market value per acre given by his own expert and was more than seven times the amount per acre which the evidence showed that any other land in the vicinity had ever brought.

[7] When the objection was sustained to the question under consideration, appellant made no offer of proof and there is not the slightest indication in the record or in the briefs concerning the nature of the testimony which appellant would have given in reply to the question. It can only be surmised that appellant was basing his estimate upon his speculation that the zoning ordinance might be modified at some future time to permit the use of the property for industrial purposes, and that the property might under those circumstances have greatly increased market value. As above indicated, there is nothing in the record to suggest that there is any reasonable probability of such modification in the near future or that any speculative possibility of such modification has had any influence whatever upon the market value of the property. As appellant's estimate of market value was entirely out of harmony with all other evidence in the record, including that given by his own expert, and as appellant has not suggested either in the trial court or in this court any rational basis for such estimate, it seems apparent that such estimate was nothing more than wishful guessing on the part of an interested owner. It further appears that in the event of another trial, it would be highly probable that appellant would be awarded less rather than more than the $20,000 awarded by the judgment from which this appeal was taken. Under these circumstances, we cannot reach the conclusion that the error of the trial court in excluding the evidence in question was prejudicial or "that the error complained of has resulted in a miscarriage of justice." Const., Art. VI, sec. 4-½.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., concur.

SCHAUER, Justice.

I dissent. It appears to me that defendant was subjected to unwarranted and prejudicial restriction in the presentation of his evidence and that the majority opinion, affirming the judgment, is unsound in at least two elements:

1. It concedes, as it must, that "the trial court erred in sustaining the objection" of plaintiff to a question asking defendant, who had qualified as an expert witness, to state his reasons for his opinion as to market value. The defendant undoubtedly was better acquainted with the property sought to be condemned, and with the surrounding property, than any other witness. From the record it is apparent that his hope for recovery of what he considered the fair value of his property was based very largely, if not almost exclusively, upon his own testimony, the testimony he expected and was entitled to give. He was permitted to state the value as being $5,000 an acre but was precluded from substantiating his estimate by his reasons. The majority, conceding the error, hold that it was not prejudicial, because, forsooth, "It can only be *surmised* that appellant was basing his estimate upon his speculation that the zoning ordinance might be modified at some future time" and "as appellant's estimate of market value *was entirely out of harmony with all other evidence in the record* * * * and as appellant has not suggested either in the trial court or in this court any rational basis for such estimate, it seems apparent that such estimate was nothing more than wishful guessing * * *." (Italics added.) From the above quotations it appears now to be the law of this state that this court may base its decisions upon its own surmise; furthermore, the novel rule is declared and followed that if the testimony of one witness is "out of harmony with all other evidence in the record" the testimony of that witness may be substantially disregarded as a matter of law. (The effect of this holding on section 1844 of the Code of Civil Procedure—"The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason"—appears to be left to further surmise.)

2. The second important defect in the majority opinion lies in the fact that it gives lip service to the rule that "damages must be measured by the market value of the land at the time it is taken, that the test *is not the value for a special purpose*, but the fair market value of the land in view of all the purposes to which it is naturally adapted" (italics added) but actually applies the rule to sustain the action of the trial court in limiting the test to "the value for a special purpose." As hereinafter appears more fully the defendant-appellant here was limited in his evidence of the value of his land to estimates based on the special purpose use of single family residential subdivision or farming operation. A statement of the facts elucidates the points above summarized.

In 1905 defendant purchased the tract which in substantial entirety is the subject of this litigaton. At that time such tract, a rectangular unit of land located on the southwest corner of Santa Fe Avenue and Columbia Street in Long Beach, had a frontage on Santa Fe of approximately 407 feet and extended westerly some 1800 feet along Columbia. Prior to this litigation defendant had conveyed to the Union Pacific Railroad for a right of way a strip, 80 feet wide, at the west end of the tract, and to other persons a rectangular plot 75 feet on Santa Fe by 445 feet on Columbia; the remainder of the original tract is the parcel belonging to defendant and involved on this appeal. (Also condemned by plaintiff, but not involved in this appeal, is the rectangular plot described hereinabove.) Defendant's parcel as it now stands comprises approximately 16 acres of land together with certain improvements thereon. It has a frontage of approximately 338 feet on Santa Fe and 1275 feet on Columbia, but except in that area wherein it is diminished by the previously conveyed rectangular plot above mentioned, is in its dimensions approximately 407 by 1723 feet.

Continuously since 1905 defendant has resided on the parcel in question and used it for livestock and general farming operations. In 1906 he built on it an eight-room frame house, and a barn, storeroom, and shed. Later a garage and shop were added. For some twelve years prior to, and up to the time of, trial (December, 1944) the shop was utilized by defendant's son as a machine shop for the repair of oil well equipment and machinery. Previous to 1941 the entire tract had been zoned for industrial uses but in that year it was rezoned by the City of Long Beach as a residential district for single family dwellings. At that time and continuing to the time of trial it had not been subdivided, no streets had been cut into it, it contained no sidewalks or publc rights of way and no sewer or gas or water installations except two water wells. The only actual industrial use of the parcel (the portion of the tract still owned by defendant-appellant) disclosed by the record is that of the operation by defendant's son of the machine shop. "It is a regular machine shop with all kinds of machinery in it for heavy work, a big lathe and a drill press and things like that." Immediately west of the property in litigation is a main line of the Union Pacific Railroad and further to the west are railroad classification yards in which freight is shifted back and forth; also parallel to the westerly border of the property is a high power transmission line of the Southern California Edison Company. Immediately north of Columbia Street is the La Serena Tract, which was subdivided for residential purposes in approximately 1921. Across Santa Fe Avenue, to the east of defendant's property, is another residential subdivision, and a third such subdivision bounds the property on the south. Santa Fe Avenue, on which, as previously mentioned, the property has a frontage of approximately 338 feet is largely used as a truck boulevard carrying heavy traffic; it has no curbs; it does have a paved center roadway 30 feet wide "and 10 feet of shoulders." Defendant testified that a restaurant, a beer parlor, and "several stores" were established at locations distant 800 feet to one-half mile from his property.

Contrary to the majority opinion, it appears to me that under the circumstances shown the refusal to allow defendant to state his reasons or basis for the value stated constitutes prejudicial error. Defendant fixed the value at $80,000; the jury awarded him only $20,000. I do not think we can properly "surmise" that the jury would have attached no weight to defendant's reasons for value which they were not permitted to hear. It was not incumbent upon defendant to make an offer of proof under these circumstances. He was already qualified as an expert and as a matter of law he was entitled to state his reasons for his opinion. The weight to be accorded those reasons was for the jury, not for us.

The prejudice of the error is emphasized by the fact that, as hereinafter appears in more detail, no other witness, either for defendant or plaintiff, appears, in making his appraisal, to have given consideration to any industrial use value of the property, or to its value for any use other than the specific one of "subdivision for single family residences" and possibly, the still lower use of farming.

All witnesses, in forming their estimates of the present market value of the property, should have given consideration to every use, including the highest and best use, for which such property was adaptable. City of Napa v. Navoni (1942) 56 Cal. App.2d 289, 299, 132 P.2d 566. In San Diego Land, etc., Co. v. Neale (1888) 78 Cal. 63, 69, 20 P. 372, 3 L.R.A. 83, this court referred to Miss. and Rum River Boom Co. v. Patterson (1879) 98 U.S. 403, 25 L. Ed. 206, opinion by Mr. Justice Field, and summarized the facts as follows: [T]hree islands in the Mississippi River were sought to be condemned for the purpose of a boom or storing place for floating logs. For general purposes the property was of insignificant value, but it was found to have a large value for boom purposes. It had never been used for such purposes, but there was nothing to prevent other persons or companies from engaging in the enterprise if they had seen fit to do so. It was held that the value for boom purposes must govern." [78 Cal. 63, 20 P. 375.] The court then quotes from Justice Field's opinion in the Boom case (98 U.S. 403, at pages 407–408, 25 L.Ed. 206): "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, What is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which is plainly adapted; that is to say, what it is worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated. So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

Concerning defendant's contention that both the jury and defendant's witness (other than himself) as to the value of his property were erroneously restricted to a consideration of its value for a specific use (for subdivision for single family residential purposes) and were not allowed to give effect to its present value for its highest and best, i. e., potential industrial use, the record discloses the following: The real estate broker and appraiser who appeared as an expert witness on behalf of defendant testified that defendant's property was worth $17,500 for the residential use (in itself largely potential because the property was not yet subdivided) permitted by the zoning ordinance. The record proceeds:

"Q. [By defendant's attorney to the expert witness] Now, I will ask you * * * what is the highest and best use for which it [defendant's land] is naturally adapted? A. Industrial purposes.

"Q. What do you mean by that? A. Manufacturing plant or operation of any kind of an industry that would be useful adjacent to the Long Beach Harbor area. That particular property is on one of the main vehicular traffic arteries going to the City of Long Beach Harbor area, and it is very accessible and it also is near transportation and trackage can be easily put into the property, because the property abuts the Union Pacific Railway lines, and it is adjacent to the classification yard and adjacent to industries, and it has all of the facilities for an industry. There are plenty of power lines and plenty of water for manufacturing plants.

"Q. Taking this same tract you have testified to, involved in this case—these parcels involved in this case—what is your opinion of its value for an industrial purpose being higher than or less than you would for residential single family homes? A. Considerably higher. * * *

"Q. How much higher? A. I don't know. I haven't given it sufficient study to determine its fair value for industrial purposes. *I confined my opinion to its use as single family residential district,* being a single family residential subdivision, on account of the ordinance which is now in force, which is restricted to that use. [Italics added.]

"Q. Yes. A. I would say to be ultra conservative, at least double the amount.

"[By plaintiff's attorney] Just a minute. I object to any statement of value which is assumed to be upon property if it should be considered from the standpoint of an industrial site. Certainly he cannot make any statement as to the exact value for any such purpose if he has given it no study.

"[By defendant's attorney] Keeping in mind this man is an expert and he is qualified as such and he said he viewed the property and that he is conversant with property in the Long Beach industrial districts, I would say that he would be qualified to give an opinion as to its valuation if it were placed on a basis of an industrial site.

"(Discussion.)

"The Court: I will sustain the objection."

No other evidence (except possibly the testimony of the defendant, himself, hereinabove mentioned) as to the value of the property for, or upon an appraisal which included consideration of, its assertedly "highest and best" (industrial) use was offered or received. The court thereafter instructed the jury that "You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court; such matter is to be treated as though you never had known of it," and, also, in reference to fixing value, that "you should not consider possible future uses under altered circumstances which may or may not arise." It thus appears that the jury were effectively instructed that they were not to consider defendant's proffered evidence as to the value of his property for its assertedly highest and best use. Furthermore, from the last quoted instruction, the jury may well have understood that they could not even consider value for residential purposes because the property had not yet been subdivided, it had no streets, sewer or gas installations, and the making of such improvements would be "altered circumstances which may or may not arise."

Plaintiff produced but one expert witness as to value. That such witness, in making his appraisal, did not consider at all the value of the property for industrial enterprises or for the use for which it was being condemned is evident from his own testimony. The transcript shows:

"Q. [To the witness Hoffman, produced by plaintiff]: I will ask you this, in arriving at the value of the appraisal which you have given us on that tract and the improvements on it, Parcel 1, did you take into consideration the highest and best use for which it was available * * *? A. I did.

"Q. Did you consider its value as an industrial site? A I did not.

"Q. You did not? A. No.

"Q. Why? A. Because it is zoned for single family residences.

"Q. And you therefore gave it no thought for any other use? A. I did not, except for farm land or subdivision."

A fair reading of the transcript supports no other conclusion than that the entire case, insofar as value is concerned, was tried by plaintiff upon a theory which in effect limited considerations of value to use of the property for subdivision for single family residences and, possibly, for farming operations, a still lower use. The defendant's expert was interrogated at length on direct examination with reference to the value of the property for the specific use of subdivision for single family residences. In their brief plaintiff's counsel, summarizing the evidence, recognize the fact by the statement that "Respondent's [plaintiff's] appraiser testified that the fair market value of the subject property *for subdivision purposes* was the sum of $12,500 for the land, and $1,000 for the buildings * * *." (Italics added.)

The rule is settled that in determining the value of land taken by eminent domain "all uses to which it is adapted and might be put" are to be considered, and compensation is to be awarded "upon the basis of its most advantageous and valuable use, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future." (18 Am.Jur. 879-880, § 244, and cases there cited; see San Diego Land etc. Co. v. Neale (1888), supra, 78 Cal. 63, 69-71, 20 P. 372, 3 L.R.A. 83; City of Los Angeles v. Hughes (1927), 202 Cal. 731, 735, 262 P. 737.) Thus, in the last-cited case it was stated with regard to the value of condemned property which had theretofore been planted to nursery stock that (at page 735 of 202 Cal., at page 739 of 262 P.) "the true basis for computing the market value of land sought to be condemned, in view of the evidence of its suitability for subdivision purposes, is its value as it stood on the date when, under the law, its value was to be determined, plus any increased value which it may have had in the market by reason of its suitability for subdivision into city lots." As observed in San Diego Land etc. Co. v. Neale, supra, at page 71 of 78 Cal., at page 376 of 20 P., 3 L.R.A. 83, "This is not sanctioning a remote or speculative value. It is merely taking the present value for prospective purposes."

Insofar as concerns the effect upon value which results from the fact that the property is subject to zoning ordinances I am aware of no authority which holds th consideration shall be given by expert witnesses to only those uses which are permitted by the ordinances at the date as of which the value of the property is to be determined. It has been declared that (City of Beverly Hills v. Anger (1932), 127 Cal.App. 223, 227, 15 P.2d 867, 868) "The question as to whether a zoning ordinance has the effect of increasing or reducing the value of land included within its provisions is one of fact to be established by evidence. Regardless of whether the value of real property is increased or diminished as a result of the application of a zoning ordinance, the ordinance is competent evidence to be considered in a suit for condemnation of property located within the district which is affected thereby, for the purpose of determining the actual market value thereof." (Cf. City of Beverly Hills v. Anger (1930), 110 Cal. App. 626, 629-630, 294 P. 476; Los Angeles City High School Dist. v. Hyatt (1926), 79 Cal.App. 270, 272, 249 P. 221.)

If, in condemnation cases, a city or county or other plaintiff can completely exclude consideration of certain types of uses, perhaps those to which the property is otherwise best suited, for which it is most valuable, and to which it is intended to put the property after condemnation, by enacting, or taking advantage under, a zoning ordinance forbidding such uses, but which ordinance can be repealed or amended after the property is acquired, the constitutional guarantee of reasonable compensation upon a taking for public use can be in a large measure circumvented. As previously indicated, all uses to which the land is adaptable may and they should, be considered. These include the use for which the property is being taken (see Miss. and Rum River Boom Co. v. Patterson (1879), supra, 98 U.S. 403, 408, 25 L.Ed. 206; San Diego Land etc. Co. v. Neale (1888), supra, 78 Cal. 63, 69, 20 P. 372, 3 L.R.A. 83; Sacramento etc. R. R. Co. v. Hailbron (1909), 156 Cal. 408, 412, 104 P. 979; City of Stockton v. Vote (1926), 76 Cal.App. 369, 405-407, 244 P. 609; City of Stockton v. Ellingwood (1929), 96 Cal.App. 708, 715, 275 P. 228; Temescal Water Co. v. Marvin (1932), 121 Cal.App. 512, 519, 9 P.2d 335; Joint Highway Dist. No. 9 v. Ocean Shore Railroad Co. (1933), 128 Cal. App. 743, 749, 755, 18 P.2d 413), not to show the value in use to the condemnor but as an element affecting the present market value (see 29 C.J.S., Eminent Domain, § 160, page 1029). Obviously here the use of the land for a school building and campus is other than a single family residence or farm use. Equally obvious is the injustice which, whether the financial loss be great or small, is perpetrated upon the landowner by allowing the plaintiff through an unreal rule or application of law to conclusively deny to him that his land presently possesses value for any other than single family residence or farm purposes in the very proceeding by which the land is being acquired for another and higher use. A further demonstration of the vice in application of such unconscionable rule is apparent in this case: Plaintiff's expert based his appraisal on single family residence use and as a reason for making his valuation for that use low he pointed out that the property was large in its dimensions, that it had not in fact been subdivided, that it was all in one piece and that it contained no streets. Yet it appears that in truth those very attributes which depreciated its value for residential use appreciated its value for the use for which it was condemned.

While the fact that a zoning ordinance forbidding particular uses had been enacted would be a material fact affecting the value of property in the zoned district generally it would be only one of many facts from which the value of the particular parcel being condemned should be determined, and the fact that such parcel was being taken for a use proscribed by the ordinance would be highly persuasive that the ordinance was entitled to relatively little weight in fixing the market value. I am therefore of the view that in presenting expert testimony as to value defendant was entitled to have the witnesses consider the influence on the present value of his land of uses, including industrial and school, to which the land was particularly adapted by reason of its character, its quantity, its dimensions, its location, its surroundings, its freedom and relative seclusion from public rights of way, the availability of transportation facilities, etc., even though a zoning ordinance presently proscribed or limited such uses.

Such a consideration of potential industrial or other uses by an expert witness does not mean that (as perhaps was sought to be accomplished here) the witness may, independently of his opinion as to the general market value of the property giving consideration to all of its uses, testify that it has one value for one specified use and another and different value for a different use. (See Sacramento etc. R. R. Co. v. Heilbron (1909), supra, 156 Cal. 408, 410-412, 104 P. 979; Joint Highway Dist. No. 9 v. Ocean Shore Railroad Co. (1933), supra, 128 Cal.App. 743, 754, 18 P.2d 413.) Prior to the adoption in 1937 of section 1872 of the Code of Civil Procedure, supra, which provides that "Whenever an expert witness gives his opinion, he may, upon direct examination, be asked to state the reasons for such opinion * * *," the rule was, as stated in the Joint Highway Dist. No. 9 case (at page 763 of 128 Cal. App., at page 421 of 18 P.2d), "it is not proper on direct examination to give in terms of money the value in use of property for any purpose whatever." It seems apparent, however, that section 1872 so modifies the earlier rule that an expert witness who has given his opinion of market value of a tract may now, upon either direct or cross-examination, in response to a request to state the reasons for his opinion, explain the various factors he has considered in reaching his opinion.

Whether, upon the exact status of the entire record here (including the facts that both plaintiff's and defendant's experts avowedly based their appraisals of value of the property upon its specific use as a subdivision for single family residences; asserted that they had not considered its possible use for industrial purposes, and, insofar as plaintiff's expert is concerned, denied that it had any value for such industrial usage; that defendant's expert testified that its value for industrial purposes would be far greater than for single family residences; and that defendant himself stated a value which was "far greater" than that ascribed to the property by the other experts for the very limited use considered by them but which value defendant was not allowed to attempt to substantiate by expression of his reasons) defendant's witness should have been allowed to testify to the money value of the property for an industrial use, need not now be determined. Upon a new trial all the qualified value witnesses could be instructed in accordance with the views hereinabove expressed as to the elements which they should properly consider in appraising the market value of the property as of the controlling date (July 21, 1944) and, either upon direct or cross-examination, each could be required to state his reasons for his opinion.

The judgment should be reversed and the cause remanded for a new trial.

SHENK and CARTER, JJ., concur.

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30 Cal.2d 743

## HEIMANN et al. v. CITY OF LOS ANGELES.

L. A. 19358.

Supreme Court of California, in Bank.
Oct. 24, 1947.

Rehearing Denied Nov. 20, 1947.

**1. Eminent domain ⇨316**

Landowners, recovering in their action for compensation for taking and damaging of their properties for public use without prior payment of just compensation, should be allowed their costs. Const. art. 1, § 14.

**2. Eminent domain ⇨316**

The constitutional provision that private property shall not be taken or damaged for public use without payment of just compensation to owner is limitation on statutory provision that plaintiff in superior court action for such compensation may not recover costs where judgment in his favor could have been rendered by municipal court. Code Civ.Proc. §§ 1032, 1243, 1255; Const. art. 1, § 14.

**3. Limitation of actions ⇨55(5)**

Where landowners were fully compensated for taking of or damage to their properties because of street widening in 1932 and did not then seek recovery of damages caused by construction of foundations under pavement for proposed viaduct in street, their claim for damages caused by such construction and claimed continuation thereof without cessation until 1942 was barred by limitations. Code Civ.Proc. § 1248; Const. art. 1, § 14.

**4. Eminent domain** ⚷63

The mere threat or possibility of construction of public work, causing damage to private property, is not actionable.

**5. Evidence** ⚷142(1)

In action for damages to plaintiffs' lands by city's construction of viaduct in abutting street, trial court properly refused to allow plaintiffs' witnesses to testify on direct examination as to prices paid by city for neighboring property. Const. art. 1, § 14.

**6. Eminent domain** ⚷95, 102

Generally, damage, for which compensation must be paid owners of private property, from construction of public improvement, is damage to property itself, and does not include mere infringement of owners' personal pleasure and enjoyment, rendering of property less desirable for certain purposes, or causing of personal annoyance or discomfort in its use. Const. art. 1, § 14.

**7. Eminent domain** ⚷203(1)

In action against city for damages by construction of viaduct in abutting street, exclusion of evidence of temporary damages from unreasonable delay in construction work and loss of use of lands because of piling of materials in street, erection of structures, etc., was erroneous, whether based on conclusion that such damages were nonactionable or that city could not be held liable therefor because construction work was performed by federal agency. Const. art. 1, § 14.

**8. Eminent domain** ⚷121

A public agency, such as city, authorizing construction of public improvement, not contractor doing construction work, is party liable, under Constitution, for damage, resulting from exercise of such power, to private property, and construction of improvement according to specifications furnished by such agency and acceptance thereof by it on completion are sufficient to fix its liability. Const. art. 1, § 14.

**9. Appeal and error** ⚷205

Where plaintiffs' offer of evidence to support their claims was general and defendant's objection to entire proof sought to be introduced was sustained, Supreme Court cannot hold that offer was insufficient or that more specific offer was prerequisite to review on plaintiffs' appeal from judgment in their favor for unsatisfactory amount.

**10. Eminent domain** ⚷148

Landowners, recovering compensation from city for damage to lands from construction of viaduct in abutting street, were entitled to interest at legal rate on amount of damages suffered from time injury was inflicted, or at least from commencement of suit for damages, not merely from time of entry of judgment in their favor. Code Civ.Proc. § 1249; Const. art. 1, § 14.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa and Leslie E. Still, Judges.

Action by Gustave A. L. Heimann and others against the City of Los Angeles for damages to plaintiffs' realty from construction of a viaduct in an abutting street. From a judgment for plaintiffs for an unsatisfactory amount, they appeal.

Reversed and remanded.

Prior opinion, 168 P.2d 28.

John F. Poole and E. H. Delory, both of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Charles F. Reiche, Asst. City Atty., and Arthur Wm. Green, Deputy City Atty., all of Los Angeles, for respondent.

SHENK, Justice.

Plaintiffs appeal from a judgment awarding compensation for damage to their real property by reason of the construction of a viaduct in the street, and from an order striking their cost bill. They claim that they are entitled to a larger award.

In 1931 plaintiffs owned parcels of real property abutting First Street, Los Angeles. In July of that year the city filed a condemnation proceeding whereby part of their land was taken for the widening of the street. Los Angeles v. Savage, No. 320,308 in the superior court. They received full compensation for the land taken and for damages to the remainder by reason of the severance.

The widening was accomplished in 1932. As a part of the project, to eliminate duplication of effort in the event of future construction of a viaduct in First Street, foundations and stanchions were built underground. These structures were carried up to a point two or three feet below the surface of the street. They were then covered and the street was paved over them, so that they were not visible on the surface.

Plans for construction of the viaduct were under consideration by the city in 1938 and 1939. Actual construction work was commenced in September, 1940, and the project was completed about October, 1942. The construction work was performed by the federal Works Progress Administration under contract with the city. One of the parcels of plaintiffs' property fronts on the viaduct and the other partially so. No offer of compensation was made by the city to plaintiffs for any taking or damage to their land by reason of the building of the viaduct, and a demand by plaintiffs in statutory form was denied.

This action for damages followed. It was alleged that wrongful acts of the city, resulting in temporary and permanent damage to plaintiffs' property, were violative of Art. I, Sec. 14 of the Constitution, and it was prayed that plaintiffs be compensated therefor in the sum of $34,500.

Trial before a jury resulted in a verdict awarding to plaintiffs damages in the sum of $800, and judgment for that amount was entered in their favor. On this appeal the plaintiffs do not question the sufficiency of the evidence to support the award insofar as it represents merely the item of damage for decrease in the market value of the properties subsequent to the commencement of the construction work on the viaduct in 1940. They contend that the court erroneously excluded evidence to their prejudice, erroneously charged the jury, and committed error in striking out their cost bill. The appeal is presented on an agreed statement which, so far as here pertinent, shows the following:

On the trial the parties stipulated, among other things, that the city is liable to plaintiffs "for whatever damage the presence of the said viaduct in the street occurs to or causes the said real property of plaintiffs." Thereafter expert witnesses were called by both sides and gave their opinions concerning the decrease in the reasonable market value of the properties caused by the building of the viaduct and occurring subsequent to the commencement of construction work in 1940. This testimony forms the basis of the $800 award, which is within the range of the figures given by the witnesses and is slightly above the amount fixed by defendant's experts.

While plaintiffs and their expert witnesses were on the stand certain questions were propounded to them, to which defendant objected upon the ground that the evidence offered was incompetent, irrelevant, and immaterial; not within the issue of the case; too remote; that no foundation had been laid to tend to prove that the city had constructed the viaduct, but that on the contrary the evidence indicated that the viaduct had been constructed by the Works Progress Administration of the United States and that the city was therefore not liable for any taking or use of the plaintiffs' property during the course of construction. Pursuant to the allegations of the complaint the plaintiffs sought to introduce in evidence substantially the following:

(1) Proof that the construction of the viaduct in fact commenced in 1931 or 1932, and not in 1940; that there was no cessation of the work but that the construction continued up to completion of the viaduct in 1942. (2) Proof that there likewise continued over the period 1931 or 1932 to 1942, a taking and damaging of the properties and loss of use, and that after the paving over of the foundations in 1932 plaintiffs were unable to sell their prop-

erties or to interest real estate dealers in selling them; that the proposed construction "killed" any opportunity to make a sale at the reasonable market value, or at any price at all. (3) Proof of prices paid by the city and other condemnors for neighboring properties. (4) Proof of (a) the amount of damage due to loss of use of the properties by reason of the construction of the foundations in 1932; (b) the amount of damage due to loss of use from commencement of construction in 1940 to completion in 1942; (c) the amount of damage due to loss of use because of an unreasonable delay of sixteen months in the performance of the actual construction work; (d) the amount of damage due to loss of use because of a continuous taking and construction from 1932 to October, 1942, with an eight year lapse which did not constitute a cessation of the construction work; (e) the amount of damage due to loss of use by reason of earth, rock, and gravel placed on and adjacent to the plaintiffs' property, and to the erection of saw mills, sheds, and the like, and the maintenance of materials and equipment used in the construction work between September, 1940, and October, 1942 (to this offer of proof the city objected on the ground that there was no evidence that the materials and implements were placed on the grounds by it but on the contrary the evidence tended to show that they were placed in the street in front of the properties by the Works Progress Administration and that the city was in no wise responsible for any such alleged taking or use of the properties); (f) the amount of damage due to loss of use of the properties by reason of the closing of streets abutting them during the period from September, 1940, to about November, 1942, to which evidence the city also objected on the aforesaid grounds. (5) Proof of interest at the legal rate of seven percent upon the reasonable market value of the properties from the time of paving over the foundations in 1931 or 1932 to October, 1942, and the amount of interest at the same rate on the reasonable market value of the properties and compensation for loss of use during the contruction period September, 1940, to October, 1942.

This entire line of offered proof was excluded by the trial court. However, plaintiffs were permitted to examine the city engineer of bridge design, who stated that he designed the viaduct; that construction started in 1940 and not in 1932; that the foundations which had been laid in 1932 were used but were enlarged; that during the course of the construction there were no bridge supervisors on the city pay roll; that the city laboratory was used to some extent to test materials and there was at all times at least one city inspector in the field at the site of the work; that while concrete was being poured there was more than one inspector on the job; and that the city made the survey and made the plan and design of the bridge.

The witness further stated that he believed that at times the roadways were entirely closed to traffic, but he only went to the site occasionally; that he did not remember any stock or material piles at either end of the viaduct, or whether any structures were built on plaintiffs' properties, but that a large quantity of material was stored in an adjoining street, although there was enough unobstructed roadway left for the passing of traffic; that tool sheds were also erected in the streets.

A civil engineer of the city, who had been in its employ for about twenty-five years, also appeared as a witness for plaintiffs. He testified that the bridge plans were drawn under his general direction but that he did not supervise the construction; that supervision was done by the Works Progress Administration; that the city had inspectors on the job who saw to it that the work was done in accordance with the plans and specifications and inspected it in the same way as a private contractor's job; that it had to pass city inspection before being accepted by the city; that in addition the city had surveyors on the job and city maintenance crews may have done some paving work.

The city inspector who had charge of inspection of the viaduct at the time of its completion testified that the construction work and the Works Progress Administration employees were not under his supervision or direction but that the work was under his inspection; that in one or two cases forms were rebuilt prior to the pouring of cement in order to pass inspection; that the general plan of the structure was not changed after it was originally laid down, but the false work design was changed several times; that he saw a blacksmith's shop, sawmill, and material piled in the streets and saw "some material piled on vacant lots."

Defendant city called to the witness stand only its three expert appraisers. On the evidence so produced the cause was submitted to the jury, with the result aforesaid.

After judgment plaintiffs filed their cost bill. Defendant moved to strike it on the ground that the judgment was such as could have been rendered by the municipal court, and that costs were therefore not recoverable by plaintiffs. Code of Civil Procedure, section 1032. The motion was granted.

[1] It has long been the rule that in a proceeding in eminent domain, the party seeking condemnation should be required to pay not only his own costs, but all proper costs of the owner of the land incurred in good faith. The reason for the rule is stated in the case of San Francisco v. Collins, 1893, 98 Cal. 259, at page 262, 33 P. 56, 57:

"To require the defendants in this case to pay any portion of their costs necessarily incidental to the trial of the issues on their part, or any part of the costs of the plaintiff, would reduce the just compensation awarded by the jury, by a sum equal to that paid by them for such costs. * * * As the property cannot be taken until the compensation is paid, and as it cannot be paid until it is ascertained, the duty of ascertaining the amount is necessarily cast upon the party seeking to condemn the property, and he should pay all the expenses which attach to the process. Any law which casts this burden upon the owner should, in our opinion, be held to be unconstitutional and void." See also Yolo Water & Power Co. v. Edmands, 188 Cal. 344, 205 P. 445; Oakland v. Pacific Coast Lumber etc. Co., 172 Cal. 332, 156 P. 468, Ann.Cas.1917E, 259; San Joaquin & Kings River Canal & Irr. Co. v. Stevinson, 165 Cal. 540, 132 P. 1021; 10 Cal.Jur. p. 432, sec. 121.

Here the proceeding is not one brought by a condemnor, but is an action wherein the owners seek compensation under Article I, Section 14 of the Constitution for the taking and damaging of their properties for a public use without just compensation having first been made or paid into court. In both forms of action the result is the same in that in each the property owner receives compensation for the invasion of his property right; only the procedure in arriving at the result is different. People v. Ricciardi, 23 Cal. 2d 390, 400, 144 P.2d 799.

In cases instituted by the property owner the reason for allowing him costs in case of recovery is even stronger than in condemnation cases, for in the former, instead of an offer of compensation or suit to condemn, there has been a wrongful taking and damaging of private property without permission of the owner or effort to first compensate him, in consequence of which the owner has been forced to initiate the litigation. If costs should be assessed against him, his recovery would be diminished by that amount and he would be to that extent deprived of the full measure of compensation to which he is justly entitled. Collier v. Merced Irr. Dist., 213 Cal. 554, 572, 2 P.2d 790.

[2] Jurisdiction in eminent domain lies in the superior court (Code of Civil Procedure, section 1243), and the discretion conferred upon that court in taxing costs (Code of Civil Procedure, section 1255), is held to be limited by Art. I, Section 14 of the Constitution. San Francisco v. Collins, supra, 98 Cal. 259, at page 262, 33 P. 56, and other cases above cited. Similarly, in actions like the present, the constitutional provision must be held to be a limitation upon the requirement of section 1032 of the Code of Civil Procedure that the plaintiff may not recover costs when the judgment is one which could have been rendered by a municipal court. The order granting the motion to strike the cost bill was therefore erroneous.

[3] The trial court properly refused to permit plaintiffs to introduce evidence of damage suffered by reason of the construction of the foundations under the pavement in 1932 and the claimed continuation of that

construction without cessation until 1942. Admittedly plaintiffs were fully compensated for any taking of or damage to their properties suffered by reason of the widening of the street in 1932 and the construction of the improvement in the manner proposed. Code of Civil Procedure, section 1248. If there was a further element of damage by reason of the placing of foundations under the pavement, that damage occurred in 1932 and recovery of the item should then have been sought. At the time of the commencement of the present action the statute of limitations had long since run against any such claim.

The assertion that the construction continued from 1932 until 1942 is shown by undisputed evidence to be without foundation in fact. The original plan contemplated the possibility of erection of a steel bridge. As constructed the viaduct was of concrete and the old foundations were enlarged to accommodate it. With respect to this structure plaintiffs state in their opening brief: "The City Engineer's office was ordered by the City Council to prepare plans and the same were duly considered by all parties from July 6, 1938, to August 23, 1939, when the same were approved." This statement of itself sufficiently negatives plaintiffs' claim of construction work continuing from the year 1932.

[4] The mere threat or possibility of construction of a public work is not actionable. In a case involving a contemplated or future possible change of grade (Eachus v. Los Angeles Consolidated Electric Ry. Co., 103 Cal. 614, at pages 621, 622, 37 P. 750, 42 Am.St.Rep. 149), this court held that until there was a change in the physical condition of the street, the plaintiff was not damaged notwithstanding the fact that an ordinance had theretofore been passed authorizing a change of grade. See also Atchison, T. & S. F. Railway Co. v. Southern Pac. Co., 13 Cal.App.2d 505, 517, 57 P.2d 575.

[5] The trial court properly refused to allow witnesses for plaintiffs to testify on direct examination to prices paid by the city for neighboring property. Although the question of the admissibility of such evidence on direct examination is one upon which there is a division of authority, this state is committed to the rule of non-admissibility, reaffirmed in the late case of City of Los Angeles v. Cole, 28 Cal.2d 509, at page 517, 170 P.2d 928, 933, in the following language: "[I]t is not competent for either party in a condemnation proceeding to put in evidence the amount paid by a condemning party to the owners of adjacent lands * * *."

A more vexing question is presented by the contention of plaintiffs that they should have been permitted to introduce evidence of various elements of alleged temporary damage suffered over the 1940-1942 period of construction work, as distinguished from the permanent depreciation in the market value of the property caused by the existence of the viaduct for which the $800 award was made. These claimed elements of temporary damage arise from an alleged unreasonable delay of sixteen months in the performance of the construction work, and an alleged loss of use over the 1940-1942 period due to the piling of earth, rock, and other materials in the streets and the erection of saw mills, sheds, and other structures, the accumulation of waste materials and rubbish on and near plaintiffs' premises, the partial obstruction and closing of streets, and the like.

On the question of compensation for elements of temporary damage a textwriter discussed the problem as follows: "Obviously, the determination of the question as to whether a temporary interference with property rights constitutes a taking or damaging within constitutional and statutory guaranties is dependent on the facts of the particular case and the jurisdiction in which the question is presented. In general the law permits a recovery only for property permanently depreciated, taken, or injured by the making of public improvements. The mere fact that the improvement renders for a time the use of property more inconvenient is not a 'taking', there being no physical invasion of the real estate of a private owner. And it is ordinarily held that a municipality is not liable for damages consequent on the performance of its duty to keep its streets in repair, pave and repave them, and to build, repair, and rebuild bridges, etc." 18 Am.

Jur., sec. 142, pp. 769, 770; see also 29 C.J.S., Eminent Domain, § 113, pages 924-926, and cases cited; L.R.A.1918E, pp. 993, 995.

It would unduly hinder and delay or even prevent the construction of public improvements to hold compensable every item of inconvenience or interference attendant upon the ownership of private real property because of the presence of machinery, materials, and supplies necessary for the public work which have been placed on streets adjacent to the improvement. But it does not follow that an unnecessary and substantial temporary interference with such property rights or an actual though temporary invasion of the right of possession of private property during construction should take place without redress.

An example of an actionable temporary injury to a property right is found in the case of Jacobsen v. Superior Court, 192 Cal. 319, 219 P. 986, 29 A.L.R. 1399, where an entry on private land made in advance of any condemnation proceeding, for the purpose of taking measurements, testing rock and soil formations by boring and excavation, etc., was held to constitute an unlawful invasion of the property rights of the land owner, compensable under the constitutional provision. This court said, at page 328 of 192 Cal., at page 990 of 219 P., 29 A.L.R. 1399: "It is idle to attempt to argue that such entry, occupation, disturbance, and destruction of the properties of these petitioners would not constitute such an interference with their exclusive rights to the possession, occupation, use, and enjoyment of their respective holdings as would amount to a taking and a damaging thereof to the extent and during the period of such entry upon said lands and of the operations of the corporation thereon."

[6] On the other hand, the construction of the public improvement may involve many non-compensable factors. Generally it has been said: "The damage for which compensation is to be made is a damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the constitution * * *." Eachus v. Los Angeles Consolidated Electric Ry. Co., supra, 103 Cal. 614, 617, 37 P. 750, 751, 42 Am.St. Rep. 149; Beckham v. City of Stockton, 64 Cal.App.2d 487, 502, 503, 149 P.2d 296.

[7] It is not clear whether the trial court's exclusion of evidence was based upon its conclusion that the claimed elements of temporary damage were non-actionable, or upon its conclusion that since the construction work was performed by the Works Progress Administration, the city could not be held liable for any taking or use of the property during the construction period. In either case the ruling was erroneous. The fact that the work was performed by the Works Progress Administration does not necessarily exonerate the city.

[8] Where a public improvement has been constructed and private property has been taken or damaged for a public use it is immaterial that the work of construction may have been done by a contractor. The public agency authorizing the work is the party to be held liable under the constitutional provision for damage resulting from the exercise of its power. If the public work is constructed according to the plans and specifications furnished by such public agency and upon completion is accepted by it, this is sufficient to fix liability. Tyler v. Tehama County, 109 Cal. 618, 626, 42 P. 240; 10 Cal.Jur. p. 438, sec. 127. Or, as said in a recent case (Veterans' Welfare Board v. City of Oakland, 74 Cal.App.2d 818, 832, 169 P.2d 1000, 1009): "If the contractor follows the plans and specifications furnished by the public agency, and damage results to the adjacent property, the public agency and not the contractor is liable. Marin Municipal Water Dist. v. Peninsula Paving Co., 34 Cal.App.2d 647, 652, 94 P.2d 404; see, also, De Baker v. Southern Cal. Railway Co., 106 Cal. 257, at page 284, 39 P. 610, 46 Am.St.Rep. 237. Whether the contractor followed the plans or specifications or not, if plaintiffs' constitutional rights have been adversely affected they are entitled to compensation from the public agency authorizing and supervising the work." See also Newman v. City of Alhambra, 179

Cal. 42, 45, 175 P. 414; Perkins v. Blauth, 163 Cal. 782, 789, 127 P. 50; Eachus v. City of Los Angeles, 130 Cal. 492, 62 P. 829, 80 Am.St.Rep. 147; De Baker v. Southern Cal. Railway Co., 106 Cal. 257, 284, 39 P. 610, 46 Am.St.Rep. 237; Marin Municipal Water Dist. v. Peninsula Paving Co., 34 Cal.App. 2d 647, 652, 94 P.2d 404; Hume v. Fresno Irr. Dist., 21 Cal.App.2d 348, 354, 69 P.2d 483; Northwestern Pac. R. R. Co. v. Currie, 100 Cal.App. 173, 175, 279 P. 1057.

[9] The settled statement does not show the basis of the court's ruling of exclusion or whether the proffered evidence tended to sufficiently support plaintiffs' claims. The offer was apparently general and defendant's objection was sustained to the entire line of proof sought to be introduced. This being so, it cannot be held that the offer was insufficient or that a more specific offer was a prerequisite to review on appeal. Lawless v. Calaway, 24 Cal.2d 81, 91, 147 P.2d 604; Tomaier v. Tomaier, 23 Cal.2d 754, 760, 146 P.2d 905; Caminetti v. Pacific Mut. Life Ins. Co., 23 Cal.2d 94, 100, 142 P.2d 741.

The general offer was to submit proof which might tend to establish some elements of actionable injury. The court should have entertained such of this evidence as tended to show the alleged temporary injury; whether the alleged damage was within the contemplation of the plans and specifications for the public improvement or whether it consisted of a private act of the Works Progress Administration so separated from any purpose of the public improvement as not to constitute the damaging of private property for public use; also whether the elements of injury so shown were actionable. Had such a record been made, either by the admission of evidence or by its exclusion upon specific offers of proof, the issue of just compensation for all elements of actionable injury could then have been submitted to the jury under proper instructions, and the propriety of its verdict as well as the correctness of the court's rulings and instructions could have been determined upon the appeal. The method employed, of a blanket exclusion of proof, practically precluded plaintiffs from procuring a determination on appeal of their right to damages for temporary injury.

Whether the plaintiffs were able to prove a substantial temporary actionable impairment of their property rights during the construction period under the allegations of their complaint is beside the question. They should have been permitted to attempt to make out their case so that the court from the evidence or from a specific offer of proof could rule upon asserted actionable elements of damage.

[10] Plaintiffs contend with good reason that they are entitled to interest at the legal rate on the amount of damages suffered and that such interest should be computed from the time injury was inflicted and not merely from the time of entry of judgment.

In most jurisdictions interest is allowable on condemnation cases on the same theory that supports the award of costs in those cases, that is, interest is allowable as part of the just compensation required by the Constitution to be paid to the owner for property taken. 96 A.L.R., cases collected in note pp. 150-206; 111 A.L.R. 1304. In this state there is not only a recognition of the majority rule and of the reasoning which supports it (Metropolitan Water Dist. v. Adams, supra, 16 Cal.2d 676, at pages 681, et seq., 107 P.2d 618, citing Danforth v. United States, 8 Cir., 102 F.2d 5; Seaboard Air Line R. Co. v. United States, 261 U.S. 299, 306, 43 S.Ct. 354, 67 L.Ed. 664; Jacobs v. United States, 290 U.S. 13, 16-17, 54 S.Ct. 26, 78 L.Ed. 142, 96 A.L.R. 1), but there is also a provision by statute that if the condemnor is put in possession by court order prior to the conclusion of the litigation, the compensation and damages awarded shall draw lawful interest from the date of the order. Code of Civil Procedure, sec. 1249. See also Los Angeles Co. Flood Control Dist. v. Hansen, 48 Cal.App.2d 314, 316, 119 P.2d 734; City of Los Angeles v. Aitken, 32 Cal.App.2d 524, 90 P.2d 377, 94 P.2d 1045; 10 Cal.Jur., sec. 64, p. 353.

In the Metropolitan Water District case, supra, 16 Cal.2d at page 681, 107 P.2d at page 621, it is said, quoting from Seaboard Air Line R. Co. v. United States, supra, 261 U.S. 299, at page 306, 43 S.Ct. 354, 67 L.Ed. 664: "It is obvious that the owner's right to just compensation cannot be made to depend upon state statutory provisions. * * * The requirement that 'just compensation' shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. * * *" See also Shoeshone Tribe v. United States, 299 U.S. 476, 496, 57 S.Ct. 244, 81 L.Ed. 360. and cases there cited.

In actions instituted by the property owner there is as much reason as in condemnation cases to allow interest prior to judgment where the right of possession of the owner has been infringed. He has been forced to initiate the litigation and, if denied interest, he is deprived to that extent of the full measure of compensation to which the Constitution says he is justly entitled.

The authorities are by no means uniform in their holdings with regard to the time from which interest should be computed. See 18 Am.Jur., sec. 272, et seq., pp. 912 et seq.; 29 C.J.S., Eminent Domain, § 176, pages 1056-1059; 96 A.L.R., supra, pp. 150-206; 111 A.L.R. 1304; 2 Lewis on Eminent Domain, sec. 742, pp. 1319-1326. But if the property owner is to be compensated in the full amount to which he is justly entitled, it seems apparent that as to a taking of property the same rule should obtain as in condemnation cases, and as to a damaging of property, interest should run from the date the damage is inflicted or at least from the commencement of suit. As said in Taylor v. Bay City St. Ry. Co., 101 Mich. 140, 59 N.W. 447, 449: "Complaint is made of the instruction to the jury to add interest from the date of the commencement of suit. The authorities are not uniform upon this subject. The old rule undoubtedly was that interest could not be allowed upon unliquidated damages, and, in actions of tort, damages are of course unliquidated. The tendency of courts has been, however, to set this rule aside, and adopt the more reasonable one, in cases of injury to property, that the jury must first determine the actual damage sustained, and allow interest upon that sum from its date. (Citing cases.)"

In Dallas County v. Barr, Tex.Civ.App., 231 S.W. 453, 456, an action under the constitutional provision to recover for a damaging of property, the court said: "Interest may be allowed as damages. It is proper, we think in this case, to calculate it from the date of the injury, and not from the date of the judgment. The fact that the amount claimed at the time of filing the suit was unliquidated does not affect the right to recover interest as part of the damages in this kind of action. (Citing cases.)" See also Donaghey v. Lincoln, 171 Ark. 1042, 287 S.W. 407.

Plaintiffs were not prejudiced by any alleged error in the charge to the jury. Certain instructions dealing with the police power seem to have been unnecessary, but were mere surplusage.

The judgment is reversed and the cause is remanded for further proceedings consistent with the views herein expressed.

GIBSON, C. J., and EDMONDS, TRAYNOR, and SPENCE, JJ., concur.

CARTER, Justice (concurring).

I concur in the judgment of reversal but cannot agree with the holding in the majority opinion that in an eminent domain action evidence of sales of similar property in the vicinity is not admissible on the issue of the value of the property involved therein.

I have expressed my views on this proposition in my dissent in City of Los Angeles v. Cole, 28 Cal.2d 509, 519, 170 P.2d 928, but there is more to be said on the subject which I believe requires the majority of the court to give further consideration to the matter. *The rule stated is squarely contrary to the statutory law of this state.* (I pointed that out in my dissent in the Cole case, but now propose to demonstrate the inescapable truth of the above statement.) *In 1937* the Legislature added section 1872 to the Code of Civil Procedure. It is a *new* section embodying a matter never before stated in the statutory law, and reads: "Whenever an expert witness gives his opinion, he may, upon direct examination, be asked to state the reasons for such opinion, and he may be fully cross-examined thereon by opposing counsel." The expert witness may give the *reasons* for his opinion of value. If some of his reasons are in truth and in fact based upon sales of similar property in the neighborhood, how can he possibly be forbidden to give them under section 1872? That section puts no limit on the scope, nature or character of his reasons. He may give *his* reasons whatever they may be. How, then, may some of his reasons (sales of similar property in the community) be excluded and others admitted? Aside from those considerations, however, the authorities that announced the rule of exclusion of other sales *were based on the proposition that the expert valuation witness could not give the reasons for his value opinion on direct examination.* In one of the first cases on the subject in this state, it is said: "But, while the opinions of witnesses thus qualified by their knowledge of the subject are competent testimony, they cannot, upon the direct examination, be allowed to testify as to particular transactions, such as sales of adjoining lands, how much has been offered and refused for adjoining lands of like quality and location, or for the land in question, or any part thereof, or how much the company have been compelled to pay in other and like cases—*notwithstanding those transactions may constitute the source of their knowledge.*" Central Pacific R. R. Co. v. Pearson, 35 Cal. 247, 262. [Emphasis added.] It is said in Clark v. Willett, 35 Cal. 534, 544: "While the opinions of such witnesses may be founded mainly upon their observation and experience in other like cases, it is well settled that they cannot, on the direct examination, be questioned as to particular instances. *The reason of this rule is obvious. Different witnesses might have different theories. Their opinions might be founded upon the observance of several and distinct instances. If allowed to adduce one, they may adduce all.* The opposite party would have a legal right to controvert each particular case mentioned by the witnesses, and yet be unable to avail himself of the right because of his inability to anticipate the cases mentioned and prepare for their investigation." [Emphasis added.] It is said in De Freitas v. Town of Suisun City, 170 Cal. 263, 266, 149 P. 553, 555: "By preliminary questions the examiner should elicit the facts relating to the qualifications of the witnesses; for example, *that he has seen and examined the land, or that he knows something of its character and condition, or the market values of land in that vicinity,* if such values have been established, or the values of land similarly situated, and the like. He may, thereupon, be asked to give his opinion of its respective values with and without the use of the water in question. From such evidence the court or jury can estimate the amount of damage caused by the deprivation of the water, if they shall find that there is such and that it is produced by defendant's tunnel. The weight of the testimony of such witnesses will, of course, depend upon the knowledge he shows in his answers to the preliminary questions and on cross-examination. He should not be asked regarding *specific facts* in the examination in chief." [Emphasis added.] This court stated in Estate of Ross, 171 Cal. 64, 66, 151 P. 1138, 1139: "The party calling a witness to give his opinion on value may qualify him by showing his familiarity with the property and with other property in the neighborhood, his experience in the business, his familiarity with the state of the market and with sales of similar property in the vicinity, and any other facts tending to show his knowledge of the subject and capacity to give an opinion thereon. *But while the fact that he knows of sales made and of the prices obtained may be elicited, the prices given in any particular instance are not admissible, except as stated, on the cross-examination* of the opposing party, if he sees fit to make the inquiry." [Emphasis added.] The thought expressed in all those cases is that the expert can give general reasons for his opinion but not specific reasons. There is no such limitation in section 1872, and *this court should read none into it.* To do so is to make the adoption of the section a wholly idle gesture. Such cases as Santa Ana v. Harlin, 99 Cal. 538, 34 P. 224; Spring Valley Water Works v. Drinkhouse, 92 Cal. 528, 28 P. 681; City of San Luis Obispo v. Brizzolara, 100 Cal. 434, 34 P. 1083, and City of Los Angeles v. Hughes, 202 Cal. 731, 262 P. 737, merely follow the Pearson case. They were all decided before 1937 when section 1872 of the Code of Civil Procedure was enacted. It is obvious that in enacting said section the Legislature intended to change the rule announced in the last cited cases which was and is out of harmony with the weight of authority and in conflict with the general rule in other jurisdictions as appears from the authorities cited in my dissenting opinion in City of Los Angeles v. Cole, 28 Cal.2d 509, at pages 520, 521, 170 P.2d 928. The holding in the majority opinion which reaffirms the holding in the Cole case, in effect nullifies the above mentioned code section by rendering it meaningless.

SCHAUER, J., concurs.

82 Cal.App.2d 82

**DOUGLAS et al. v. HOFF et al.**
**Civ. 15689.**

District Court of Appeal, Second District,
Division 3, California.
Oct. 27, 1947.

**1. Automobiles 🔑245(6, 55, 72, 90)**

Motorist's negligence in striking pedestrian at crosswalk, pedestrian's contributory negligence in looking for approaching traffic, and proximate cause were for jury.

**2. Automobiles 🔑242(8)**

Where pedestrian was unable because of loss of memory to testify as to her own conduct, it was presumed that she exercised ordinary care, looked carefully, and used crosswalk.

**3. Automobiles 🔑242(8)**

The jury were not bound to believe testimony that pedestrian was looking straight ahead, conflicting with presumption that she exercised due care, but such presumption would support a finding that she looked to the side for approaching automobile.

**4. Automobiles 🔑217(6)**

Pedestrian's error of judgment in believing that she had time to cross street safely, while in crosswalk and having right of way, would not necessarily convict her of negligence precluding recovery from motorist whose automobile struck her.

**5. Automobiles 🔑245(6, 72)**

Fact that pedestrian is crossing street not in a crosswalk when struck by motorist does not as a matter of law convict pedestrian of contributory negligence or acquit motorist of negligence.

◆

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by May Douglas and another against Walter R. Hoff and others for injuries suffered in automobile collision. From a judgment on a directed verdict for defendants, plaintiffs appeal.

Reversed.

Edmund M. Bluth, Francis J. Gabel and Henry F. Walker, all of Los Angeles, for appellants.

Syril S. Tipton, of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

[1] Plaintiffs, husband and wife, appeal from a judgment on directed verdict in their action arising out of personal injuries, sustained by the wife, May Douglas, herein referred to as plaintiff. She was injured by the automobile of defendant Hoff as she crossed the street. The question for decision on the appeal is whether a verdict in her favor would have had support in the evidence, that is to say, whether there was sufficient evidence to support the implied findings of a favorable verdict that defendant was negligent and that his negligence was the sole proximate cause of the accident. From a study of the record we are satisfied that the issues of negligence, contributory negligence and proximate cause should not have been taken from the jury.

At about 9:00 o'clock p.m., plaintiff started east across Figueroa Street, in Los Angeles, from the southwest corner of the intersection of Figueroa and Eleventh Streets.

When she had traveled about 20 feet she came into contact with defendant's car which was traveling south at about 18 miles per hour; was thrown to the pavement, rendered unconscious and severely injured. She lost all remembrance of the circumstances of her accident and although she was a witness at the trial was unable to relate how it happened. It appears from the record that the court directed a verdict for defendant upon the ground that plaintiff was guilty of contributory negligence. This is the principal ground relied upon by defendant for support of the judgment, although it is also argued that there was no evidence of negligence on the part of defendant.

We will consider first the question of defendant's negligence. There was a marked crosswalk 15 feet wide across Figueroa, the north line being a prolongation of the south curb line of Eleventh Street. According to defendant's testimony he had driven there before and knew of the existence of this crosswalk. He was returning with his wife from dinner in Chinatown and stopped at Eleventh Street to allow a car coming from the south to make a lefthand turn ahead of him into Eleventh Street; he started up slowly, driving close to the center line of the street, saw no pedestrian in the street, heard the sound of the impact as his car struck plaintiff, and felt the checking of the car as a result of the impact, put on his brakes, moved about a car length, stopped, looked back and saw plaintiff lying in the street. Several other witnesses, including police officers, testified that plaintiff was lying about 15 feet south of the south line of the crosswalk. Defendant testified that when he applied his brakes he skidded his wheels for about 30 inches; police officers corroborated this and described the skid marks as extending from 15 inches north of the south line of the crosswalk to a point 15 inches south of it. Defendant testified that the headlights of his car were on and he could see 100 or 150 feet ahead; also that there were two cars ahead of him to his right, that he could not see all of the crosswalk because of these cars but that he drove on without waiting until he could see all of it. A Mr. Whittaker, driver of the car which turned west on Eleventh Street ahead of defendant's car, testified that he saw no car except defendant's at or in the intersection. There was a lighted street light at the corner where the accident occurred and there were traffic signals but these were not operating.

Defendant's testimony alone was sufficient to prove his negligence. He drove his car through a crosswalk and struck a pedestrian without seeing her until he had stopped his car and looked back to where she lay in the street. If other cars partially obstructed his view of part of the crosswalk, which the jury may well have doubted, he should have been all the more cautious in driving through it. If plaintiff was in the crosswalk—a matter to be discussed later—defendant's unexplained failure to yield the right of way would have constituted negligence. Had the question of defendant's negligence been submitted to the jury a finding adverse to him would have had ample support in the entire evidence, including the testimony of defendant.

[2] The issue of contributory negligence, also, upon the evidence, was one of fact, and should have gone to the jury. Plaintiff, being unable, because of loss of memory, to testify to her own conduct, was to be presumed to have been exercising ordinary care in crossing the street. Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590; Satariano v. Sleight, 54 Cal.App.2d 278, 129 P.2d 35; Hoppe v. Bradshaw, 42 Cal.App.2d 334, 108 P.2d 947; Scott v. Sheedy, 39 Cal.App.2d 96, 102 P.2d 575.

[3, 4] The presumption is evidence that she did what a person of reasonable prudence and caution would have done under the circumstances. Since it would have been negligent for her not to have looked for approaching traffic it was to be presumed that she did look and look carefully. It was to be presumed also, under the evidence, that she was proceeding in the crosswalk, since, if she had not been, it would have been the part of prudence and safety to yield the right of way to defendant. It is argued that there was testimony that plaintiff did not look for approaching traffic as she proceeded into the street. The witness Whittaker, who saw plaintiff leave the curb and walk some 7 feet in the crosswalk

while he was observing her, testified, "She didn't look any way, went straight ahead—she was looking straight ahead." This testimony, if believed, would have been in conflict with the presumption that plaintiff exercised due care but the jury were not bound to believe it, and if they had believed the witness to be truthful might still have thought he was testifying to something he did not know, and which it would have been difficult for him to know, to be a fact. If the evidence had shown, without substantial conflict, that plaintiff was attempting to cross the street without looking, cases relied upon by defendant, and many others, would support his contention that she was negligent, but they have no application where the evidence upon that point, consisting of the presumption, would support a finding that she did look. Duehren v. Stewart, 39 Cal.App.2d 201, 208, 102 P.2d 784. It is argued that if she had looked she would have seen the headlights of defendant's car. This no doubt is true, but she nevertheless might reasonably have believed, although mistakenly, that she had time to cross in safety, especially if she was in the crosswalk and had the right of way. A mistake or an error of judgment upon her part would not necessarily have convicted her of negligence.

Defendant places the weight of his argument on the evidence which, he contends, conclusively establishes as a fact that plaintiff was not proceeding in the crosswalk and he contends that she was therefore guilty of contributory negligence as a matter of law. He relies principally upon the evidence as to where she lay after the accident. There are two sufficient answers. The first relates to the question of plaintiff's negligence. There was substantial evidence, in addition to the presumption already mentioned, that plaintiff was in the crosswalk. Whittaker was the only witness who saw her in the street before the accident and when he ceased to watch her she was in the crosswalk about 7 feet from the west curb. No witness saw her leave the crosswalk. All the witnesses agreed that as she lay in the street her head was some 15 feet south of the south line of the crosswalk with her body extended toward it, and the witness Adams, who heard the noise of the impact and turned around to see her fall testified that she fell 3 or 4 feet, but this evidence was not conclusive as to point where she was struck. Defendant claimed at the trial and now contends that plaintiff walked into the side of his car and therefore would not have been thrown for any considerable distance, but he testified also that he did not see her until she had been thrown to the ground and he had passed by her. There are two facts which clearly contradict this theory, and it is nothing more than a theory; one is the fact, as testified to by defendant, that the impact was so severe that he felt the "checking" of his car; the other is that the skid marks were bisected by the south line of the crosswalk. If the impact was so severe as to "check" the car, is it not a reasonable inference that plaintiff was struck by the front of the car and thrown some distance? Also, defendant testified that he applied his brakes after the impact. If the brakes were applied after the impact and before the car left the crosswalk, as shown by the skid marks, is it not a necessary conclusion that plaintiff was struck in the crosswalk?

[5] The second answer is that if plaintiff was not in the crosswalk that fact, alone, would not establish the defense of contributory negligence. The fact that a pedestrian is crossing a street not in a crosswalk when he is struck by a motorist does not as a matter of law convict him of contributory negligence or acquit the motorist of a charge of negligence. Umemoto v. McDonald, 6 Cal.2d 587, 58 P.2d 1274; Watkins v. Nutting, 17 Cal.2d 490, 110 P.2d 384; Nicholas v. Leslie, 7 Cal.App.2d 590, 46 P.2d 761; Shipway v. Monise, 59 Cal.App.2d 565, 139 P.2d 60.

And again, even if plaintiff had been outside the crosswalk and guilty of negligence, there would still have been the question of proximate cause to consider, and upon the evidence this was a question of fact. If the jury had believed that plaintiff was a few feet outside the crosswalk, but in plain sight of defendant, they might reasonably have concluded that she would have been run over, even if she had been in the crosswalk, and that her being outside of it did not contribute proximately to the accident.

The issue as to liability should have been submitted to the jury.

The judgment is reversed.

WOOD, J., and VALLÉE, J. pro tem., concur.

* * *

81 Cal.App.2d 943

## CHATTERTON v. BOONE et al.

Civ. 7362.

District Court of Appeal, Third District, California.

Oct. 20, 1947.

**1. Bailment 🔑16**

An action for conversion of personal property lies against a bailee for hire, who, upon demand, wrongfully refuses to deliver possession thereof to the owner and exercises dominion over the property to the owner's detriment.

**2. Bailment 🔑25**

"Trover" is the form of an action for conversion of personal property against a bailee for hire, who, upon demand, wrongfully refuses to deliver possession thereof to the owner and exercises dominion over the property to the owner's detriment.

See Words and Phrases, Permanent Edition, for all other definitions of "Trover".

**3. Bailment 🔑31(1)**

Proof by plaintiff of ownership of property, right of possession, and a demand therefor establish a prima facie case of conversion against bailee for hire, who then has burden of proving his affirmative defense that it is impossible to return property because it is lost or destroyed by fire.

**4. Warehousemen 🔑24(3)**

Where property stored in warehouse was saturated with water used to put out fire in warehouse, bailee for hire had duty to use ordinary care for preservation of property in safety and in good condition to prevent further loss and deterioration on account of its water-soaked condition. Civ. Code, §§ 1852, 1858e, 1928.

**5. Bailment 🔑16**

The gist of the action for "conversion" or "trover" is the wrongful interference with owner's right of dominion and possession of his property, motive with which the bailee exercises dominion or refuses owner possession of property to which owner is entitled being immaterial.

See Words and Phrases, Permanent Edition, for all other definitions of "Conversion".

**6. Warehousemen 🔑34(7)**

In suit for conversion of household goods stored in warehouse partially damaged by fire and further damaged when goods were saturated with water in a second warehouse fire, evidence sustained finding that goods could be safely removed and should have been delivered to bailor upon demand and that bailees were not warranted in withholding goods for a period of several months during which the goods were further damaged by leaving them stored in their water-soaked condition. Civ. Code, §§ 1852, 1858e, 1928.

**7. Trial 🔑375**

When, by stipulation of respective parties, trial judge views the premises and condition of property, his observations became competent evidence in support of findings and judgment, to be weighed with other evidence upon those issues adduced at the trail.

**8. Trover and conversion 🔑44, 46, 54**

In suit for conversion of personal property, measure of damages sustained is value of the property at the time of conversion, with interest from that time, or an amount to indemnify party injured for loss which is the natural, reasonable, and proximate result of wrongful act complained of and which a proper degree of prudence on his part would not have averted, together with fair compensation for time and money expended in pursuit of property. Civ.Code, § 3336.

**9. Warehousemen ⚷34(8)**

Plaintiff was entitled to damages for conversion of household goods in sum sufficient to indemnify plaintiff for loss which was the natural, reasonable, and proximate result of the wrongful refusal of bailee for hire to return the goods upon plaintiff's demand.

**10. Warehousemen ⚷34(8)**

Evidence sustained finding that value of household goods was $2,038.75 when defendant bailees for hire wrongfully refused to deliver upon demand of bailor after fires in warehouse, and bailee had kept goods in storage allowing them to deteriorate from water-soaked condition from use of water in putting out fires, until a complete loss resulted.

**11. Evidence ⚷113(2, 8)**

In suit for conversion of household goods, evidence of the original cost of goods and their value before conversion was admissible as a circumstance to be considered with other circumstances in determining value of property at time of conversion.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Suit by Amy Chatterton, also known as Mrs. W. L. Chatterton, against Arthur G. Boone, Arthur G. Boone, doing business under the firm name and style of Boone's Transfer & Storage, Almand B. Atkinson, and John Orr for conversion of household goods which were stored by plaintiff in warehouse. From an adverse judgment, Arthur G. Boone, and Arthur G. Boone, doing business under the firm name and style of Boone's Transfer & Storage, appeal.

Judgment affirmed.

Bradford, Cross & Prior and Gerald M. Desmond, all of Sacramento, for appellant.

Joseph W. Mento, of Sacramento, for respondent.

THOMPSON, Justice.

Boone's Transfer and Storage Company and Arthur G. Boone have appealed from a judgment of $2,038.75 and costs, which was rendered against them in a suit for conversion of household goods which were stored by plaintiff in appellants' warehouse in Sacramento. The goods were partially damaged as the result of a fire which occurred in the warehouse on February 19, 1945. The fire was supposed to have been extinguished by the Sacramento Fire Department, but within twenty-four hours thereafter it again broke out and further damage resulted, chiefly from the use of a large quantity of water. Within thirty days thereafter the plaintiff demanded delivery of the property, which was repeatedly refused. The goods were saturated with water and remained in that condition for several months, resulting in complete loss. Defendants' attorney conceded that defendants had not delivered any of the property and acknowleged that it was so damaged that it was "an impossibility * * * to deliver it." Respondent admits that "the fires were not caused by any negligent act on the part of appellant."

The cause was tried by the court sitting without a jury. The judge viewed the premises at the request of both parties. Findings were adopted favorable to the plaintiff in every essential respect. Judgment was rendered for plaintiff for a sum equal to less than one-half of the original value of the property. A nonsuit was granted as to the defendants, Atkinson and Orr, who were sued as owners of the warehouse building which was rented by the storage company. Judgment for conversion was rendered under Section 3336 of the Civil Code, on the theory that appellants failed to exercise reasonable care and diligence for the protection and preservation of the goods after the fire, as required by Section 1858e of that code.

The court found that on February 20, 1945, the appellants were in possession of plaintiff's said goods. That was immediately after the second fire. The court further found that plaintiff was then the owner and entitled to the immediate possession of the goods, and that, after demand by plaintiff for possession, which was refused, the appellants unlawfully retained possession and "thereby unlawfully converted the same

* * *" to plaintiff's damage in the sum of $2,038.75. Judgment was rendered accordingly.

The appellants contend that the findings and judgment are not supported by the evidence, that they did not convert the property to their own use, and that the court erred in receiving evidence of their value prior to the time of the fires.

[1-4] We are of the opinion the evidence in this case amply supports the findings and judgment. An action for conversion of personal property lies against a bailee for hire, who, upon demand, wrongfully refuses to deliver possession thereof to the owner and exercises dominion over the property to the owner's detriment. The form of such an action is that of trover. 4 Cal.Jur. 34, sec. 20. Proof by plaintiff of ownership of the property, the right of possession and a demand therefor establish a prima facie case of conversion against the bailee, who then has the burden of proving his affirmative defense that it is impossible to return the property because it is lost or destroyed by fire. Wilson v. Crown Transfer & Storage Co., 201 Cal. 701, 706, 258 P. 596; Vagim v. Haslett Warehouse Co., 131 Cal.App. 197, 201, 20 P.2d 992; Atwood v. Southern California Ice Co., 63 Cal.App. 343, 218 P. 283; 71 A.L.R. 768, note. In the present cause the complaint merely alleged a simple case of trover. The appellants affirmatively alleged in their answer their inability to "salvage the goods stored", and the damage caused by the fire. The burden was on them to establish that defense. There was a conflict of evidence regarding the ability to remove the property from the warehouse after the fires. After the fires it became the duty of the bailee for hire to use ordinary care "for its preservation in safety and in good condition," to prevent further loss and deterioration on account of its water-soaked condition. Civil Code, sec. 1928, and sec. 1852. This they failed to do.

[5, 6] The gist of the action for conversion or trover is the wrongful interference with the owner's right of dominion and possession of his property. The motive with which the bailee exercises dominion or refuses the owner possession of property to which he is entitled is immaterial. The mere good faith of the bailee in refusing to deliver the goods to the owner, upon demand, is no defense to the action of trover. Poggi v. Scott, 167 Cal. 372, 375, 139 P. 815, 51 L.R.A.,N.S., 925; Staley v. McClurken, 35 Cal.App.2d 622, 628, 96 P.2d 805; Vagim v. Haslett Warehouse Company, supra. The only reasons assigned by appellants for refusal to deliver the goods to plaintiff on her demand were that the owners of the building had not yet adjusted their claim against the insurance company for damages to their building by the fires, and that it was dangerous to enter the building. There is a conflict of evidence in that regard. But there is evidence that the goods, which were located in a stall near the entrance, could be safely removed, and that plaintiff offered to hire a truck and remove them herself, which appellants refused to permit her to do. By stipulation of the respective parties, the trial Judge, Peter J. Shields, visited the premises and inspected the building and damaged goods. He held that the property could and should have been delivered to plaintiff upon demand, and that appellants were not warranted in withholding it for a period of several months during which the goods were further damaged or destroyed by leaving them stored in their water-soaked condition. The goods included upholstered furniture, mattresses, bedding and other property, which rotted, deteriorated and lost their value.

[7] When, by stipulation of respective parties, the trial judge views the premises and the condition of the property, his observations become competent evidence in support of the findings and judgment, to be weighed with other evidence upon those issues adduced at the trial. Noble v. Kertz & Sons Feed & Fuel Co., 72 Cal.App.2d 153, 159, 164 P.2d 257; Gates v. McKinnon, 18 Cal.2d 179, 183, 114 P.2d 576.

[8-10] The measure of damages sustained, in a suit for unlawful conversion of personal property, is the value of the property at the time of conversion, with interest from that time, *or an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and*

*proximate result of the wrongful act complained of* and which a proper degree of prudence on his part would not have averted, together with fair compensation for the time and money expended in pursuit of the property. Civil Code, sec. 3336; Betzer v. Olney, 14 Cal.App.2d 53, 61, 57 P.2d 1376; Edwards v. Jenkins, 214 Cal. 713, 721, 7 P.2d 702. In this case the court properly allowed damages in the sum of $2,038.75 as the value of the property at the time it was wrongfully converted on February 20, 1945, which was after the fires occurred. No damages were allowed as the immediate result of the fires. The plaintiff conceded that she was not entitled to damages resulting from the fires. She claimed and the court allowed her only a sum "sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act" of refusing to deliver the goods upon demand. The proximate result of the refusal to deliver the goods after the fires, and of keeping them in storage to rot and deteriorate from their water-soaked condition, was the total loss of the goods, which damage the court determined amounted to the sum of $2,038.75. There is ample evidence to support that award of damages. Sigfried Larson, an expert witness, who had had forty years of experience as a salesman of furniture and household goods for John Breuner Company in Sacramento, and in his own business, and who had inspected the property ten days after the fires occurred, testified as to the value of the property at that time. The court saw the condition of the goods at the time of the trial which was eleven months after the conversion. We conclude that the measure of damages allowed was proper, and that the sum allowed is adequately supported by the record.

[11] The appellants contend that the court erred in receiving evidence of the original cost of the goods and their value before the fires occurred. We think not. There was ample evidence of their value just after the fires occurred. The owner of property is entitled to testify to their cost and value. Evidence of the cost and value of the goods before the fires may be considered in connection with the subsequent values in determining the loss sustained as a result of the unlawful conversion. Kirstein v. Bekins Van and Storage Co., 27 Cal.App. 586, 588, 150 P. 999. In the case last cited it is said at page 589 of 27 Cal.App., at page 1001 of 150 P.:

> "'The owner of an article, whether he is generally familiar with such values or not, ought certainly to be allowed to estimate its worth. The weight of his testimony (which often would be trifling) may be left to the jury.' The testimony as to the cost of the goods was a circumstance tending to show value, and was properly admitted. Levy v. Scott, 115 Cal. 39, 46 P. 892; Angell v. Hopkins, 79 Cal. 181, 21 P. 729."

That was a suit for damages for loss of stored household goods sustained on account of fire. The jury was instructed that, "In arriving at the reasonable market value of property, you may take into consideration the original cost of the property, its usage and condition." The judgment for damages was affirmed.

In 24 California Jurisprudence, at page 1060, section 34, the text, which is supported by several California authorities, reads in that regard:

> "As tending to prove the value at the time and place of conversion, evidence of the cost of the property is admissible,—not as showing the value conclusively, but *as a circumstance to be considered with other circumstances such as the extent of the use of the property and its condition and depreciation.*" (Italics added.)

The challenged evidence in this case was admitted for the very purpose indicated by the foregoing italicised language in the text last quoted. It was therefore competent.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

82 Cal.App.2d 117

## PEOPLE v. DENNINGHAM.

Cr. 4092.

District Court of Appeal, Second District,
Division 2, California.
Oct. 29, 1947.

**1. Criminal law** ⚷55

Lack of memory of alleged entry into a residence to commit an act of sex perversion would not render defendant guiltless on ground that defendant had no knowledge of his deed and no intention to commit it, if lack of memory was the result of influence of alcohol voluntarily consumed. Pen.Code, § 288a.

**2. Stipulations** ⚷14(4)

In prosecution for entry into a residence to commit an act of sex perversion, a finding against insanity plea simultaneously with conviction of defendant was not error because defense of insanity was not tried subsequent to conviction of crime, where parties had stipulated that court might determine issue of insanity on reports of physicians on file. Pen.Code, §§ 288a, 1026.

**3. Criminal law** ⚷311

In prosecution for entry into a residence to commit an act of sex perversion wherein defendant pleaded not guilty by reason of insanity, presumption of sanity attended defendant throughout trial. Pen. Code, §§ 288a, 1026.

**4. Burglary** ⚷41(1)

Evidence sustained conviction of entry into a residence to commit an act of sex perversion. Pen.Code, §§ 288a, 459.

**5. Criminal law** ⚷1159(2)

A verdict cannot be disturbed unless there is no evidence to support it.

**6. Criminal law** ⚷494

Opinion of psychiatrists that defendant charged with entry into a residence to commit an act of sex perversion was insane at the time of the crime was not required to be accepted by trial court, and court could disregard it or give to it the weight to which it was entitled. Pen.Code, §§ 288a, 1127b.

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Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Charles Denningham was convicted of entering into a residence to commit an act of sex perversion, and he appeals.

Judgment affirmed.

Charles Denningham, in pro. per.

Fred N. Howser, Atty. Gen., and Ward Sullivan, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant was accused by amended information of burglary in two counts, namely: (1) Entry into a residence to commit rape; (2) entry to commit an act of sex perversion. Penal Code, sec. 288a. To both counts he pleaded not guilty and not guilty by reason of insanity. The parties stipulated: (a) To waive a jury trial; (b) that the court "may determine the issue (insanity) on the reports of the physicians on file." The decision was not guilty under count one, guilty as to count two and that defendant was sane at the time of the commission of the offense. Probation having been denied, he was sentenced for the term prescribed by law.

Since sentence was pronounced appellant has reposed in the county jail from which without aid of counsel he has prosecuted this appeal. Inasmuch as he made no argument in support of his contention that the judgment is contrary to law and the evidence, in view of the asserted state of his mind at the time of the crime a study of the entire record has been made.

The unfortunate man, though springing from a worthy family and though fairly well educated in the fundamentals and trained as a radio technician (at which trade he has toiled for 25 years), fell victim to the inordinate use of alcohol. To his first wife three children were born. She divorced him in 1939. His second marriage in 1941 was followed by his development of the curse of sex perversion as a result of which he alienated the attachment of his wife who had left him some time prior to the date of his crime, to wit, April 20, 1946. On that date he left his hotel in downtown Los Angeles about 7:30 p. m. in search of his wife who with him had formerly lived near Main street on East 45th street. Having ascertained that she had left no forwarding address he visited two nearby cafes at which he drank three glasses of wine. He testified that he had no memory of any other occurrence that evening except the application of handcuffs by the police and his being booked.

Having admitted her husband about 12:-30 a. m., the prosecutrix returned to her bed while her spouse entered his bathtub in the adjoining room. While lying asleep on her stomach she felt a hand touch her shoulders and caress her neck and a face touch her cheek. When the hand went under the covers she thought as it touched her body that it was her husband. But when the head of the intruder began moving downward along her body she suspected villainy as she heard a splash in the bathtub. Taking him by the hair of the head she pulled him out to discover appellant, a total stranger to her. While holding him by the sleeve her scream brought her husband from the scene of his ablutions to a resolute pursuit of the intruder. The man suffered a brutal flogging. Immediately thereafter he was removed by the police and lodged in the emergency ward of the General Hospital.

[1] Because he has no memory of any of the events after drinking the wine and prior to the arrival of the officers, appellant contends that he could not be guilty of the burglary. It is true that in the case of a person who had suffered from epilepsy on former occasions and who was under such a spell when he committed a violation of the Vehicle Code, of which he was convicted, this court held him to be guiltless because he had no knowledge of his deed and no intention to commit it. People v. Freeman, 61 Cal.App.2d 110, 117, 142 P.2d 435. But in the same decision it was announced that a crime committed as a result of voluntarily using intoxicants is a wilful act. See People v. Hill, 22 Cal.2d 863, 866, 141 P.2d 418. Inasmuch as the proof against appellant, in the light most favorable to him, presents him as an actor under the influence of alcohol, voluntarily consumed, the philosophy of the Freeman case cannot avail him. Moreover, there was testimony of two competent witnesses who did not detect the odor of liquor on appellant. The court might have believed them.

[2-6] While section 1026 of the Penal Code requires that the defense of insanity be tried subsequent to a conviction of the crime, in view of the stipulation of the parties no error appears to have been committed by finding against the insanity plea simultaneously with the conviction of appellant. See People v. French, 12 Cal.2d 720, 739, 87 P.2d 1014. The presumption of sanity attended appellant throughout the trial. Moreover, he took the stand and gave his own version of his acts. With the presumption of sanity added to the court's view of appellant himself, there was sufficient evidence to convict. The reviewing court cannot disturb a verdict unless there is no evidence to support it. People v. Coleman, 20 Cal.2d 399, 409, 126 P.2d 349; People v. Greig, 14 Cal.2d 548, 553, 95 P.2d 936. While two psychiatrists opined that appellant was insane at the time of the crime, the court was not obliged to accept such testimony but could disregard it or give to it the weight to which it is entitled. Section 1127b, Penal Code; People v. French, supra, 12 Cal.2d 763, 87 P.2d 1014. The court may properly have found from all the evidence that appellant was merely drunk or was acting wilfully with criminal intent.

As to the sufficiency of the evidence, the court appears to have so construed the conduct of appellant as to convict him of the lesser crime. The description of his acts by the victim of his attack would reasonably warrant no other finding. Since the act inhibited by section 288a is a felony, appellant's entry into the home is a burglary. Penal Code, sec. 459. The testimony of the husband and wife is sufficient to prove his intent to commit an act of sex perversion.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

82 Cal.App.2d 183

## TROUTMAN v. LOS ANGELES TRANSIT LINES, Inc.

Civ. 15720.

District Court of Appeal, Second District,
Division 3, California.

Oct. 31, 1947.

**1. Carriers ⟹280(3)**

A street railway company is not an insurer of safety of its passengers though it is required to use utmost precaution and diligence for their safety.

**2. Carriers ⟹320(24)**

It is not negligence as matter of law for motorman of streetcar to suffer bag or satchel of passenger to remain on floor of car in aisle, where bag is not so placed as to obstruct free passage.

**3. Carriers ⟹320(24)**

In action for injuries to passenger stumbling over another passenger's baggage, evidence was sufficient to make case for jury as to whether such baggage by its position obstructed free ingress or egress of passengers and whether motorman's conduct in knowingly permitting it to remain in its location constituted breach of that degree of care which company owed passenger.

**4. Carriers ⟹318(4), 346(2)**

In action for injuries to passenger from stumbling over another passenger's baggage standing in aisle of streetcar, evidence sustained finding that streetcar was at standstill at time of accident, that position of bag was not such as to obstruct free passage in aisle, and implied finding that such fall was result of contributory negligence.

**5. Trial ⟹260(1)**

The refusal of portions of requested instruction was not error where such portions were fully covered by instruction given.

**6. Carriers ⟹321(23)**

Where injured passenger alleged that another passenger's baggage was negligently left standing in aisle of streetcar and that company negligently caused streetcar to start with a sudden jerk, causing plaintiff to stumble over such baggage, instruction that plaintiff was entitled to verdict if either a sudden jerk in starting the car or the baggage in the aisle was proximate cause of the injury was properly refused, since plaintiff had burden of proving both acts of negligence alleged in the conjunctive.

◆

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Blanche Troutman against Los Angeles Transit Lines, Inc., for damages for personal injuries alleged to have been sustained by plaintiff while riding as passenger on defendant's streetcar as result of negligence of defendant. Judgment for defendant on the verdict of a jury, and plaintiff appeals.

Affirmed.

Marcus C. Clark, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and Philip C. Sterry, both of Los Angeles, and James D. Derby, Jr., of Los Angeles, for respondent.

KINCAID, Justice pro tem.

Plaintiff appeals from a judgment in favor of the defendant in an action for damages for personal injuries alleged to have been sustained as a result of the negligence of defendant and urges as grounds for a reversal thereof that the evidence is insufficient to support the verdict of the jury and that the trial court erred in its refusal to give an instruction requested by the plaintiff.

By her complaint plaintiff alleged that she was a paid passenger upon a street car belonging to and operated by defendant corporation on Seventh Street near Hill Street, in the city of Los Angeles. Such pleading further alleged: "That then and there, and at said time and place aforesaid, the said defendant corporation, by and through its said agent, servant and employee, John Doe, negligently, carelessly, wrongfully and unlawfully permitted and allowed passengers to deposit their baggage in and along the passenger aisle of said street car rendering the said aisle dangerous to other passengers moving upon and along said aisle *and* did negligently and carelessly so manage, maintain and operate said street car as to cause the said street car *to start* with a sudden, violent and unusual *jerk, whereby and because whereof* plaintiff was *thrown backward and stumbled and fell over said baggage* and sustained personal injuries as hereinafter set forth." The italics are added by us for later reference.

The answer of defendant specifically denied the negligence as alleged, and further alleged acts of contributory negligence proximately causing the injuries sustained by plaintiff. With reference to plaintiff's contention that the evidence is insufficient to support the verdict of the jury, evidence was adduced in behalf of defendant by a disinterested passenger witness to the effect that at the time of the incident in question she was seated on a front seat of the street car; that when the car reached Seventh and Hill Streets she was watching passengers come aboard when she heard someone say, "Are you hurt?" She turned and saw plaintiff seated on a handbag in the aisle; that during all the times in question, including the period she observed plaintiff sitting on the bag, the street car was standing perfectly still.

The motorman of the involved street car testified his attention was called to the accident when he heard a commotion at his right side, and upon looking around saw plaintiff sitting on a handbag; that he turned in his seat, placed both hands under plaintiff's elbows and raised her to her feet; that the street car was standing still at all times during the events in question. The evidence further shows that the bag occupied the same position in the aisle during the period the car had travelled some twenty-five blocks, and that many passengers had walked past it while entering and leaving the car in this interval. Plaintiff testified that the car started up with a violent jerk which caused her to fall over the bag, thus causing her injuries. She located the position of the bag as being on the lefthand side of the car and opposite the second seat to the rear of the motorman. The latter and two passenger witnesses testified that the bag was placed as far forward in the street car as the structure thereof would permit, was adjacent and parallel to the platform on which the motorman's chair was based, and that there was room between the entrance and the bag in which to pass into the aisle.

Plaintiff argues that the foregoing evidence shows the motorman had knowledge of the fact that the bag was placed in the aisle of the car in such a position as to cause a person to fall over it; that because the law requires a carrier of persons for reward to use the utmost care and diligence for their safe carriage, to provide everything necessary for that purpose, and to exercise to that end a reasonable degree of skill, such evidence shows negligence on the part of defendant as a matter of law.

[1, 2] A street railway company is not an insurer of the safety of those it undertakes to transport, although it is required to use the utmost precaution and diligence for their safety. It is not negligence as a matter of law for the motorman of a street car of ordinary type to suffer the bag or satchel of a passenger to remain on the floor of the car in the aisle where it is not so placed as to obstruct free passage out of or into the car. Selman v. City of Detroit, 283 Mich. 413, 278 N.W. 112, 115; Pitcher v. Old Colony St. Ry. Co. 196 Mass. 69, 81 N.E. 876, 13 L.R.A.,N.S., 481, 124 Am.St.Rep. 513, 12 Ann.Cas. 886. To the same effect see Holda v. Public etc. Transport, 168 A. 753, 11 N.J.Misc. 879; Bragg v. Houston Electric Co., Tex.Civ. App., 264 S.W. 245; Burns v. Pennsylvania Ry. Co., 233 Pa. 304, 82 A. 246, Ann.Cas. 1913B, 811; Jackson v. Boston Elevated Ry. Co., 217 Mass. 515, 105 N.E. 379, 51 L.R.A.,N.S., 1152.

[3, 4] Under the circumstances here shown the location of the bag in the car, both prior to and at the time of the accident, and as to whether, by its position, it obstructed free ingress or egress of passengers, were questions of fact for the determination of the jury. It was likewise a factual matter as to whether the act of the motorman in knowingly permitting it

to remain in its location constituted a breach of that degree of care which defendant owed plaintiff. The evidence presented in defendant's behalf is substantial in character and from it the jury was entitled to believe not only that the street car was at a standstill at the time of plaintiff's fall, but that the position of the bag was such as not to obstruct free passage in the aisle. It further supports the implied finding that her act in falling was as a result of her own contributory negligence. Such being the case, the evidence, although directly conflicting in many particulars, is amply sufficient to sustain the verdict.

Plaintiff also complains of prejudicial error in the refusal of the trial court to give the following instruction to the jury:

"The plaintiff in her complaint alleges in substance that the operator of the street car started the same with a sudden violent and unusual jerk and that the said operator permitted and allowed a piece of baggage in and along the passenger aisle of said street car, rendering the said aisle dangerous to other passengers, whereby and because whereof plaintiff was thrown backward and stumbled and fell over said baggage and sustained certain personal injuries.

"Even though you should find that the plaintiff has proved both of these allegations of negligence, it is not necessary that she prove both if the evidence establishes proof of one of these allegations, which, in fact, was the proximate cause of the accident, and injuries, if any, sustained by the plaintiff.

"The defendant owed a duty to the plaintiff to exercise the highest degree of care in the management and operation of the said street car, and if you should find from the evidence that the motorman of said street car did start the said street car with a violent and unusual jerk, causing the plaintiff to be thrown against some object in said street car whereby she was injured and that the plaintiff herself was not guilty of any contributory negligence, then your verdict must be for the plaintiff and against the defendant.

"If you should find from the evidence that the said street car was not put in motion with a violent and unusual jerk, but that the plaintiff, without any contributory negligence on her part, stumbled over the baggage in the aisle of said street car and thereby injured herself; and if you find further that the motorman of said street car knew, or in the exercise of ordinary care should have known of the presence of said piece of baggage in said aisleway; and if you find further that the presence of said piece of baggage constituted a danger to passengers, including the plaintiff herein, using the said aisleway, then your verdict must be in favor of the plaintiff and against the defendant, if you should further find that the plaintiff herself was not guilty of any contributory negligence as that term has been or will be defined in these instructions."

[5, 6] The subject matter of the first and third paragraphs of the instruction in question was fully covered by other instructions given to the jury. The trial judge was justified in refusing to deliver the second and fourth paragraphs of such instruction as the substance thereof was directed to facts entirely outside the issues as framed by the pleadings. Cooper v. Los Angeles Terminal Ry. Co., 137 Cal. 229, 231, 70 P. 11; Carbaugh v. White Bus Line, 51 Cal.App. 1, 5, 195 P. 1066.

Plaintiff did not allege general negligence upon the part of the defendant. Reference to the allegations of her complaint above quoted shows that she specifically alleged two distinct acts of negligence in the conjunctive. It is her position as shown by such pleading that the defendant was negligent in permitting a passenger to deposit his handbag in the aisle of the street car *and* in so operating the car as to cause it to start with a jerk, thus causing plaintiff to fall over the bag. This is conceded by the first paragraph of the instruction in question. The second and fourth paragraphs thereof had the effect of charging the jury with a duty to find for plaintiff if they found that either a sudden jerk in starting the car or the position of the bag in the aisle was the proximate cause of her fall and injury. Plaintiff, on the contrary, had the burden of proof, under the limited issues thus specifically raised by her complaint, to establish both the claimed factors of negligence by a preponderance of the evidence.

The judgment is affirmed.

SHINN, Acting P. J., and WOOD, J., concur.

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82 Cal.App.2d 141

**JACOBS v. MOFFETT et al.**

**Civ. 3497.**

District Court of Appeal, Fourth District, California.

Oct. 29, 1947.

**Appeal and error 🔑635(3)**

Where all questions raised on appeal depended for answer upon consideration of evidence which was received by trial court but no evidence was before District Court of Appeal in that appeal was based upon clerk's transcript alone, judgment must be affirmed.

Appeal from Superior Court, Riverside County; R. A. Moore, Judge.

Action by Mary Josephine Jacobs against Clifford H. Moffett and another for cancellation of an alleged contract, wherein defendants filed a cross-complaint. Judgment for plaintiff on the complaint and for defendants on the cross-complaint and plaintiff appeals.

Affirmed.

Gerald A. Coxe, of Los Angeles, for appellant.

John J. Beck, of Los Angeles, for respondents.

BARNARD, Presiding Justice.

The parties hereto entered into a contract under which it was agreed that the defendants would support the plaintiff for the remainder of her life, that they would have the use of her home property, and that she would make a will leaving all of her property to them. She made such a will, and the defendants moved into her home and later installed certain improvements on the property.

About a year after the contract was made the plaintiff brought this action seeking a cancellation of this contract and will. The defendants answered and also filed a cross-complaint alleging that in reliance upon the contract they had made certain improvements on the premises in question and, among other things, seeking to recover the value of these improvements.

When the case was called for trial the defendants conceded that the terms of the contract could not be enforced and the trial proceeded on the issues raised by the cross-complaint and the answer thereto. Findings were waived in open court, and a judgment was entered cancelling the agreement between the parties and awarding the defendants $3000 on their cross-complaint. From this judgment the plaintiff presents this appeal, based upon a clerk's transcript alone.

The appellant concedes that the respondents should be compensated for any improvements which they placed upon the property which would tend to enhance its value or which would inure to the benefit of its owner, but contends that it cannot be told whether or not the judgment entered took into consideration certain monies which were advanced to the respondents by the appellant; that the appellant was entitled to have the rental value of the property, during the time it was occupied by the respondents, offset against any allowance made to the respondents; and that the evidence does not support the amount of the judgment.

The record before us discloses that the respondents occupied the premises with the consent of the appellant, but it does not disclose whether or not any allowance therefor was made in adjusting the various claims made by the respective parties in the accounting which was apparently had. All of the questions raised depend, for an answer, upon a consideration of the evidence which was received by the court. What that evidence was, we have no means of knowing. No record of that evidence is here and no attempt was made to secure or produce such a record. The only record before us fully supports the judgment as entered.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

### In re READE'S ESTATE.

### QUEIROLO et al. v. RUHLAND.*

Civ. 13385.

District Court of Appeal, First District, Division 2, California.

Oct. 24, 1947.

Hearing Granted Dec. 22, 1947.

**1. Municipal corporations 🔑187**

The constitution and by-laws of Widows' and Orphans' Aid Association of San Francisco Police Department formed contract between association and member thereof for payment of benefit for his death to person designated by him.

**2. Executors and administrators 🔑86(1)**

Where life insurance is payable to executors or administrators of deceased insured's estate, personal representative must collect and administer on such insurance.

**3. Municipal corporations 🔑187**

The language, "as executrix of my will", in decedent's designation of his daughter, "as executrix of my will", to receive death benefit, payable by Widows' and Orphans' Aid Association of City Police Department, meant "in the character of executrix".

See Words and Phrases, Permanent Edition, for all other definitions of "As Executrix of My Will".

**4. Municipal corporations 🔑187**

Decedent's designation of his daughter, as executrix of his will, to receive death benefit from Widows' and Orphans' Aid Association of City Police Department, was not inoperative as not made within restricted class stipulated in Association's constitution and by-laws, where association paid benefit to designee without threat of contest, whereupon its contract became completely performed and functus officio.

**5. Municipal corporations 🔑187**

The words, "as executrix of my will", in decedent's designation of his daughter, as such executrix, to receive death benefit from Widows' and Orphans' Aid Association of City Police Department, were not merely descriptive and surplusage, but authorized payment of benefit to designee only as executrix, not individually, though there was no will naming her as executrix in existence at time of designation.

**6. Executors and administrators 🔑511(2)**

Allowance of fee to attorney for parties objecting to administratrix' account was not authorized by statute or equity rule that fees for legal services rendered in preserving common fund for benefit of persons not participating in labors to effect its preservation are proper charges against such fund. Code Civ.Proc. § 1021; Probate Code, §§ 703, 927, 1233.

**7. Costs 🔑239**

On appeal by decedent's daughter, individually and as administratrix of decedent's estate, from superior court's order, surcharging her account as administratrix with amount of beneficial association death benefit collected by her on ground that it was part of decedent's estate, and allowing fee to her attorney, appellant individually and objectors should pay their own costs since appellant was not aggrieved as administratrix by portion of order holding amount of benefit part of estate, but was aggrieved as administratrix with respect to attorney's fee.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

In the matter of the estate of James E. Reade, deceased. From an order, surcharging the account of Olive Helen Ruhland, as administratrix of the estate, with the amount of a death benefit collected by her from the Widows' and Orphans' Aid Association of the San Francisco Police Department, directing inclusion thereof in the account for distribution, and directing payment from the benefit fund of a fee for the attorney for Dorothy Queirolo and another, objectors, Olive Helen Ruhland, individually and as administratrix, appeals.

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* Subsequent opinion 191 P.2d 745.

Affirmed in part and reversed in part.

Lawrence A. Cowen, of San Rafael, and Herbert Chamberlin, of San Francisco, for appellant.

J. E. Hood, of Oakland, for respondents.

GOODELL, Justice.

The decedent, a member of the Widows' and Orphans' Aid Association of the San Francisco Police Department, in 1942 designated "Olive Helen Ruhland, as executrix of my will," as entitled to his death benefit. He was a widower with four daughters and two sons. Another daughter predeceased him, leaving children, and one of the sons died during administration, leaving children. Decedent died in 1945 and his daughter Olive, appellant herein, was appointed administratrix of his estate. She collected the death benefit of $2654 and used it for herself.

Both the inventory and the first and final account filed in the estate failed to show the $2654 as an asset. Respondent, another daughter of decedent, filed written exceptions to the account based on appellant's failure to account for the $2654.

The court found that the money had been paid to and received by appellant "in her capacity as personal representative of the estate"; that her claim to the fund in her individual capacity was without right, and ordered that the account of the administratrix be surcharged with the $2654 and that such sum be included in the account for distribution. The court also found that $500 was a reasonable fee for respondent's attorney and ordered that sum paid out of the $2654 fund. From the court's order this appeal was taken.

Appellant's principal contention is that the evidence is insufficient to support the order.

The respondent relies mainly on three pieces of documentary evidence, (1) the designation of appellant "as executrix of my will"; (2) the resolution of the association authorizing the payment to "Mrs. Olive Helen Ruhland, as Executrix of my will * * * daughter and beneficiary of James E. Reade, deceased", and (3) the receipt signed "Olive Helen Ruhland, as daughter and Executrix of the will of her father * * *," to which was attached a certified copy of her letters of administration.

To show that decedent intended Mrs. Ruhland to have the death benefit in her own right, she introduced parol evidence which went in over objection. The financial secretary of the association testified that decedent told him that appellant "was the one that had stayed with him; the rest of the family had married and gone away and one thing and another and that he wanted her to have this * * * benefit." It was stipulated that the Inspector of Police (who accompanied the secretary to decedent's home to obtain the designation) would give similar testimony. Appellant testified that when her mother died thirteen years before, her father had said she was to have the money. A daughter-in-law of decedent testified that on many occasions he had said that this money was to go to appellant.

At the same time it appears from the testimony of one of appellant's own witnesses that when decedent made the designation he acted with deliberation and with his eyes open. The financial secretary testified that after reading the designation he advised decedent that "it wasn't necessary for him to say 'as executrix of my will * * *' because it was his intention he told me at that time to leave it to [Olive] * * * all he had to say was 'I designate my daughter Olive Helen Ruhland' " to which decedent replied that "he was making a will and naming her executrix * * *."

On September 30, 1943, decedent attempted to make a will but it was denied probate because it was typewritten and not witnessed. It provided: "* * * I, appoint Olive Helen Ruhland, as my Executrix * * * she to dispose of all my property, both real and personal to the following Children of mine * * * Dorothy C. Queirolo, Olive H. Ruhland, Norma

E. Weimers, Maxine Bradshaw, Gerald Reade share alike."

There were two applications for letters of administration in this estate, one filed by appellant, the other by respondent. At the hearing on the account appellant was cross-examined respecting the circumstances surrounding her appointment as administratrix, as follows:

"Q. Do you remember * * * I called the Court's attention to the fact there was this $3,000 fund * * * and you were making some claim to it? A. Yes. * * *

"Q. Do you remember that the Court at that time gave three reasons for appointing you instead of the other petitioner? A. Yes.

"Q. One was that you were the prior petitioner * * * and another was that you renounced or waived any claim to— A. Yes.

"Q. And the third, your father in the will—there was an abortive will—named you as executrix. Do you remember that? A. Yes.

"Q. Do you recall I called this to the Court's attention, asking if you were appointed administratrix that this $3000 be considered in fixing bond and Mr. Cowen said, that's all right, and the bond should be $5000? * * * A. Yes.

"Q. At that time you did not claim this $3,000, did you? A. Not on that particular date. * * * We had other things to take up."

Appellant's attorney testified that he had known nothing about the insurance fund until he came into court the day of the hearing for letters of administration and that "When the question * * * came up I said if it belonged to the estate it will be part of the estate and that is all I could say."

At the end of the hearing on the account the judge remarked that he had a faint recollection that appellant had disclaimed, at the original hearing, any interest in this money, and that he must have then assumed the death benefit to be part of the estate or he would not have fixed the bond at $5,000.

In addition to the parol evidence offered on the appellant's side, she presents several legal arguments.

[1-3] Her first point is that the constitution and by-laws of the association formed the contract between it and the decedent, a proposition which is not, and cannot be, questioned. Valentine v. Head Camp etc., 180 Cal. 192, 180 P. 2, 3 A.L.R. 380. From this premise appellant argues that she became entitled to the fund "by virtue of the contract and not by succession." In Burke v. Modern Woodmen of America, 2 Cal.App. 611, 84 P. 275, 276, relied on by appellant, the certificate was payable to "[the] legal heirs * * *" of the member and the court held that the money should be shared by them equally, regardless of the proportions in which they would take under the laws of succession. Where, however, insurance is payable *to the executors or administrators* of the insured "the personal representative must collect and administer upon it." Estate of Miller, 121 Cal. 353, 355, 53 P. 906, 907; see also Estate of Ward, 127 Cal.App. 347, 359, 15 P.2d 901. The language "as executrix of the will" obviously means *in the character of executrix.* 4 Words and Phrases, Perm. Ed., page 289.

[4] Appellant next contends that because the designation could have been made only "within the restricted class stipulated in the constitution and by-laws," the decedent's designation was inoperative and ineffectual. The authorities relied on, however, are cases where the contest was between the claimant and the insurer, and in order to get into court the claimant necessarily had to bring himself within one of the specified classes. Here there is no such issue, for the association paid without even a threat of contest, and its contract thereupon became completely performed and functus officio.

[5] Appellant next claims that "the words 'as Executrix of my will' must be discarded as mere description and surplusage," citing Jenkins v. Jenkins, 112 Cal.App. 402, 297 P. 56. In that case Jenkins took out insurance in favor of Hilda B. Jenkins, *wife of the assured.* They were later divorced and he married Hazel, who was

his wife when he died. When the first wife sued on the policy the widow claimed that as Hilda was not *the wife of the assured* when he died, she was not his beneficiary. The court in deciding otherwise held that the words *wife of the assured* should be disregarded as merely descriptive of Hilda's status when the policy was written. There is a wide difference between such a case and one where the benefit is payable to a person *as executrix*, namely, *in the character of executrix*.

Prior to the designation decedent made two wills, one in 1938, and one in 1939, naming a bank as executor. Moreover, at the time of the designation there was no will extant naming appellant as executrix. With respect to these circumstances the judge said at the end of the hearing: "In addition to all of that this disclaimer I think Mrs. Ruhland made on that occasion; I think there is ample evidence here to warrant the court in finding that the designation referred to her as executrix even though it is not directly shown there was a will in existence at the time which named her executrix. He did say 'as executrix' when he drew that will [sic] and he did not strike it out although he had the assistance of these officers who testified. All they would have to do would be strike a pen through that."

We agree that there is ample evidence to support the order as to the death benefit.

[6] *The allowance of the $500 counsel fee* is also attacked by appellant.

Sec. 1021, Code Civ.Proc., provides that "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; * *." See also 7 Cal.Jur. p. 286. Section 1021 is made applicable to probate proceedings by section 1233, Pro. Code. O'Day v. Superior Court, 18 Cal.2d 540, 542, 116 P.2d 621, 623, holding that "The language of section 1233 is broad and all inclusive".

Respondent does not direct attention to any part of the Probate Code authorizing counsel fees in a situation such as this. Section 927, dealing with exceptions to accounts is silent on the subject. Section 703 provides for the appointment of an attorney at the expense of the estate in certain contests between an executor or administrator and the estate, but it is only where a claim has been filed that that can be done (Tanner v. Superior Court, 43 Cal.App.2d 732, 736, 111 P.2d 713) and even then the attorney must first be appointed by the judge.

The three cases which respondent claims are directly in point do not touch this case.

In the Tanner case, just cited, at page 735 of 43 Cal.App.2d at page 714 of 111 P.2d the court recognized the rule in equity which respondent invokes "that where legal services are rendered in protecting or preserving a common fund for the benefit of some who did not participate in the labors to effect its preservation, the expense of such services including counsel fees are a proper charge against the common fund so preserved or protected [citations]," but held it inapplicable, ruling that the statute (and not the court's equity powers) was the source of its authority. It was held that the case did not come within section 703.

Estate of Marre, 18 Cal.2d 191, 114 P.2d 591, 592, was an appeal prosecuted by a beneficiary of a trust, from an order denying his petition for an allowance from the trust funds to pay the fees of his attorney. In affirming the order the court said: "There is no general rule which permits the recovery of attorney's fees by a successful litigant. Compensation for the services of an attorney must ordinarily be paid by the client employing him, in the absence of exceptional circumstances, such as a special ageement or special statutory provision." Among other authorities the court cites sec. 1021, Code of Civ. Proc., supra. The court then refers to the rule in equity, already referred to, but holds that the petitioner's case was not within it.

In Adams v. California Mut. Bldg. & Loan Ass'n, 18 Cal.2d 487, 116 P.2d 75, the court held that the equitable rule applied, but that was a building and loan liquidation, not a probate proceeding.

None of the cases relied on by respondent is authority in her favor on this point.

Clearly there is no statutory authorization for the payment of the $500 fee, and we are satisfied that in *this probate proceeding* the rule prevailing in equity cannot be successfully invoked.

[7] This appeal was taken by Olive Helen Ruhland individually and as administratrix. The order was in favor of the estate in so far as it held that the $2654 was part of the estate. Therefore she was not an aggrieved party as administratrix and could appeal from that part of the order only in her individual capacity. As to the attorney's fee she was an aggrieved party, as administratrix. Accordingly, each side (appellant, in her individual capacity, and respondent) should stand its own costs.

That part of the order determining that the $2654 fund is part of the estate and should be included therein for distribution is affirmed. That part directing the payment of the $500 fee is reversed. Costs on appeal are to be borne as indicated above.

NOURSE, P. J., and DOOLING, J., concur.

81 Cal.App.2d 952

## PEOPLE v. DYE.

Cr. 2002.

District Court of Appeal, Third District, California.

Oct. 20, 1947.

**1. Criminal law 🔑1159(4)**

Appellate Court is concerned only with the existence of sufficient evidence to support conviction and not with discrepancies in testimony of prosecuting witness, testimony tending to impeach him, or weakness of testimony of other witnesses for prosecution.

**2. Criminal law 🔑1159(4)**

Inconsistencies and contradictions developed in examination of prosecuting witness and his credibility were matters for consideration of jury in determining the weight to be given to his testimony.

**3. Criminal law 🔑1159(2)**

While appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, either a physical impossibility or apparent falsity of testimony without resort to inferences or deductions is necessary to warrant rejection of testimony believed by trial court, the mere fact that testimony discloses unusual circumstances being insufficient.

**4. Infants 🔑20**

Evidence sustained conviction of committing lewd and lascivious acts upon a 12 year old boy. Pen.Code, § 288.

**5. Witnesses 🔑287(1)**

Where defense counsel had shown on cross-examination that prosecuting witness had given contradictory testimony at preliminary examination, permitting district attorney on redirect examination to refer the witness to a different part of the transcript in an effort to obtain an explanation was not error, particularly where trial court, concluding that prosecution had failed to procure an explanation on redirect examination, struck it out on motion of defendant.

**6. Criminal law 🔑1037(1, 2)**

Misconduct of district attorney in making allegedly objectionable remark in presence of jury could not be urged for the first time on appeal, where defendant did not object to statement when made or request an instruction to jury to disregard it.

**7. Criminal law 🔑706**

In prosecution for lewd and lascivious acts committed on a 12 year old boy in theater, testimony of companion that he moved away from defendant after defendant had whispered something which he did not understand and had leaned over into his seat warranted using him as a witness, particularly where his testimony corroborated that of prosecuting witness. Pen. Code, § 288.

**8. Criminal law 🔑706**

Where defense called prosecuting witness' sister in an attempt to impeach prosecuting witness' testimony by showing that he had made statements to defense counsel at variance with testimony he gave at trial, cross-examination of sister by prosecution to show why prosecuting witness' story to defense counsel may have differed was proper.

**9. Criminal law ⚷1037(2), 1129(1)**

Error could not be predicated on alleged misconduct of prosecuting attorney in asking defendant prejudicial questions on cross-examination, where defendant's objection thereto was sustained, conduct of prosecuting attorney was not assigned as error and trial court was not asked to admonish jury to disregard questions.

**10. Criminal law ⚷1037(2)**

Allegedly prejudicial statements made by prosecuting attorney in argument to jury could not be considered on appeal where defendant did not ask trial court to admonish jury to disregard them.

**11. Criminal law ⚷1169(2)**

Any error in admitting testimony of police officer over defendant's objections was cured upon cross-examination of the witness when defense counsel brought out substantially the same testimony.

**12. Criminal law ⚷696(3)**

In prosecution for committing lewd and lascivious acts on a child, motion to strike testimony of prosecuting witness' companion as not tending to corroborate other testimony regarding acts of defendant was properly denied, particularly since if it did not corroborate testimony of prosecuting witness, it was not prejudicial to defendant. Pen.Code, § 288.

**13. Criminal law ⚷673(2)**

Limiting use of photographs introduced by defendant showing defendant and attorney seated in seats in theater occupied by defendant and prosecuting witness when lewd and lascivious acts allegedly were committed was not error. Pen.Code, § 288.

**14. Criminal law ⚷438**

Photographs of scene of alleged crime introduced to demonstrate the impossibility of defendant having committed alleged acts are admissible for the purpose of illustration only and not as evidence of what in fact occurred.

**15. Witnesses ⚷327, 333**

Testimony that prosecuting witness was mentally deficient and emotionally unstable was inadmissible in prosecution for committing lewd and lascivious acts on a child. Pen.Code, § 288.

**16. Witnesses ⚷341**

Credibility of prosecuting witness in prosecution for committing lewd and lascivious acts on a child could not be impeached by testimony that he had a proclivity for theft, even though defendant had testified that prosecuting witness had attempted to steal his wallet which prosecuting witness denied. Pen.Code, § 288, Code Civ.Proc. § 2051.

**17. Criminal law ⚷911**

Denial of motion for new trial predicated on grounds urged in appellate court for reversal was not abuse of discretion, where record disclosed no reversible error.

* * *

Appeal from Superior Court; Sacramento County; Dal M. Lemmon, Judge.

Denzil L. Dye was convicted of a violation of Penal Code, Section 288, his motion for new trial was denied, and he appeals.

Judgment and order denying a new trial affirmed.

Arthur De Beau Carr and Kenneth W. Donelson, both of Sacramento, for appellant.

Fred N. Howser, Atty. Gen., and Leonard M. Friedman, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

Appellant was charged with and convicted by a jury of a violation of section 288 of the Penal Code. He made a motion for a new trial which was denied, and he has appealed from the judgment and order.

[1] The first contention of appellant is that the evidence is insufficient to support the verdict. In that connection he points out discrepancies in the testimony of the prosecuting witness, Richard Hernandez, a

boy 12 years of age, as well as testimony tending to impeach him. He also argues the weakness of the testimony of other witnesses called by the prosecution. An appellate court, however, is not concerned with this, but only with the question whether there is sufficient evidence to support the verdict. We have read the record and find that the boy's testimony was corroborated in part by his companion, Walter Lasek, and in part by police officer Fred Schroeder. Richard testified that he and Walter Lasek, aged 13 years, together went to the Liberty Theater in Sacramento about 7:00 o'clock in the evening of August 12, 1946, and occupied seats in the middle of the theater on the right-hand side about three or four seats from the wall; Walter sat to the left of Richard. Later appellant came into the theater and sat at Walter's left; Walter then moved to the seat on Richard's right and appellant left his seat and walked into the aisle. A few minutes later appellant returned and sat to the left of and next to Richard and leaned over the arm-rest of the seat toward him and said something to the boy which the latter did not understand; then appellant crossed his legs and part of appellant's leg came upon the boys' leg between his knee and hip; the boy moved his leg away from appellant and the latter then uncrossed his legs and whispered to the boy twice, but the boy did not understand him; then appellant reached over and grabbed the boy's privates; the boy raised his leg and put his left foot on the chair so appellant could not do it any more. After appellant let go of the boy's privates the boy moved over as far as he could go and appellant put his hand on the boy's bottom; the boy pulled appellant's hand away and appellant grabbed the boy's hand and squeezed it. Richard told him to "let go of my hand," but appellant squeezed the hand more. The boy tried to get away, whereupon appellant let go of his hand, then got up and walked up the aisle. Two policemen in plain clothes came in and told the two boys to come outside. They talked together on the sidewalk, after which the boys returned to the theater. Appellant was then standing inside the theater near the entrance and the boys told the officers where appellant was standing; then the two boys resumed their seats, Walter sitting to the left of Richard. Appellant returned and took the seat next to Walter whereupon Richard climbed over the seats into the row ahead. Walter followed. After a few minutes both boys left for home.

Walter Lasek testified that he accompanied Richard to the theater on the evening in question, that they arrived about 7:00 o'clock and occupied seats on the right side about the middle of the theater; Richard sat to the right of Walter and the latter was nearest the aisle. Thereafter appellant came in and took the seat next to Walter and leaned on Walter's side of the seat toward him. Walter leaned away from appellant toward Richard, who was seated at his right; appellant whispered something to Walter which the latter could not make out; then appellant got up and went out whereupon Walter moved over on the other side of Richard, thus leaving Richard nearest the aisle; appellant returned and took the seat that Walter had vacated next to Richard. Walter said he was engrossed in the pictures and was not noticing either appellant or Richard, but he did glance at Richard who "kept on moving over towards me"; appellant left his seat and the detectives came in and called the boys out; they talked to the officers on the sidewalk, then returned to the theater and took their seats. Appellant also returned and Richard saw him and climbed over the seats to the row ahead and Walter followed him.

Police officer Fred Schroeder testified that on the evening of August 12, 1946, he was in the Liberty Theater about 8:15 or 8:30 o'clock and occupied a seat two rows behind appellant and one seat to the left of him. He saw Richard sitting in the seat on the right of appellant and Walter seated to the right of Richard; he was in the theater approximately 25 to 40 minutes and retained his seat for 30 minutes during which time he had appellant under his observation except when appellant went to the lavatory. Appellant was leaning almost half into Richard's seat and the more appellant would lean into Richard's seat the more the boy would move over. Appellant leaned over and whispered into Richard's ear, and he would say appellant tried to kiss the boy; that the boy pulled away and then appellant went way down in his seat, looked around and then put his leg over the boy's leg and took hold of the boy's hand. The boy jerked his hand away; appellant reached over and laid his hand on the boy's leg and the boy put appellant's hand down. Appellant then took hold of the boy's hand; the boy pulled his hand away and moved over; appellant got up and went to the lavatory and the witness tapped the boy on the shoulder and asked him to come out for a talk. In front of the theater the officer talked with the boys and then they returned to the theater. The witness also went back into the theater and sat behind appellant and the boys. He saw the two boys climb over the seats to the row ahead, whereupon appellant went back to the lavatory. Upon his return the officers placed him under arrest.

Manuel Saetes testified that he was night manager of the theater and came on duty that evening between 7:30 and 8:00 o'clock. On cross-examination by counsel for appellant he testified that appellant had tried to get into the theater previously on stubs that were old, and that he had kept his eye on him; that he had known appellant to come in two or three times a day; and that appellant had already seen the pictures that were being shown.

[2, 3] Any inconsistencies and contradictions developed in the examination of the prosecuting witness, and his credibility, were clearly matters for the consideration of the jury in determining the weight to be given to his testimony. People v. Carlson, 73 Cal.App.2d 933, 939, 167 P.2d 812, citing People v. Jackson, 63 Cal.App.2d 586, 147 P.2d 94. People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758, 759, also was a section 288 case and in affirming the conviction the court said: "Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. * * * To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Cases cited.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends."

[4] There appears no reason why this court should interfere with the verdict of the jury. As we said in People v. Jackson, supra, 63 Cal.App.2d 586, at page 593, 147 P.2d 94, we must assume that the learned trial judge was satisfied with the verdict or he would have granted the motion for a new trial. We find no merit in appellant's first contention.

Appellant's second contention is that the district attorney was guilty of prejudicial misconduct during the trial of the case and in his argument to the jury.

[5] The first instance relied upon is that after counsel for the defense had shown that the prosecuting witness had given contradictory testimony at the preliminary examination, the district attorney, on redirect examination, referred the witness to a different part of the transcript in an effort to obtain an explanation. Appellant objected, contending that the prosecution was attempting to impeach, and to cross-examine its own witness. A similar contention was made in People v. Ferdinand, 194 Cal. 555, 562, 229 P. 341, 343, where the court said: "Appellants complain that the court erred in permitting the prosecution to impeach its own witness. An examination of the record discloses the facts connected with the incident, to which reference is made by appellants, to have been that one of the witnesses presented by the prosecution was sought to be impeached by the defendants by calling her attention to certain testimony which she had given at the coroner's inquest over the body of the deceased, and which testimony was apparently inconsistent with statements which she had made on her direct examination. On redirect examination, and as explanatory of the statements made by her on cross-examination, the prosecution directed the attention of the witness to certain other testimony given by the wit-

ness at the inquest. The rule is universal that such a right exists."

The Ferdinand case was followed by this court in People v. Kennedy, 21 Cal.App.2d 185, 200, 69 P.2d 224. Furthermore, the trial court concluded that the prosecution had failed in its effort to procure an explanation on the redirect examination and on motion of the defense struck it out. Therefore, any impeachment remained unaffected.

[6] However, appellant complains that during the argument over the defense objection, the prosecutor said: "* * * well, I hate to make a statement here, your Honor"; and appellant argues: "It is self-evident that the district attorney by making some sort of veiled reference about hating to make a statement here confused and confounded the jury, the effect of which is and was prejudicial to the defendant." The record reveals that no objection was made to the statement and the court was not requested to admonish the jury to disregard it. Therefore, the point cannot be urged for the first time on appeal. It was incumbent upon appellant to ask for an instruction to the jury to disregard the alleged objectionable remarks of the prosecutor. People v. Hanks, 35 Cal.App.2d 290, 302, 95 P.2d 478; People v. Wagner, 62 Cal. App.2d 597, 601, 145 P.2d 646; People v. Greene, 80 Cal.App.2d 745, 182 P.2d 576. We fail to find any prejudice to appellant by reason of this incident.

The next incident complained of is that the district attorney presented Walter Lasek as a witness over the objection of defense counsel. To the objection, made almost at the time the witness started to testify, the court said: "I assume Counsel presents a witness to the Court in good faith, thinking that there is something relevant to the testimony that the witness may give, and when the time comes if there is nothing relevant you can move to strike,—proceed."

[7] After Walter Lasek testified as herein earlier recited, the defense moved to strike out his testimony, and the motion was denied. The argument is now made that: "This testimony and the district attorney's introducing it was prejudicial in that it created in the minds of the jurors the idea that the boy was afraid something was going to be done to him by Dye, so he moved over away from Dye." It is probably true that such was the reason why Walter moved over on the other side of Richard, and it occurred after appellant had whispered something to Walter which he did not understand and had leaned over into his seat. This was enough to justify Walter in moving away from appellant. The testimony given by Walter, as hereinabove recited, warranted using him as a witness, and in several respects he corroborated Richard. There is no justification for the complaint mentioned in this instance.

[8] Appellant next complains that the prosecution was guilty of misconduct in the cross-examination of the sister of the prosecuting witness, who was called by defendant in an attempt to impeach Richard's testimony by showing that he had made statements to defendant's counsel at variance with the testimony he gave at the trial. By his cross-examination the assistant district attorney merely sought to show why the boy's story to defense counsel may have differed. We do not consider that such cross-examination was improper. In Sichterman v. R. M. Hollingshead Co., 117 Cal. App. 504, 506, 4 P.2d 181, the court said: "There can be no question that where a party to an action has changed his testimony, the circumstances under which that change was made are admissible in evidence to explain and characterize his action in so doing, so as to enable the jury to judge whether the change was due to mere inadvertence, or was part of a deliberate scheme of perjury." And in People v. Slaughter, 33 Cal.App. 365, 372, 165 P. 44, where it was sought to impeach the testimony of the prosecuting witness by letters and an affidavit in which she had stated that her charge against defendant was false, cross-examination by the prosecution to ascertain the circumstances under which the letters were written and the affidavit made was held proper. Also see 3 Wigmore on Evidence (3d Ed.), p. 738.

It is next complained by appellant that the conduct of the deputy district attorney was prejudicial in that, on the cross-examination of defendant, he persisted in inquiring whether defendant had previously seen the pictures being shown. The transcript shows the following:

"[Mr. McDonell] Q. Isn't it a fact, Mr. Dye, you were in that theater the day before?

"Mr. Donelson: We object to that on the same ground, immaterial.

"The Court: The objection is sustained.

"Mr. McDonell: Isn't it a fact, Mr. Dye, that you had made a practice of going to the Liberty Theater because they have a lot of cowboy pictures, and because those boys go to see cowboy pictures?

"Mr. Carr: Same objection, and ask that the District Attorney—

"The Court: (Interposing) Same ruling.

"Mr. Donelson: We ask that the District Attorney be cautioned not to continue that line of questioning.

"The Court: Yes, I have ruled on that line of questions, Counsel should refrain from them."

[9] It is particularly urged that the question whether defendant had made a practice of going to the Liberty Theater because they have a lot of cowboy pictures there, etc., was prejudicial. But as the record above recited reveals defendant's objection was sustained, the conduct of the deputy district attorney was not assigned as error, and the trial court was not asked to admonish the jury. In People v. Wilson, 76 Cal.App. 688, 702, 245 P. 781, 786, the court said: "There is nothing in the record to indicate bad faith on the part of the district attorney, or that any of the questions were asked for the wanton purpose of raising a prejudice against either of the defendants. It frequently happens that in the heat of trial counsel ask improper questions, but inadvertences of that character are not alone sufficient to raise a presumption that the prosecuting officer was willfully endeavoring to prejudice the accused in the eyes of the jury. Moreover, appellant did not assign the alleged misconduct of the district attorney as error."

Also see People v. O'Donnell, 11 Cal.2d 666, 671, 81 P.2d 939; People v. Vatek, 71 Cal.App. 453, 468, 469, 236 P. 163. Furthermore, on cross-examination of Manuel Saetes defendant's counsel brought out that the witness had known defendant to come in two or three times a day when he had already seen the pictures that were being shown.

Other questions asked by the counsel for the people are contended by appellant to have been prejudicial, but it does not appear that defendant's counsel requested that the jury be admonished to disregard them, or that such conduct was assigned as misconduct; and as for some of such questions, no objection was made. We deem it unnecessary to set them forth in detail.

[10] Appellant also complains that in his argument to the jury the attorney for the prosecution was guilty of prejudicial misconduct. But here, again, defendant did not call for an admonition to the jury to disregard the alleged prejudicial statements, therefore they cannot be considered on appeal. See People v. West, 215 Cal. 87, 96, 8 P.2d 463; People v. Shears, 133 Cal. 154, 65 P. 295; People v. Routh, 182 Cal. 561, 567, 189 P. 436; People v. Hanks, supra; People v. Wagner, supra; 4 Cal.Jur. 10-Yr. Supp., p. 916.

Errors in the admission of evidence are also relied upon by appellant as prejudicial error. In the examination of police officer Schroeder the following occurred:

"Witness: A. He at that time leaned over and whispered in Richard's ear.

"Mr. Carr: I ask that go out.

"The Court: Q. Now, did he whisper? A. He definitely whispered.

"The Court: It will stay in then,—Go ahead.

"A. (Continuing) he was so close to the boy's ear that it looked to me like he tried to kiss the boy on the neck,—

"Mr. Carr (Interposing) I ask that go out, and ask the witness be admonished not to volunteer things of that kind.

"The Court: Q. Well, now did he try to kiss the boy?

"A. I would say he did, yes.

"The Court: It will stay in.

"A. (Continuing)—At that time the boy pulled away. Then the defendant went way down in his seat like this (indicating),—at the time he was doing this he was looking around to see who was behind him, or who was next to him,—

"Mr. Carr: I ask that go out.

"The Court: The "looking around" will stay in; the rest will go out.

"Witness: A. He got down almost to this position (indicating) and put his leg over the little boy's leg, and put his hand down in this position; I observed that by standing up in my seat and looking down. At that time was the time he took hold of the little boy's hand, and he laid it on the boy's leg,—I observed all that."

[11] If there was any error in permitting this testimony, it was cured on the cross-examination of the witness where the following occurred:

"[Mr. Carr] Q. Did you hear Dye at any time whisper to the boy, or say anything to him? A. No, I didn't hear nothing.

"Q. Were you listening? A. Yes, I was.

"Q. Judge Lemmon asked you if he whispered when I made the objection, and you said yes he did,—how did you determine that? A. His lips were moving when he was up alongside the boy's ear.

"Q. You saw his lips moving? A. That is right.

"Q. Would you show the jury how his lips were moving at that time? (Witness demonstrates to jury with movement of lips.)

"Q. Like that? A. Yes, sir.

"Q. Was this an alleged love kiss, or whispering, or both? A. I would say it was both.

"Q. It was a whisper and a kiss at the same time? A. That is right."

It is therefore apparent that defendant's counsel brought out substantially the same testimony which he now complains was erroneously admitted. People v. Dollor, 89 Cal. 513, 517, 26 P. 1086.

[12] It is next assigned as error that the court refused to strike out the testimony of Walter Lasek. It is argued that nothing appears therein that corroborates other testimony regarding the acts of defendant. We cannot say that Lasek's testimony did not, in some respects, corroborate the testimony of Richard. If it did not, we fail to see how it was prejudicial to appellant. In 10 Cal.Jur. 808, it is said that the tendency of modern decisions is to admit any evidence that may have a tendency to throw any light or give any weight, and to leave the question of the strength of such tendency or the amount of such weight to be determined by the jury. Also see People v. Mooney, 177 Cal. 642, 655, 171 P. 690.

Appellant also complains that the court erred in limiting the use of two photographs introduced by appellant, which show defendant and one of his attorneys seated in the seats in the theater occupied by Richard and defendant, the asserted purpose of such photographs being to demonstrate to the jury the impossibility of defendant's having assumed the poses testified to by Richard and the two police officers. Objection to two of the photographs was made on the ground that Attorney Donelson and Richard Hernandez were not of equal size, and also that the boy's testimony was that he was sitting on the edge of his seat. The records shows the court's ruling as follows:

"The Court: Now, I am in accord with Mr. Donelson as to the part of the testimony, the picture as relating to Mr. Donelson,—the situation is far different than that which is testified to; however, insofar as the picture shows the posture, the different postures of the defendant seated in the seat, I think that is relevant and to that extent it is admitted."

[13, 14] We cannot say that the court's ruling was error. These two photographs, as well as four others taken at the same time, were admitted in evidence, and the photographer who took them was permitted to testify at some length as to what it would have been possible for defendant to do or not to do while seated in the theater, as shown in the pictures. Photographs such as these are admissible for the purpose of illustration only, "and not as evidence of what in fact occurred." See People v. Clapp, 26 Cal.App. 523, 527, 147 P. 469, and cases there cited; People v. Lee, 34 Cal.

App. 702, 709, 168 P. 694. And appellant was allowed all the benefit from them to which he was legally entitled, if not more.

[15] Appellant next assigns as error the refusal of court to permit Albert Sessarago, principal of the school attended by Hernandez, to testify that the boy was mentally deficient and emotionally unstable, and that he "had a proclivity for theft."

As for the mental condition of the witness the court said in People v. Champion, 193 Cal. 441, 448, 225 P. 278, 281: "A witness not affected by mental disease or mental derangement may be impeached only in the manner and for the reasons provided in sections 2051 and 2052 of the Code of Civil Procedure. People v. Harrison, 18 Cal. App. 288, 296, 123 P. 200. His testimony may not be impaired by the opinion of other witnesses that he is afflicted with a weak memory. That fact, if it be a fact, may and perhaps must be done by cross-examination. Ah Tong v. Earle Fruit Co., 112 Cal. 679, 682, 45 P. 7." In the case last cited it was sought to prove by another witness that the witness Davis was a person of weak memory, but the rejection of such evidence was approved, the supreme court saying [112 Cal. 679, 45 P. 9]: "The memory of a witness not affected by mental derangement is not to be impeached by other witnesses in order to disparage his testimony. It must be done by cross-examination." Also see People v. Mackey, 58 Cal. App. 123, 127, 128, 208 P. 135. Appellant argues that the jury had a right to consider the mental condition of Hernandez, which is doubtless true, and this was urged upon them by appellant's counsel in his argument. That he is emotional and unstable was conceded by the deputy district attorney in his argument. But it does not follow that appellant was entitled to produce a witness to testify as to his opinion that the boy was mentally deficient and emotionally unstable. As said in People v. Champion, supra, this must be developed by cross-examination.

[16] It is further urged that defendant should have been permitted to call Albert Sessarago to testify as to Hernandez' "proclivity for theft." What the testimony of Sessarago would have been in this connection does not appear. Appellant argues that anyway he should have been permitted to so testify because defendant, apparently in an attempt to explain his conduct in the theater, testified that the boy had attempted to steal his wallet, which Hernandez denied; and that a showing that Hernandez had a "proclivity for theft" would have tended to support defendant's testimony. But defendant's testimony could not be so bolstered. Hernandez was not on trial, and his credibility as a witness could not be so impeached. See C.C.P. sec. 2051; People v. Nichols, 2 Cal.App.2d 99, 102, 37 P.2d 710; 27 Cal.Jur. 132, 133. Appellant relies upon People v. Briggs, 117 Cal.App. 708, 4 P.2d 593, but that case did not involve the admissibility of evidence. It merely recites that there was evidence that the complaining witnesses were addicted to falsehood, which was admitted by one of them, and that their credibility was thereby impeached.

[17] Finally appellant urges that the trial court erred in denying a new trial. But as we have arrived at the conclusion that the record does not reveal reversible error, and the motion for a new trial was predicated upon the grounds here urged for reversal, we cannot say that the court abused its discretion in denying such motion. See People v. Sarazzawski, 27 Cal. 2d 7, 15, 16, 161 P.2d 934.

Appellant has made other assignments of error. We have examined them all but find none of them meritorious or justifying further prolongation of this opinion. It seems highly improbable that the experienced and learned judge below could have made as many errors as appellant attributes to him; and the very fact that appellant has seen fit to assign so many errors, tends to indicate that he has, himself, little confidence in any of them.

The judgment and the order denying a new trial are affirmed.

PEEK and THOMPSON, JJ., concur.

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## PEOPLE v. COSTON.

Cr. 2460.

District Court of Appeal, First District,
Division 1, California.

Oct. 23, 1947.

Hearing Denied Nov. 20, 1947.

**1. Criminal law 🔑1160**

The verdict of a jury in a murder prosecution, which has been approved by the trial court, cannot be set aside on appeal unless it clearly appears that on no hypothesis whatever is there sufficient substantial evidence to support the jury's conclusion.

**2. Homicide 🔑237**

In murder prosecution, evidence was insufficient to establish that defendant was in an insane frenzy and incapable of forming an intent to take life premeditatedly and clearly. Pen.Code, § 189.

**3. Homicide 🔑253(1)**

Evidence sustained conviction of murder in the first degree. Pen.Code, § 189.

**4. Homicide 🔑22(2)**

The first degree murder statute requires both deliberation and premeditation and as an element of such crime substantially more reflection than may be involved in the mere formation of a specific intent to kill. Pen.Code, § 189.

**5. Homicide 🔑286(3)**

In murder prosecution, instruction that there need be no appreciable space of time between the intention to kill and the act of killing, and that they may be as instantaneous as successive thoughts of the mind, was proper. Pen.Code, § 189.

**6. Criminal law 🔑993, 1183**

On application to reduce the degree or class of an offense, the trial judge may review the weight of the evidence, but an appellate court can consider only its sufficiency as a matter of law. Pen.Code, § 1181, subd. 6.

**7. Criminal law 🔑1186(4)**

In murder prosecution, alleged error in giving of instruction that there need be no appreciable space of time between intention to kill and act of killing, and that they may be as instantaneous as successive thoughts of the mind, was not prejudicial, where there was no evidence from which a jury could reasonably believe that defendant's intention to kill was formed at the very instant of the act. Pen.Code, § 189; Const. art. 6, § 4½.

**8. Criminal law 🔑1186(4)**
**Homicide 🔑294**

In murder prosecution, instruction that the intentional denial of recollection does not raise a suspicion of unconsciousness, was erroneous because evidence of forgetfulness may be an element in proof of unconsciousness, but it was error without prejudice where only purported evidence of unconsciousness was defendant's own statement of lack of memory, and no explanation was offered, as to why he did not remember or as to why he was unconscious. Pen.Code, § 189; Const. art. 6, § 4½.

**9. Homicide 🔑28**

Unconsciousness brought about by voluntary intoxication is no defense in a murder prosecution, and can only be used on the question of intent in determining degree. Pen.Code, §§ 22, 189.

**10. Homicide 🔑309(1)**

Instruction that in determining the type of passion which will reduce homicide to manslaughter, it must be based on such facts and circumstances as are sufficient to arouse the passions of an ordinary and reasonable person, was proper.

**11. Homicide 🔑300(9)**

In murder prosecution, court properly refused to give defendant's requested instructions with reference to self-defense, where there was no evidence of self-defense. Pen.Code, § 189.

**12. Criminal law 🔑1170(4)**

In murder prosecution, alleged error in sustaining objection to question asked by defendant of deceased's wife on cross-examination if deceased's wife did not at the time when she was getting a divorce from defendant register with defendant at a hotel as husband and wife, was cured when she subsequently testified that defendant was unable to obtain a hotel room by himself, and that he registered for them as husband and wife in her absence.

**13. Criminal law** ⚿1170(3)

In murder prosecution, alleged error in the exclusion of letters written by deceased's wife to defendant was cured, where the court subsequently ruled that the letters could be referred to in argument, and all letters were in evidence and were so considered by the parties.

◆

Appeal from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

John J. Coston was convicted of first degree murder, and he appeals.

Judgment affirmed.

Alfred J. Hennessy, of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and Carl W. Wynkoop, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Defendant was convicted by a jury of murder in the first degree with penalty of life imprisonment.

The facts in this case read like a story taken from the Arabian Nights. In May, 1943, defendant, who was then living in Norfolk, Virginia, with his wife, Goldie, to whom he had been married for about eight years, enlisted in the Navy. While he was away from home in the service, his wife became acquainted with the deceased, Lieutenant White, who was also in the Navy. Apparently the gold braid of an officer was more appealing to Goldie than the blue jacket of an enlisted man, for in June, 1945, Goldie left defendant in Norfolk and went to Reno to get a divorce so that she could marry White. Defendant followed her to Reno, arriving there July 16th. There he learned for the first time that she was getting a divorce. Defendant testified that Goldie told him that the divorce was sort of a joke on their friends so that they could get remarried again. At any rate, defendant signed the documents which her Reno attorney desired signed, so that the divorce could go through expeditiously. Defendant spent approximately twelve days in Reno, during the six weeks period required for Goldie to get her divorce. Defendant contends that during his stay he and she lived together as husband and wife. Goldie denies this, but admits that the first night he was in Reno he stayed all night at her apartment, and that the next day "He checked in [at a hotel] as Mr. and Mrs. because they would not let him have a room by himself." On April 12, 1946, practically nine months later, a child was born to Mrs. White. This child defendant claims was conceived during his stay in Reno, and also claims that Goldie told him on several occasions that the child she was going to have was his. She denies this, but it is significant that in her letters to defendant she called the unborn child "Spike," a name given it by defendant. She received her divorce on August 27, 1945, and married White in San Francisco on August 31, which is the date upon which she claims the child was conceived. Less than two months after her marriage, Goldie went to Norfolk, because of the illness of her mother. She was in Norfolk approximately from October 12 until October 25. Defendant claims, and is supported in this behalf by witnesses, that Goldie lived with him during her stay there. This she denied. On her return to her husband in San Francisco and about the first of November, Goldie talked over the phone to defendant, who was in Norfolk. Up to this time, in spite of her admission that she saw defendant daily during the time she was in Norfolk, she had not told defendant of her marriage to White. She did so in this phone conversation. A day or so later she wrote him indicating that, as he claimed, they had discussed remarriage ("How about the marriage? Do I have to wait two and a half years before I get married?"). On November 3 defendant wrote her a long, rambling letter in which he stated, among other things, "Goldie, let's be friends. Now I don't want to cause you any trouble with him, but any time he objects to me tell him to be man enough to take it out on me, not you, I'm his size, I don't give a damn how big he is or how little—in other words if he treats you O. K.

he is regarded by me as a friend, but on the other hand *if he steals you away from me then craps on you, sister, he will pay the price,* 'so help me God I just want to remind you Goldie I'm sober' or I guess you say I'm crazy." (Emphasis added.) A couple of days later, November 5th or 6th, defendant arrived in San Francisco by plane, and went up to the White's apartment about 1:30 in the afternoon. He remained with Goldie all afternoon, even going with her to the grocery store while she did her shopping. White returned home about 5 o'clock and defendant, after congratulating him upon the marriage, stayed for dinner and spent the evening with the newly married couple. Defendant then charged White with being the cause of some difficulty defendant had had in getting the Navy to transfer him from sea duty to shore duty at Norfolk, which White denied. Defendant returned to Norfolk and Goldie arrived there about a week later, on December 16th. The cause of her going to Norfolk is disputed. It seems that a few days before, defendant's stepfather was shot in his Norfolk home. Goldie claims that defendant called her on the phone, told her that his mother had shot her husband, and asked Goldie to come to Norfolk to help in the defense of the mother as Goldie could testify that on a number of occasions the husband "had gotten fresh" with her. (Incidentally, both the mother and the stepfather testified at defendant's trial, that the stepfather accidentally shot himself.) Defendant claims that Goldie, by telephone, made up this story about his mother doing the shooting and asked defendant to send her a telegram to come to Norfolk to testify, so that she would have an excuse to show to her husband. She went to Norfolk, defendant having wired her $150 for plane fare. Goldie remained in Norfolk for over a month, occupying, according to defendant and several witnesses, an apartment with him. This Goldie denies, although admitting she saw defendant every day and claiming that he was trying to get her to leave White and come back to him. During this time defendant took her to an attorney where the matter of getting a divorce from White was discussed. Goldie admits the discussion, but denies she ever intended to get such a divorce. She claims that defendant was threatening to have her husband kicked out of the Navy, and that she would have divorced White rather than have that happen. Defendant claims and she denies that she told the lawyer that her unborn child was defendant's. In response to an invitation to visit his sister in Oakland defendant flew to San Francisco arriving the morning of February 25th. He immediately went to the White apartment. Defendant claims that Goldie had asked him to come there to see her before she went to the hospital as she felt that she was not going to survive childbirth. This she denies, but language in one of her letters corroborates defendant on her fear of childbirth. At this time defendant stated that he was going to Los Angeles to get a job. From February 25th to March 12th defendant and Goldie saw each other practically every day. Three or four days before March 12th, defendant met White and Goldie coming from the store and went to the apartment with them. He told them he was leaving the next day and had come to say goodbye. He claims that White refused to drink with him and he threatened to turn White into the Navy if he did not get his baby when born. (He admits that he had consulted naval legal authorities as to his rights against White for taking his wife.) He did not leave the next day, but continued to call at the apartment in White's absence. On March 12th, the day of the shooting, according to Goldie, defendant for the first time in San Francisco asked her to leave her husband. Defendant brought with him from Norfolk his service revolver, .45 calibre, at the request, he contends, of his sister. A letter was received in evidence, which she testified she wrote to defendant on February 12, 1946. In it she requested defendant to bring his gun as some one had tried to break into her house. However, defendant did not give her the gun. On the morning of March 12th he left the sister's home in Alameda, carrying the unloaded gun and eight cartridges in a sack. He claims he brought them to San Francisco to pawn to supplement his cash so that he could buy a plane ticket to Norfolk that night. About 10:30 that morning Goldie met him on Pine Street in front of a tavern, he claims by prearrangement, which she denies. They went into the tavern, remaining there about forty-five minutes. According to defendant, and denied by Goldie, he told her that he was returning to Norfolk and showed her a letter from a girl there. He told Goldie that he planned to marry that girl. Goldie then asked him not to leave San Francisco as she did not think she would live through the childbirth and "what will become of Spike"; that she would leave White after the baby was born, if she survived. Defendant claims, again denied by Goldie, that he showed her the gun and cartridges and told her he was trying to get the money on the gun and asked her to let him have some money. She offered him $6, which he did not take. He claims that he reluctantly went to the apartment with her and while there she "pulled her dress up showing her body where, what she termed 'Spike is kicking.' She said, 'You can't leave us.'" Goldie denies the entire incident. She claims she purchased groceries and took them to the apartment. Defendant then again met her in front of the tavern about 12:30 or 1 p. m. He accompanied her to the 5 & 10 store and to the branch post office, and then to a tavern. At this time, according to Goldie, defendant asked her to leave White and go and live with defendant's sister. She told him that she would not leave White as she loved him very much. Defendant denies that any such conversation took place. After a few minutes they left the tavern. Defendant claims that the last time he saw Goldie that day he was to call back to see if she had been able to borrow money to give him to go to Norfolk. Goldie testified that about 3:30 o'clock defendant came to her apartment and asked her if she had changed her mind about not leaving White and that he then said he would call her at 4:30 to find out again if she had changed her mind. Around 5 o'clock defendant phoned her. He asked her if she had changed her mind, and when she said no, he angrily said, "Well, I am taking matters into my own hands." The bartender in a certain tavern testified that about the same time defendant telephoned to some one from his place, and spoke in a loud and angry voice, and slammed the phone. About 8 o'clock Goldie and White left the apartment and went about a block and a half to get newspapers. They returned in about 20 minutes. Goldie took her coat off and went to hang it in the closet and White walked into the bedroom to hang up his coat. The doorbell to the apartment then rang. White went to answer it. At that time Goldie was either in the closet or sitting on the chesterfield, in easy hearing distance of the apartment hall. Goldie saw flashes through the frosted glass of the door and heard shots. Rushing into the apartment hallway she found defendant lying face down on the floor at the feet of White, who was also stretched out on the floor. Defendant's arms were extended. His revolver lay about four inches from one of his hands, which was apparently attempting to grasp the gun just out of reach. White had four bullet wounds in his body, and one through his left arm. Defendant had one bullet wound over his heart. White was dead, and defendant apparently dying. Defendant was taken to the hospital and in due time one of the miracles of modern surgery performed. The bullet had gone completely through the heart and the body. The heart was stitched and defendant later recovered. Paraffine glove tests were made of the hands of both White and defendant, which showed powder marking on both hands of defendant and none on the hands of White. In the apartment hallway the broken glass on the floor and a mark on the door indicated that defendant had broken the door glass with his revolver butt from inside the door. The powder marks, the position of the men on the floor, the location of the gun, the nature and location and direction of the wounds on each man, the lack of powder burns on the clothes of White, and presence and location of powder burns on the clothes of defendant, the fact that defendant's coat and topcoat had no bullet hole to correspond to the hole in the front of defendant's vest, the fact that all the bullets were fired from defendant's gun, and the other circumstances of the case, force but one reasonable conclusion, that defendant shot White and then turned the gun on himself.

The contentions made by defendant on this appeal will be taken up in order.

Alleged Insufficiency of the Evidence.

Defendant contends that the evidence did not prove any homicide, and that there is no evidence that the homicide, if proved, was deliberate, wilful and premeditated. He contends that under the evidence it is equally probable that the killing could have been murder, manslaughter, lawful self-defense, or that a "bandit who made good his escape may have shot both deceased and appellant." The chief premise upon which he bases the latter contention is that there is no evidence of what transpired between White and defendant in the very short interval between the time White answered the doorbell and the time the shots were fired. Goldie did not hear the conversation, if any, between these parties. To carry defendant's argument on this subject to a logical conclusion, no one ever could be convicted of homicide where the actual killing was not witnessed. To say that the shooting may have been by an outsider or in self-defense is to ignore completely the circumstances of the shooting and the evidence in the case. As to the outsider doing the shooting, such suggestion completely ignores, among other things, the fact that the shooting was done with defendant's gun. The self-defense theory will be discussed later.

[1] While the rule is that the verdict of the jury, which has been approved by the trial court, cannot be set aside on appeal unless it clearly appears that upon no hypothesis whatever is there sufficient substantial evidence to support the jury's conclusion (People v. Tom Woo, 181 Cal. 315, 184 P. 389; People v. Newland, 15 Cal.2d 678, 104 P.2d 778), in this case there is practically no evidence that would justify a conclusion that the killing was not deliberate, wilful and premeditated. On November 3, 1945, defendant wrote Goldie after he knew she had married White that if the latter "steals you away from me then craps on you, sister, he will pay the price, 'so help me God * * *'" On November 5th he arrived in San Francisco by plane, and without warning appeared at White's apartment and then flew back to Norfolk that evening. A few days later in Norfolk defendant told Goldie's sister that he was coming to San Francisco to kill Goldie, White and himself. "He was going for a one-way ride." And on other occasions about this time he told the sister that he was going to kill White if it was the last thing he did, and that he was going to make Goldie suffer. In one letter defendant wrote "He [White] should be happy knowing I'm not going to do anything to him until after the baby is born." In January, 1946, defendant in a long distance phone conversation with White showed ill feeling towards him. Defendant very definitely felt (and with good reason) that White had stolen Goldie from him, although the evidence shows that unknown to White Goldie was still interested in defendant. Defendant also felt that White was responsible for the Navy keeping him on sea duty so long and that White was trying to make trouble for him with the Navy over some allotment checks. Defendant admitted that in January he had threatened to turn White into the Navy for stealing his wife. Assuming defendant brought the gun to California at his sister's request, and that the sister changed her mind about wanting it after defendant arrived, even if one believes that the defendant brought the gun to San Francisco the morning of the shooting to pawn it, it is extremely significant that it was then unloaded. Sometime that day defendant decided to kill White and himself and then loaded the gun. There is no other inference possible under the evidence. While heretofore defendant had been content with sharing Goldie with White, on March 12th he demanded that she leave White. He would not take no for an answer. He finally called her at 5 o'clock and when she still refused to change her mind he decided to take matters into his own hands, and so told her. He next appeared at the apartment door, rang the bell and almost immediately started shooting White and himself. Defendant told a medical student at the San Francisco Hospital the second day after the shooting that when White came to the door defendant deliberately killed him and then turned the gun on himself. In defendant's pocket when he was taken to the hospital was an envelope on which defendant had written "To my mother, Mrs. T. R. Beck, 330 Duncan, Norfolk, Virginia, please noti-

fy." This was dated the day of the shooting. Defendant claims he wrote it that afternoon in the tavern. There was also another envelope with a similar endorsement on it which he claims he wrote while on the plane in November, 1945. There could hardly be a stronger case of deliberate premeditation and wilful murder.

[2] Although defendant in his opening brief denied that there was evidence that he tried to commit suicide, in his closing brief he claims that the fact that he did attempt to commit suicide negatives premeditation and deliberation. It is a little difficult to follow that reasoning. The designing of a plan to kill both White and himself shows that he planned and premeditated. Defendant argues, further, that the attempt to commit suicide indicates great instability of mind or even insanity. This is the first time the question of insanity has appeared in the case (except, of course, a plea of not guilty by reason of insanity, which was withdrawn after verdict). Defendant says it is not legal insanity but medical insanity, and that defendant was in an insane frenzy and incapable of forming an intent to take life premeditately and clearly. However, there is no substantial evidence to justify this contention. It is true that defendant testified that in the apartment at 4 o'clock that afternoon he told Goldie "It is driving me insane," but there is nothing else upon which to base such a claim. It is negatived by the threats which preceded his preparation for the crime, his bringing the gun to San Francisco when he had all day to consider and deliberate his actions generally, and the entire circumstances of the case. As defendant told Goldie's sister about four months before, he intended to shoot both White and himself and make Goldie suffer. He did.

Defendant admits that the evidence showed motive. "The motive, it might be argued, arose from the chagrin over the loss of his wife, his enmity towards the deceased because of the breaking up of his home, and his despair over his failure to induce her to return to him * * *" The threats, both express and implied, were proved by the testimony of Goldie, her sister, and defendant's letters. Defendant then contends that the third element necessary to prove that he committed a homicide of any kind, the carrying out of the threats, was not proved, because no one actually witnessed the shooting. But the physical facts themselves are subject to only one interpretation, namely, that defendant did all the shooting that was done that evening. Cases like People v. Lamson, 1 Cal.2d 648, 36 P.2d 361, cited by defendant, are not in point, as their facts are so dissimilar from those here. People v. Salaz, 66 Cal.App. 173, 225 P. 777; People v. Frank, 2 Cal. App. 283, 83 P. 578, and People v. Howard, 211 Cal. 322, 295 P. 333, 71 A.L.R. 1385, were cases in which proof of the corpus delicti, or that defendant was the killer, depended practically entirely upon the admissions of the defendant. Here, it does not require the admissions of the defendant to prove either.

[3] On reduction of degree defendant cites several cases. In People v. Kelley, 208 Cal. 387, 281 P. 609, the killing occurred during a drunken orgy. The homicide was reduced from first degree murder to manslaughter because there was no evidence of malice, deliberation or premeditation. In People v. Howard, supra, 211 Cal. 322, 295 P. 333, the court reduced the homicide from first degree to second degree murder. There the defendant killed his roommate. There was no evidence of the circumstances of, nor the reason for, the killing, except the defendant's confession. This confession established only second degree murder. In People v. Bender, 27 Cal.2d 164, 163 P.2d 8, the conviction of first degree murder without recommendation was reduced to murder in the second degree. There the killing was accomplished in a drunken orgy and there was no proof of malice or premeditation or deliberation. In People v. Holt, 25 Cal.2d 59, 153 P.2d 21, the conviction of first degree murder without recommendation was reduced to second degree murder. There the decedent kept advancing towards the defendant, after a warning shot by the defendant and a warning not to come closer. In People v. Heslen, 27 Cal.2d 520, 165 P.2d 250, on a rehearing of its first decision, and upon motion of the attorney general, not

resisted by defendant, the court reduced a conviction of murder in the first degree with death penalty, to second degree murder. In none of these cases were the facts similar to those in the case at bar. In the Holt case, Schauer, J. discussed at great length the difference between first and second degree murder and between murder and manslaughter. He adopts the language used in People v. Howard, supra [25 Cal.2d 59, 153 P.2d 38]: " 'To be murder of the first degree, under our statute, the killing must be premeditated, except when done in the perpetration of certain felonies; that is to say, *the unlawful killing must be accompanied with a deliberate and clear intent to take life.*' (Italics added.)" Applying that test here, there can be no doubt that at the time of the shooting defendant had a deliberate and clear intent to take White's life, and his own, as well.

In his brief defendant cursorily states that the shooting was not proved to have been done by defendant's gun. He does not point out in what respects such proof falls short. The defendant admitted the gun was his, and the circumstances of the shooting and the tests made by the expert are so conclusive on this subject that there can be no reasonable question about it.

### No error in Instruction Concerning Degrees of Murder.

[4] Defendant complains particularly of an instruction which used this language in defining murder in the first degree: "There need be, however, no appreciable space of time between the intention to kill and the act of killing—they may be as instantaneous as successive thoughts of the mind." Defendant relies principally on the cases of People v. Thomas, 25 Cal.2d 880, 156 P.2d 7, and People v. Bender, supra, 27 Cal.2d 164, 163 P.2d 8, for his contention that the giving of this instruction was error. Considerable confusion has arisen on the question of what instructions on first degree murder a trial court can safely give since the decision of these two cases. While the Bender case indirectly criticizes this language, it states that it is "abstractly a correct statement of the law." 27 Cal.2d at page 182, 163 P.2d at page 19. It then goes on to say in effect that the objection to the use to jurors of that language is that unless it is fully explained the jurors may be misled by it; they may get the idea that where the act is executed in the very moment it is conceived the matter of premeditation and deliberation may be entirely eliminated, and hence there would be no field for the classification of second degree murder. The important thing, according to the Bender case, is that to make the crime first degree murder there must be deliberation and premeditation in forming the intent. We are here, of course, not considering murder committed in the specified situations such as in perpetration or attempt to perpetrate arson and the other crimes enumerated in section 189, Penal Code, but are considering the part of that section which includes in murder of the first degree "any other kind of wilful, deliberate, and premeditated killing." As pointed out in the Thomas case, the section requires "as an element of such crime substantially more reflection than may be involved in the mere formation of a specific intent to kill." 25 Cal.2d at page 900, 156 P.2d at page 18. The Thomas case then goes on to show that it is the intention to kill which must be deliberate and premeditated and that when that test has been met the act may follow instantaneously. "Since the decision in People v. Sanchez, 1864, 24 Cal. 17, 30, it has been repeatedly declared that 'There need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as successive thoughts of the mind,' but this is not the equivalent of saying that the *intention to kill* can be formed without being preceded by deliberation and premeditation. It is only a declaration that the act of killing may instantaneously follow the intention once the latter is finally formulated. It does not imply that mature reflection (deliberation and premeditation) need not precede the ultimate formation of the evil intention. By its very language it has reference only to the 'space of time between the intention to kill and the act of killing.' In other words, a murder is of the first degree no matter how quickly the act of killing follows the ultimate formation of the intention if that intention has been reached with deliberation and premedita-

tion. This view of the law is manifest in the Sanchez case by the statement (at page 30 of 24 Cal.) that 'The intent to kill must be the result of deliberate premeditation; it must be formed upon a pre-existing reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation.'"

That this is the underlying basic fact of the Bender case is shown by the following (27 Cal.2d at page 184, 163 P.2d at page 20): "The words 'deliberate' and 'premeditate,' as above shown, have clearly defined and commonly understood meanings. In view of such commonly understood meanings it might not be necessary, at least in the absence of a request therefor, for the trial court to instruct the jury at all on the significations of those words, but when it does undertake to define or describe their significativeness any definition or description given should be fair and complete. For example, the jury may be told that 'Neither the statute nor the court undertakes to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent which is truly deliberate and premeditated. The time would vary with different individuals and under differing circumstances. The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly, but the express requirement for a concurrence of deliberation and premeditation excludes from murder of the first degree those homicides (not specifically enumerated in the statute) which are the result of mere unconsidered or rash impulse hastily executed.' People v. Thomas, 1945, supra, 25 Cal.2d at page 900, 156 P.2d 7, 18.) But if they are instructed in that vein, which emphasizes the rapidity with which thoughts may follow each other, fairness requires a further instruction placing at least equal emphasis on the true (see definitions above) meaning of the terms. In other words, while the jury may be told that the brain can function rapidly they must not be misled into thinking that an act can at the same time be hasty, hurried, and deliberate or impulsive, unstudied, and premeditated. The extent of the reflection in every case, if it is to pass the test, must fairly and reasonably meet the ordinary and unquestioned significations of the test words."

[5] A reading of the instructions on first degree murder in our case shows that they were framed from the opinion of Mr. Justice Schauer in the Bender case. After qualifying the previously quoted portion by saying that "In other words, a murder if [is] of the first degree no matter how quickly the act of killing follows the ultimate formation of the intention, *if that intention has been reached with deliberation and premeditation*" the instruction uses verbatim the above quoted language from the Bender case which was taken from the Thomas case. (Emphasis added.) See People v. Thomas, 25 Cal.2d at page 900, 156 P.2d 7. The instruction then goes on to use the very definitions of "deliberate," "premeditated," "malicious intent," and "malice aforethought" given in the Bender case. This instruction is a proper one. Apparently it was thoughtfully and painstakenly drawn to meet the suggestion in the Bender case that language which is abstractly a correct statement of the law might be misunderstood unless properly explained. The very explanation of it given in the Bender and Thomas cases was given here.

In order to constitute first degree murder, as pointed out by defendant, based upon the Howard and Bender and other cases, there must be both deliberation and premeditation. However, to carry the theory of those cases to the conclusion defendant reaches, or to find that under the circumstances of this case evidence did not fully justify the finding that there was both such deliberation and premeditation, would mean that no longer in California would a first degree murder conviction stand unless there were eyewitnesses at the exact moment of killing, and unless the defendant himself at the moment of killing stated something to the effect that he had fully deliberated and premeditated and knew what he was doing. To hold that the logical and reasonable inferences from the circumstances which preceded the killing cannot be used by the jury in determining whether there was such deliberation and premeditation on the part of the killer, is to make a travesty of justice, because there always will be, as here, killings in which the movements of the killer immediately before and at the time of the killing cannot be shown. Moreover, it is impossible to show the workings of a defendant's mind other than by his acts. Yet this is the result the defendant is contending for here, that because no eyewitness saw the killing or heard the defendant say what was in his mind (except, of course, his statement to Goldie that he was going to take matters into his own hands, which the defendant passes off as of no importance) the jury may not consider the facts in this case which would cause any reasonable person to conclude that there had been the deliberation and premeditation required by the law. Life is being too lightly regarded as it is, but to stretch the rule in the Bender and Thomas cases to the extent asked for here, would mean that the taking of life never could constitute first degree murder except where taken in connection with the commission of crimes mentioned in section 189 of the Penal Code. To reduce the degree here to second degree or manslaughter would be to ignore completely the evidence and the fact that a jury, which is the exclusive judge of the credibility of witnesses (People v. Robinson, 49 Cal. App.2d 576, 122 P.2d 77, saw the witnesses, and decided on very substantial evidence that defendant was guilty of first degree murder. In doing so, they resisted the sympathy they must necessarily have had for a man whose wife had been taken from him by a superior officer, who had knocked at death's door and been saved therefrom by a miracle, who fainted on the stand, and because of his condition required many recesses of court.

[6] The rule on appeal in this respect is well stated in People v. Thomas, supra, 25 Cal.2d 880, 904, 156 P.2d 7, 20, "Defendant urges that the rule is 'that the judgment must be reduced *when there is a doubt* as to the sufficiency of the evidence to support the higher crime' and that 'the doubt which justifies the reduction is the court's doubt and furthermore it is the doubt of *the particular court passing upon the question.'* (Italics added.) This view of the law would require courts of appellate jurisdiction in all cases involving crimes divided into degrees or including lower offenses, where the defendant was convicted of any other than the lowest possible class or degree, to examine and pass upon the *weight* of all the evidence in the record. We are satisfied that the trial court (with or without a jury), as the original trier of facts, having the witnesses before it and possessing facilities peculiarly appropriate and convenient to the ascertainment of facts, is in a better position than are we to pass upon the weight of evidence, and that the Legislature in amending subdivision 6 of section 1181 of the Penal Code to provide that 'When the verdict is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed,' did not intend to effect a general alteration of the rule as to the respective functions of trial and appellate courts. While the *power* granted to the appellate court is equal to that given the trial court the circumstances which will justify its exercise in a particular court are those which are appropriate to typical functioning of that court. In other words, upon an application to reduce the degree or class of an offense, a trial judge may review the *weight* of the evidence but an appellate court should consider only its *sufficiency as a matter of law.* This is in accord with the general rule stated in People v. Holt, 1944, supra, 25 Cal.2d pp. 59, 70, 153 P.2d 21, 28: 'The function of the jury was to appraise the weight of the evidence; ours is to appraise its legal adequacy' and (25 Cal.2d at page 90, 153 P.2d 21 at page 38) 'While the jury is given the function of determining the facts upon the evidence it does not have the power of changing the standard [as to what constitutes murder of the first degree as distinguished from murder of the second degree].' Implications to the contrary in People v. Howard, 1930, supra, 211 Cal. 322, 330, 295 P. 333, 71 A.L.R. 1385, are disapproved. Having examined the record in

this case we do not feel constrained to hold that the evidence is legally inadequate to support a verdict of murder of the first degree. Hence, we are not authorized to reduce the judgment under our view of section 1181(6) of the Penal Code."

[7] If there were error in giving this instruction, and there was not, such error would not be prejudicial under section 4½ of Article VI of the Constitution. There was no evidence in the case upon which a jury could reasonably believe that the intention to kill was formed the very instant of the act. Among many other factors his appearance at the door of the apartment with a loaded gun which most of the day had been unloaded, after he claims that he did not want to see White again, his act earlier that day in endorsing on an envelope the direction to notify his mother when he already was carrying an envelope with a similar direction on it, and his suicide attempt, would completely negative any possible inference that the killing was the result of a spur-of-the-moment thought.

Although not necessary to a finding of first degree murder, in view of all the other testimony in the case, it is a very reasonable inference from the evidence that just before the shooting defendant was waiting in or around the apartment building for the Whites to return, and hence, actually was "lying in wait," which under section 189 of the Penal Code is conclusively presumed to show wilful, deliberate and premeditated killing.

### The Instructions on Unconsciousness.

The court after instructing the jury that if a person commits an act while unconscious he does not thereby commit a crime, that unconsciousness is classified separately from insanity, and defining what is the state of unconsciousness, giving somnambulism as an example, then gave the following instruction: "You are instructed that the inability to remember is not evidence of unconsciousness. The inability of a defendant or a witness to remember is of such common occurrence and so naturally accountable for upon the normal defects of memory, or, what is more likely, the intentional denial of recollection, as to raise in and of itself not even a suspicion of unconsciousness."

[8] Defendant contends that this instruction is untrue as a matter of fact and improper as a matter of law. It was taken practically verbatim from the opinion in People v. Sameniego, 118 Cal.App. 165, 4 P.2d 809, 5 P.2d 653, where it was used in considering defendants' claims that because of the use of a certain drug they were unconscious at the time they made confessions of guilt. The court held that statements of inability to remember are not evidence of unconsciousness at the time of the confessions, because such alleged forgetfulness is a matter "of such common occurrence and so naturally accountable for upon the normal defects of memory, or, what is more likely, the intentional denial of recollection, as to raise not even a suspicion of the declarations having been made while in an unconscious condition." 118 Cal.App. at page 172, 4 P.2d at page 812. This instruction is incorrect in that evidence of forgetfulness may be an element in the proof of unconsciousness. However, it is certain that a defendant's mere statement of forgetfulness, unsupported by any other evidence, is at most very little evidence of unconsciousness at the time of performing a particular act. There must be something more than his mere statement that he does not remember what happened to justify a finding that he was unconscious at the time of that act. Here the only purported evidence of unconsciousness was the defendant's own statement of lack of memory. No explanation was offered, by medical testimony or otherwise, as to why he did not remember, nor as to why he was unconscious, if he ever was, except, of course, some intimation that Goldie's talk with him about the coming birth of the child, and her request for him to stay when he told her he was going to Norfolk to get married, might have caused it. The error in this instruction was error without prejudice. The defendant offered no instruction on the defense of unconsciousness. The court fully and fairly (with the exception of the above-quoted portion) instructed on the subject of unconsciousness. There was no evidence upon which the jury would have been justified

in finding that defendant did not know what he was doing at the time of the shooting. Defendant claims that the last clear thing he remembered until about the time of the preliminary examination, on March 26th, was leaving Goldie's apartment between 3 and 4 p. m. on the day of the shooting. That too much reliance cannot be placed on his claim of lack of memory is shown among other things by the following incident: When asked if he had not called her to find out if she had changed her mind about not leaving White, he definitely said (rep. tr. p. 280): "That call was for money. *I called her.*" (Emphasis added.) Later when asked by his counsel if he made the call, he said he could not say, he might have. While he claims his memory is a bit hazy about what happened in the apartment, he clearly remembers that he had told her he would call her about the money. He told his sister a couple of hours after the shooting, "get Goldie here, she can tell you everything"; and the medical student the day after the shooting that he had shot both White and himself. On March 15 he told a police inspector that he would rather wait a couple of days before telling what happened and made no claim that he did not remember. On March 18 he remembered that he had told the inspector "the other day" what had happened and that he had told the inspector that he drank some beer on the day of the shooting. He then stated, "I remember everything that happened."

[9] Defendant at no time has stated that he was unconscious at the time of the shooting. His only claim is that he does not remember what happened. No reasonable explanation at the trial was attempted of why he should have become unconscious. Admittedly he used no drugs. True, at the trial he said he had some beer that day; at the hospital he apparently told the inspector he had had 10 or 11 beers. The barkeeper who saw defendant angrily talking on the phone at 4 o'clock said he was not intoxicated, and of course unconsciousness brought about by voluntary intoxication would not be a defense. It could only be used on the question of intent in determining degree. Sec. 22, Penal Code; People v. Sameniego, supra, 118 Cal.App. 165, 4 P.2d 809, 5 P.2d 653. Defendant at no time has claimed he was intoxicated, nor did he offer any instructions on the effect of intoxication.

Defendant's brief nowhere points out any facts which could have been a basis for a claim of unconsciousness, and any claim that Goldie's action towards defendant may have upset him so that he did not know what he was doing is inconsistent with his testimony. He testified that before leaving Goldie's apartment that day, she had exhorted him not to go away but to see her through the birth of his child, and had told him that she was going to leave White for him, although he had not asked her to do so, and she had promised to try to get for him the money he needed, and that he then told her he was going to Norfolk to marry another girl and that he did not want to meet White again. According to his story, what was there to upset him? He did not get particularly upset the year before when he found out that Goldie had divorced him so that she could immediately marry White, nor when he learned that she had married; she was still living with him on occasions; she was going to bear his child, then leave White; she was even going to raise money for him. Moreover, defendant had had about 8 months to become reconciled to Goldie's marriage to White. In the preceding November defendant had written, "Goldie, I sure feel relieved, to a certain extent, knowing that we are completely through, before I had hopes, but when you stop and consider everything I don't see how we could make a go of it, as you know too much has happened. Guess it is just as well this way." On the other hand, taking her story that she refused to leave White for him, she had done that before. There was no circumstance this time that would have caused such an upset as to cause his mind to go blank, and there is no testimony that any or all of these things would cause unconsciousness. An examination of the record shows that defendant changed his mind about what he was going to say about the circumstances of the crime. He first decided to tell the truth that he shot both

White and himself, then he decided to claim that White shot him, and then he changed his mind and decided his best out was to claim he did not remember what went on. It is not reasonable to assume under the circumstances of the case that the verdict would have been any different had the court not given the complained of instruction.

### Manslaughter Instruction.

[10] In instructing on manslaughter the court stated in effect that in determining the type of passion which would reduce the crime to manslaughter it must be based upon such facts and circumstances as were sufficient to arouse the passions of an ordinary and reasonable person. Defendant objects to this test. However, he offers no authority in support of his position except an abstract statement by the late Mr. Justice Holmes. The instruction in question is the identical language in which the opinion in People v. Logan, 175 Cal. 45, 49, 164 P. 1121, says the court should advise the jury; hence there can be no error in giving the instruction.

### Instruction on Self Defense.

[11] Defendant offered several instructions correctly stating the law as to self defense. The court refused to give any, apparently on the theory that there was no evidence on which to base a claim on self defense. The court did not err. There is not one iota of evidence of self defense in the case. Defendant's whole contention in this behalf is based upon the testimony of defendant's mother, stepfather, sister and brother-in-law that on March 19 (7 days after the shooting) they saw some blue and greenish-yellow bruises on defendant's legs and arms. There was no testimony that they were there prior to the 19th. The medical student, who testified it was his duty to look for presence or non-presence of abrasions or lacerations, saw none on the night of the shooting nor at any time thereafter, except that defendant had a sore left leg due to blood transfusions given him. In addition the police inspector and the criminologist who saw the defendant naked, saw no such markings. Any claim of self defense in this case is completely fanciful in view of what took place at the Whites' door. The defendant does not claim that he was acting in self defense, nor that any occasion arose justifying the shooting. He just says he does not remember. To expect serious consideration of such a claim there must be something more than bruises discovered a week later by the family of a man who appears at the victim's door with a loaded revolver. Where there is no evidence tending to show that the homicide was committed in self defense, instructions on self defense should not be given. People v. Manoogian, 141 Cal. 592, 75 P. 177; People v. Stephens, 5 Cal.App.2d 33, 42 P.2d 86.

### Exclusion of Evidence.

[12] On cross-examination Goldie was asked, "Isn't it a fact that on the next day [after his arrival when she was getting her divorce] you and he registered at the Travelers Hotel in Reno as Mr. and Mrs. John Coston?" The court sustained an objection to this question. If this was error, it was cured later on in the trial when Goldie was asked, referring to the same time: "Q. Did you check in at the Travelers with him? A. No, I did not. He checked in as Mr. and Mrs. because they would not let him have a room by himself. Q. Were you there when he checked in? A. No, I wasn't."

[13] Goldie wrote defendant at Norfolk 11 letters while she was in San Francisco living with her husband White. These letters were offered in evidence. At first the court sustained objections to their introduction. Later the following occurred: They were again offered in evidence. The court stated that there might be some portions of the letters which would be contradictory of testimony given by Goldie, and that such matters would be admissible. He then suggested that counsel look the letters over and call the attention of the court to the portions of the letters which came within that category. Later defendant read into evidence portions of the letters which had apparently been agreed upon in conference, but expressly not waiving his offer of all portions of the letters. Defendant

then asked for a recess to have an opportunity to go through all the letters "because there are other parts that may be germane to the issue and admissible." Upon returning from the recess this occurred:

"Mr. Peery [for the prosecution]: * * * If your Honor please, in the interest of time, if counsel wishes to read all the letters, I withdraw my objection. I feel certain portions of them are not material, and under your Honor's ruling I think you feel the same way, but in the event they want to read them all, go ahead.

"The Court: Or read them in argument?

"Mr. Peery: We can stipulate we can refer to them in argument.

"Mr. Klein [for the defense]: Yes." Still later, the subject of the letters was again brought up.

"The Court: Is that all this afternoon, gentlemen, or are you going to read those letters, whatever you desire?

"Mr. Toner [for the defense]: I think we have stipulated if we desire to read the letters in argument we may use any portion of them.

"Mr. Peery: How about the other one? Shall I put that in and refer to that in argument?

"Mr. Klein: Yes. It is a letter from his sister to Johnny. It is certainly agreeable to be put in. If you have any letters other than these, Mr. Peery,—the police got all the letters in Johnny's possession, produce them and we will be glad to take them in. They may be offered as the prosecution's.

"Mr. Peery: Next in order.

"Mr. Klein: Yes."

It is clear that any error the court might have committed in at first denying admission to the letters was later cured. To all intents and purposes, all the letters were in evidence and so considered by the parties. Moreover, we have read the letters and the omitted portions are merely cumulative of the relationship between defendant and Goldie, which was already well shown in the portions read to the jury.

The judgment is affirmed.

PETERS, P. J., and FINLEY, J. pro tem, concur.

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82 Cal.App.2d 143

## RALSTON v. HEWITSON.

Civ. 13388.

District Court of Appeal, First District, Division 2, California.

Oct. 30, 1947.

**1. Automobiles ⚿227(3)**

Where pedestrian, becoming frightened while crossing four-lane highway at night, voluntarily left place of safety on island in center of highway and ran in front of defendant's automobile, "last clear chance" doctrine was not applicable.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Clear Chance".

**2. Negligence ⚿83**

"Last clear chance" doctrine applies only where defendant is aware of dangerous situation of plaintiff due to his own negligence under such circumstances that defendant realizes, or ought to realize, plaintiff's inability to escape and has the last clear chance to avoid injuring plaintiff by exercise of ordinary care, but fails to do so.

◆

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Albert A. Ralston against Thomas L. Hewitson for injuries sustained when struck by defendant's automobile. Judgment for defendant, and plaintiff appeals.

Judgment affirmed.

O'Day & Kearns and Melvin Cohen, all of San Francisco, for appellant.

Bronson, Bronson, & McKinnon, of San Francisco, for respondent.

NOURSE, Presiding Justice.

This appeal presents the single question whether the trial court erred in refusing to instruct the jury on the last clear chance doctrine.

To avoid controversy we will accept appellant's statement of the evidence in the light most favorable to him. At about 10 P.M. of September 10, 1944, appellant, a pedestrian, attempted to cross the four-lane highway running through the town of Ignacio. He passed safely to the center where he paused to look for traffic. He saw a car coming behind him from the south. He saw respondent's car about two hundred feet away coming from the north. He became frightened and dashed in front of respondent's car.

It should be added that the center strip where appellant stood while watching the approaching cars was an "island" running throughout the length of this portion of the highway approximately four feet wide.

[1, 2] There was no error in refusing to give the proposed instruction. "The last clear chance rule presupposes: That the plaintiff has been negligent; that as a result thereof she is in a situation of danger from which she cannot escape by the exercise of ordinary care; that the defendant is aware of her dangerous situation under such circumstances that he realizes, or ought to realize, her inability to escape therefrom; that he then has a clear chance to avoid injuring her by the exercise of ordinary care, and fails to do so. If all of these elements are present, the rule applies and enables the plaintiff to recover, notwithstanding her own negligence. But if any of them be absent the rule does not apply, and the case is governed by the ordinary rules of negligence and contributory negligence." Palmer v. Tschudy, 191 Cal. 696, 700, 218 P. 36, 37.

We had occasion to enlarge upon this statement in Poncino v. Reid-Murdock & Co., 136 Cal.App. 223, 227, 28 P.2d 932, 934, where this court said: "In other words, it is not enough to relieve a plaintiff of his own negligence that the defendant may have had *a chance* to avoid the accident, but defendant must have had the *last chance* and also had a *clear* chance to do so by the exercise of *ordinary* care. That he should have had the *last chance* implies that his chance to avoid the accident must have come later in point of time than any similar chance on the part of the injured person. That he should have had a *clear chance* implies that he must have had more than a *bare possible chance* to avoid an unexpected peril created practically simultaneously with the happening of the accident by the negligence of the injured party."

Again in Johnson v. Sacramento Northern Ry. Co., 54 Cal.App.2d 528, 533, 129 P.2d 503, and Rather v. City & County of San Francisco, 81 Cal.App.2d 625, 184 P.2d 727, this court followed the rule of the Poncino case. In Johnson v. Sacramento Northern Ry. Co., supra, 54 Cal.App.2d at page 532, 129 P.2d at page 505, numerous cases were cited supporting the doctrine of Palmer v. Tschudy. We see no purpose in prolonging the discussion since the evidence discloses that appellant voluntarily left a place of safety in such a manner that respondent had no chance to avoid the injury.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

82 Cal.App.2d 16

## Ex parte MARTIN.

Cr. 2025.

District Court of Appeal, Third District, California.

Oct. 22, 1947.

Hearing Denied Nov. 20, 1947.

**1. Criminal law 🔑982**

One who pleaded guilty to charge of driving a vehicle while under influence of intoxicating liquor and admitted prior conviction of receiving stolen goods was ineligible to probation, but consequent invalidity of order of probation did not render void for lack of jurisdiction subsequent sentence to prison upon revocation of probation for violation of terms thereof. Pen.Code, §§ 1191, 1203; Vehicle Code, § 501.

**2. Criminal law 🔑977(3)**

A probationary proceeding is not "disposed of" within meaning of statute extending time for pronouncement of judgment and sentence until probationary proceeding has been disposed of until defendant has satisfied conditions of probation and been discharged or has had his probation revoked and sentence pronounced against him. Pen.Code, §§ 1191, 1203.

See Words and Phrases, Permanent Edition, for all other definitions of "Dispose Of".

**3. Criminal law ⟹977(3)**

Failure to pronounce judgment within the time limited by statute is not jurisdictional. Pen.Code, § 1191.

**4. Habeas corpus ⟹30(3)**

Defendant, having applied for, consented to and taken advantage of favorable terms of probation, though ineligible therefor due to prior conviction of felony, could not, after probation had been revoked for violation thereof, challenge for the first time on habeas corpus court's jurisdiction to pronounce sentence. Pen.Code, §§ 1191, 1203.

**5. Criminal law ⟹982**

Provisions in order requiring as condition of probation that defendant, among other things, pay $500 fine and serve first 30 days of probational period in county jail did not constitute a judgment or sentence and compliance therewith did not deprive court of jurisdiction to sentence defendant to prison for offense of which he originally pleaded guilty, when probation was revoked for violation of other terms thereof. Pen. Code, § 1203.

◆

Proceeding in the matter of the application of Charles W. Martin for a writ of habeas corpus directed to Robert A. Heinze, Warden of the California State Prison at Folsom.

Writ discharged and prisoner remanded.

John J. Wells and Patrick J. McCarthy, both of Sacramento, for petitioner.

Fred N. Howser, Atty. Gen., and Doris H. Maier and Leonard M. Friedman, Deputy Attys. Gen., for respondent.

THOMPSON, Justice.

Upon habeas corpus it appears that petitioner was charged by an amended information filed in Madera County November 14, 1946, with the crime of driving a vehicle while under the influence of intoxicating liquor, contrary to section 501 of the Vehicle Code, and three prior convictions of felonies. He pleaded guilty of the principal offense and admitted the prior felonies. Probation was granted and the defendant signed a written consent to the terms thereof. Probation was erroneously granted for the reason that section 1203 of the Penal Code precludes the granting of probation when the defendant has been previously convicted of any felony. The petitioner admitted a prior conviction of the crime of receiving stolen goods. Sentence was suspended November 16, 1946, and the court ordered that petitioner be granted probation for a period of two years on condition that he pay fine of $500 and serve thirty days' imprisonment in the county jail, and refrain from the use of intoxicating liquor and narcotics. The fine was paid. On petition of the Probation Officer, after hearing at which the defendant was present and testified in his own behalf, he was found guilty of violating the terms of his probation, and the court, on January 4, 1947, thereupon revoked his probation and sentenced him to state prison "for the term prescribed by law." Pursuant to that sentence he was committed to San Quentin State prison.

The petition for habeas corpus was filed in this court July 7, 1947. The petitioner contends that the order for probation was invalid under section 1203 of the Penal Code, and that, since he paid the $500 fine and served thirty days' imprisonment in the county jail, he is entitled to be released from custody; that the judgment that he pay a fine of $500 and serve thirty days' imprisonment in the county jail has been fulfilled, and the court was without jurisdiction to thereafter sentence him to imprisonment in state prison.

[1] The petitioner was ineligible to probation since it appeared that he had been previously convicted of the crime of "receiving stolen goods." Penal Code, sec. 1203; People v. Superior Court, 136 Cal. App. 541, 28 P.2d 1076; People v. Leach, 22 Cal.App.2d 525, 71 P.2d 594.

[2, 3] The invalidity of the order for probation did not render the subsequent sentence void for lack of jurisdiction under

section 1191 of the Penal Code or otherwise. The court was authorized to revoke the probation for violation of its terms or because probation was unauthorized, and to thereafter sentence the prisoner to state prison for the crimes of which he had been convicted. People v. Patrich, 118 Cal. 332, 50 P. 425; People v. Williams, 24 Cal.2d 848, 850, 151 P.2d 244; In re Goetz, 46 Cal. App.2d 848, 851, 117 P.2d 47; People v. Rubens, 11 Cal.App.2d 576, 587, 54 P.2d 98, 1107; People v. Haines, 64 Cal.App. 628, 222 P. 183; People v. Zuvela, 191 Cal. 223, 215 P. 907; 141 A.L.R. 1225, note; 8 Cal.Jur. 451, sec. 470; 4 Cal.Jur. 10-Yr. Supp. 872, sec. 474. In the present case there was no motion for new trial or appeal from the judgment. The time for sentence was suspended when probation was granted. Sentence was finally pronounced before the probationary period had expired. The defendant consented to the terms of probation, and violated a provision thereof. Regarding the jurisdiction of the court to pronounce a valid sentence under circumstances similar to this case, after five days from the "plea or verdict of guilty," the Supreme Court said, in People v. Williams, supra, that [24 Cal.2d 848, 151 P.2d 245],

"The amended portion of the section [1203 Penal Code] extending the time for pronouncement of judgment and sentence until any probationary proceeding under section 1203 has been disposed of is procedural in nature, is not ex post facto, and did not deprive defendant of a vested right. [Citing authorities.] A probationary proceeding is not disposed of within the meaning of section 1191 *until the defendant has satisfied the conditions of his probation and received his discharge or has had his probation revoked and sentence pronounced against him.*

"Although section 1191 provides that the judgment must be pronounced within a designated period, it has been consistently held that *failure to pronounce judgment within the time specified is not jurisdictional.* [Citing numerous authorities.]" (Italics added.)

[4] Applying the preceding quoted language to the present case, it follows that the probationary proceeding was not finally disposed of until probation was revoked for defendant's violation of its terms or because it was determined to be invalid. He was sentenced to state prison on the same day his probation was rescinded. The defendant may not apply for, consent to and take advantage of favorable terms of probation, even though he was not lawfully entitled thereto, and then, after probation has been duly revoked for violation thereof, challenge, for the first time, on habeas corpus, the right of the court to pronounce sentence, since the time was extended at his request. That would result in a travesty of justice.

In the Patrich case, supra [118 Cal. 332, 50 P. 426], the defendant was convicted of burglary. Sentence was suspended, and it was ordered that he be "allowed to ship upon * * * a deep water vessel." He enlisted as a United States sailor. He consented to the terms of probation. Three years later he was apprehended for violation of his probation. The order suspending judgment was set aside, and he was then sentenced to imprisonment in the state prison. It was contended on appeal that the order amounted to illegal deportation, and that the court was without jurisdiction to sentence the defendant. The Supreme Court held otherwise. The court said: "In substance, it is a mere order that sentence be suspended until the further order of the court; and, said order having been made 'upon motion' of the defendant, he cannot be heard to complain of it."

In an elaborate note found in 141 A.L.R. at page 1225, supported by numerous authorities from various jurisdictions, including that of California, it is said in the caption: "Assuming that a particular suspension of the imposition or execution of a sentence *is not authorized,* the suspension may be revoked or disregarded and the sentence may be imposed or enforced." (Italics added.)

On the following page of the last mentioned authority, it is likewise said in that regard: "Where the court, instead of pronouncing sentence upon the defendant in a criminal case, has suspended the pronouncement thereof *without authority,* it is held in some jurisdictions that the court may thereafter revoke the unauthorized order and impose sentence." (Italics added.)

The foregoing text is supported by the case of People v. Patrich, supra, and many authorities from other jurisdictions.

We conclude that the court did not lose jurisdiction in the present case to rescind the order for probation, although it may have been unauthorized and void, or to lawfully sentence the defendant to state prison for the offenses of which he had been convicted. The judgment is valid.

The petitioner, however, contends that, while the order granting probation was contrary to section 1203 of the Penal Code, and therefore void, it contains a valid, severable judgment that he pay a fine of $500, as penalty for the crime to which he pleaded guilty, and that he be confined in the county jail "the first thirty days" of his probational period of two years, with which last mentioned provisions he complied by paying the designated fine and serving the thirty days of imprisonment in the county jail. He claims that he thereby fulfilled the penalty for the crime prescribed by the court; that the court was therefore without jurisdiction to resentence him to imprisonment in state prison.

In support of the last mentioned contention the petitioner cites and relies upon In re Scarborough, 76 Cal.App.2d 648, 173 P.2d 825, 827. That case is not in point. Probation was wrongfully revoked in that case on the sole ground that the defendant violated the unlawful condition of probation requiring him to immediately depart from "Stockton and San Joaquin County and remain away for the period of two years." That petitioner was not discharged from custody. We merely held that the court had no authority to banish a prisoner and since no other valid term of probation had been violated, his probation was wrongfully revoked and that "he is entitled to his freedom *on probation* unless [or until] it is revoked for lawful reasons." In the present case, probation was properly revoked for violation of valid terms and conditions contained therein, as follows:

"4. That you do not violate knowingly any law of this State or any ordinance of any county or city of this State.

"5. That you absolutely abstain from the use of intoxicating liquors, opium in any form, cocaine or other noxious drugs."

[5] The petitioner was never sentenced to pay a fine of $500 *as a penalty for the crimes of which he had been convicted.* He was merely permitted to pay that fine as one of the conditions of his probation. The fine was incident to the order of probation, and not otherwise. Even though the defendant was not eligible to probation, and that the order was invalid for that reason, it certainly may not be held that payment of the fine was in fulfillment of his sentence, and that he is therefore entitled to be discharged from custody on habeas corpus. No sentence was pronounced at that time. Sentence was specifically suspended.

Clearly the trial judge did not intend to, and the court did not, pronounce judgment as a complete penalty for the crimes of which the defendant had been convicted. It directed that he should serve the first thirty days of his two year probation in the county jail and pay a fine of $500, as some of the conditions upon which the probation was granted. They are inseparable conditions of and mere incidents to the order of probation. The Clerk's minutes show that on November 16, 1946, the court said that, "the defendant *is admitted to probation for the period of two years;* the first thirty days to be confined in the County jail and to pay a fine of $500.00. In lieu of fine to serve 200 additional days in jail, *and terms of probation to be such as set down by the Probation Officer.* * * *" (Italics added.)

On the same date, the trial judge signed the complete order for probation, which was filed seven days later; containing the recital that, "said defendant having made application to the court to be admitted to probation, and it appearing to this court that there are circumstances *in mitigation of punishment prescribed by law* * * * it is hereby ordered * * * that the imposition of sentence upon you be suspended and the same continued for a period of two years * * * upon the following terms and conditions: * * *." (Italics added.)

The specific terms and conditions of the probation were then enumerated, including the terms heretofore mentioned. The defendant signed a written consent to the terms of that instrument on November 16, 1946. He voluntrily paid the $500, and served thirty days in the county jail. The petitioner has suffered no detriment which was not due wholly to his wilful violation of the terms of probation to which he agreed in writing.

The foregoing statement with respect to the probationary requirement to pay a fine of $500 also applies to the condition that the defendant should serve the first thirty days of his probation in the county jail. Those provisions did not constitute a judgment or sentence. In re Goetz, 46 Cal.App. 2d 848, on page 851, 117 P.2d 47, on page 49, it is said, in that regard: "When probation is granted there is no finality to the proceeding; the judgment may be modified or set aside by the court under the statute. An order placing a defendant on probation, even though it include as a condition a period of detention in the county jail, is not a *judgment and sentence.* Also, the imposition of a fine as a condition of probation is not a judgment imposing a fine. People v. Wallach, supra [8 Cal.App.2d 129, 47 P.2d 1071]; People v. Roberts, 136 Cal.App. 709, 29 P.2d 432. 'In this cause, although defendant was guilty and had been *convicted,* having been placed on probation in the first instance there was no *existing judgment* against him. Probation is not a judgment.' In re Marquez, 3 Cal.2d 625, at page 627, 45 P.2d 342, at page 343; In re Herron, 217 Cal. 400, 19 P.2d 4."

The order for probation was properly revoked, not only because the petitioner violated its specific terms, but because it was wholly void since he was not eligible to probation on account of his prior convictions of other felonies. The petitioner has not paid the penalty of his crimes. He is not illegally restrained of his liberty. The court properly sentenced him to imprisonment in state prison. It is immaterial that petitioner served thirty days' imprisonment in the county jail and paid the sum of $500. We have no doubt the proper authority will consider the circumstances of this proceeding in determining the term of imprisonment to be imposed. People v. Chan Chaun, 41 Cal.App.2d 586, 594, 107 P.2d 455.

The writ is discharged and the prisoner is remanded.

ADAMS, P. J., and PEEK, J., concur.

82 Cal.App.2d 136

## LOS ANGELES COUNTY v. IMPERIAL COUNTY.

Civ. 3484.

District Court of Appeal, Fourth District, California.
Oct. 29, 1947.

**1. Paupers 🔑44**

The statute permitting two counties to enter into express contract for payment by one of them for support of indigent residing therein by other county does not forbid accomplishment of same result through implied contract. Welfare and Institutions Code, § 2503.

**2. Paupers 🔑39(4)**

The statutes obligating county to care for indigent persons residing therein, and permitting county board of supervisors to authorize payment of expenses incurred in treating indigent patients in hospitals operated by other counties, sufficiently authorize board to pay such bills. Pol.Code, § 4307, subd. 7; Welfare and Institutions Code, §§ 2500, 2502, 2503.

**3. Paupers 🔑44**

The statutory obligation of county to care for indigent person residing therein, its statutory power to contract to pay another county for such person's support and treatment in hospital operated thereby, and delay by county of patient's residence in committing itself to pay for such treatment, warranted implication of agreement by residential county to repay such costs. Pol.Code, §§ 4075, 4307, subd. 7; Welfare and Institutions Code, §§ 2500, 2502, 2503.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by the County of Los Angeles against the County of Imperial to recover costs incurred by plaintiff in furnishing hospital treatment for an indigent resident of defendant county. Judgment for plaintiff, and defendant appeals.

Affirmed.

L. J. Mouser, Dist. Atty., of Holtville, and Don C. Bitler, Chief Deputy Dist. Atty., of El Centro, for appellant.

Harold W. Kennedy, Co. Counsel, and Gerald G. Kelly and Robert L. Trapp, Deputy Co. Counsels, all of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an action to recover the costs incurred in furnishing hospital treatment, from April 6, 1942, to August 22, 1942, for an indigent resident of the defendant county. The case was tried in Inyo County, by stipulation of the parties, and was submitted on stipulated facts. The defendant has appealed from a judgment awarding the plaintiff $764.43.

One Wilson, a resident of Imperial County, was treated in the Imperial County Hospital from January 31, 1942, to April 3, 1942. Since he had made no improvement he was advised by Dr. Heald, Assistant County Physician, to go to Los Angeles County. It was necessary for Dr. Heald to refer the patient to some physician or hospital outside of Imperial County as there were no facilities therein for the treatment necessary for his condition. Dr. Heald told the patient to go to White Memorial Hospital in Los Angeles, giving him a letter addressed "To Whom it May Concern" stating the general facts of his condition, that there was no one in Imperial County who did the necessary work, and that the patient had been advised that his only chance for recovery was to be in the hands of a qualified chest surgeon. On arriving at the White Memorial Hospital, Wilson disclosed that he was without funds and was referred by that institution to the Los Angeles County General Hospital.

He was admitted to the Los Angeles County General Hospital on April 6, 1942, as the admitting physician found him to be acutely ill and in need of immediate hospitalization. In tracing the events which followed we will, for convenience, refer to the Los Angeles County General Hospital as "the hospital," to the Welfare Department of Imperial County as "the welfare department" and to the Board of Supervisors of Imperial County as "the board." On April 7, the hospital sent a telegram to the welfare department asking it to wire an authorization to pay the bill for Wilson, stating that he had been sent to Los Angeles County without funds by Dr. Heald for the reason that Imperial County had no facilities for his care. The welfare department did not refer this matter to the board but on April 9, wired a reply stating that it was not authorized to act and that the board was the only body empowered to comply with the request. On April 10, the hospital wired the board asking it to wire an authorization to pay for the hospital care of Wilson, stating that he had been sent to Los Angeles County without funds by Dr. Heald because there were no facilities in that county to give the needed treatment. The board referred this request back to the welfare department which, on April 13, wrote the hospital that its request would be referred to the board at its meeting on April 20. On or about April 22, the welfare department phoned the hospital and asked for an estimate of the cost of this care. On April 24, the hospital wired the welfare department stating that the care up to April 22 was $74.46, that the diagnostic work was not completed, and that it was not possible to prognosticate the extent of care. Subsequently, the hospital "was given to understand that Imperial County would not commit itself without a definite statement of cost" which the hospital "could not issue since * * * no financial costs could be estimated as diagnosis was impossible at that time."

Nothing more was heard from Imperial County and on May 22, the hospital wired the welfare department setting forth the bad condition of the patient, stating that prolonged hospitalization was indicated and asking authorization to pay for this care. On May 25, the welfare department wrote to the hospital asking to be informed as to the daily cost of care, plus laboratory charges, and also as to the type of treatment necessary in order that they could ascertain whether or not such treatment could be given locally. At that time it was not possible for the hospital to render an estimate of specific financial costs as no one knew what the correct diagnosis was nor what would be needed in the way of treatment. On June 12, the hospital wired the welfare department stating that it was still unable to establish a diagnosis but that chest surgery was indicated, stating that the cost per day was $4.44 without extras, asking them to see Dr. Heald for an answer as to whether Imperial County could give the necessary care, and stating that unless authorization to pay the bill was received soon from the board they would have to return the patient to Imperial County.

On June 24, the hospital wrote to the State Department of Social Welfare outlining what had occurred, stating that no reply had been received to their wire of June 22, and asking that department whether they should jeopardize the life of this patient by sending him to the county of his residence but which had no facilities for treatment or, if not, who would pay for his care.

During July, the hospital's doctors succeeded in diagnosing the patient's trouble and effective treatment was secured. The bill rendered indicates that surgery was employed. On August 14, the doctors expressed the opinion that the patient was able to travel to Imperial County but expressed doubt as to its advisability at that time. On August 22, the patient was discharged. A claim for payment for the services rendered was duly filed with the board and denied by it.

Several months later, the State Department of Social Welfare held a hearing in the matter after which it rendered a decision stating that Wilson was a resident of Imperial County, but refusing to decide who was responsible for the payment of his care while in the Los Angeles County hospital.

Although findings were unnecessary, in view of the stipulated facts, the court made findings of fact. Among other things, it was found that on April 22, the defendant advised the plaintiff to return the patient to defendant county for treatment; that plaintiff did not return the patient and continued with his hospitalization; that because of the condition of the patient at that time it was not advisable or humane for him to be returned to the defendant county; and that there was no unreasonable delay in furnishing an estimate of costs because no one knew what the diagnosis was or what would be needed. Because it is largely relied on by the appellant, it should be observed that there is nothing whatever to support a finding that on April 22 the appellant advised the respondent to return the patient to Imperial County for treatment, although there is support for findings to the effect that he could not be returned because of his condition. The only evidence in the record which has any relation to a request for a return of the patient is that contained in the letter of the welfare department of May 25, asking that it be advised as to the daily cost of care, and also concerning what treatment was necessary, in order that it could be ascertained whether or not treatment could be given locally.

The appellant contends that a recovery in such a case as this is not authorized by any statute, that there was no express agreement between these counties as permitted by section 2503 of the Welfare and Institutions Code, that the matter is strictly statutory, and that since no statute imposes liability the doctrine of implied contract is not applicable.

[1, 2] The judgment is sufficiently supported by the statutes and by the acts and conduct of the parties, which were sufficient to constitute an implied contract. Section 2500 of the Welfare and Institutions Code imposed an obligation on the appellant to care for this indigent person. While section 2502 gave the respondent the right to return the patient to Imperial County, this was neither necessary nor reasonably possible under the circumstances. Section 2503 permits two counties to enter

into a contract under which the county wherein an indigent resides will pay another county for his support. While that section provides for an express contract there is nothing therein which forbids or makes illegal an accomplishment of the same result through an implied contract. Subdivision 7 of section 4307 of the Political Code provides that the board of supervisors may, in its discretion, authorize the payment of expenses incurred in treating indigent patients in a hospital operated by another county. These sections sufficiently authorize and empower a board of supervisors to pay such bills, where the circumstances warrant, and it cannot be said that such payments are entirely unauthorized by statute. Section 4075 of the Political Code, in requiring the presentation of claims, recognizes that they may be based upon an implied contract by requiring the filing of any claim whether it "be founded upon contract, express or implied, or upon any act or omission of the county or any officer or employee thereof."

[3] The appellant county knew that the respondent county was giving this treatment in an emergency case and that it was demanding and expecting to be reimbursed therefor. While the appellant county refused to commit itself or, more properly speaking, delayed in committing itself it allowed the situation to go on, continued to ask for information which it was not then possible for the respondent to furnish, and at the same time it avoided making any definite statement to the effect that it denied responsibility or would eventually refuse to pay for the service being rendered. The statutory obligation, the statutory power and the action of the parties are sufficient to constitute a situation from which the law will imply an agreement to repay the costs thus expended. Being a claim which the board had the right and power, under the law, to allow and order paid it is one for which it became liable under the well-known principles of an implied contract. County of Tulare v. County of Kern, 132 Cal.App. 462, 22 P.2d 750; Union Bank & Trust Co. v. Los Angeles County, 2 Cal.App.2d 600, 38 P.2d 442. The board of supervisors of the appellant county exercised its discretion by permitting these treatments to go on, with full knowledge of the facts, without taking any more definite advance action.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

82 Cal.App.2d 145

**PEOPLE v. SPARKS.**

**Cr. 4140.**

District Court of Appeal, Second District, Division 1, California.

Oct. 30, 1947.

**1. Criminal law 🔑522(1)**

Alleged confessions were not rendered involuntary by subsequent action of police officer, who allegedly called accused a vile name and pulled him by the hair.

**2. Criminal law 🔑522(1)**

Alleged confessions were not rendered involuntary by fact that accused was apprehensive of bodily injury because, prior to his arrest, he had read a newspaper account of another prisoner having been beaten by the police.

**3. Criminal law 🔑736(2)**

Where police officer testified that statements attributed to accused were freely and voluntarily made, without threat, violence, promise of immunity, or other inducements, credibility of accused who testified that his statements were made involuntarily or in response to promises of immunity became a matter for determination by the court in the first instance, and then by the jury.

**4. Criminal law 🔑1159(3)**

Where the evidence is conflicting, it is only when determination of the triers of fact is so barren of support in the evidence that to adopt it would result in fundamental unfairness violative of due process that District Court of Appeal is warranted in rejecting their determination.

**5. Criminal law 🔑517(1)**

A proper foundation having been laid by preliminary showing that alleged confessions were voluntarily made, without any offers of immunity, leniency, threats, or inducements, confessions were admissible, subject to right of accused to challenge admissibility by proof that they were not freely and voluntarily made or made because of offers of immunity or hope of reward.

**6. Criminal law 🔑1158(4)**

Where evidence of whether alleged confessions were freely and voluntarily made was conflicting, reviewing court would uphold decision of the triers of fact if there was substantial evidence to support it.

**7. Burglary 🔑41(2)**

In burglary prosecution, corpus delicti was established by testimony of three householders whose homes were burglarized, as to the essentials of burglary.

**8. Weapons 🔑17(4)**

In prosecution for violation of the deadly weapon act, corpus delicti was established by testimony of arresting officers that at time of arrest accused was armed with blackjack, coupled with testimony of accused at the trial admitting such possession. Gen.Laws, Act 1970, § 1.

**9. Criminal law 🔑563**

The corpus delicti need not be proved by direct, positive evidence, but may be proved by circumstantial evidence and reasonable inferences drawn therefrom.

**10. Burglary 🔑41(2)**

In burglary prosecution, when prima facie evidence was presented that homes in question were entered with intent and purpose of committing larceny, evidence in support of corpus delicti was sufficient.

**11. Criminal law 🔑563**

Connection of accused with crimes charged against him is not part of the corpus delicti.

**12. Burglary 🔑45**
**Weapons 🔑17(5)**

In prosecution for burglary and for violation of the deadly weapon act, evidence including alleged confessions and testimony to establish corpus delicti was sufficient for the jury. Gen.Laws, Act 1970, § 1; Pen. Code, § 1118.

**13. Criminal law 🔑720(6)**

Counsel in argument may draw any reasonable inferences from the evidence and give to the jury his version of what is shown by the evidence, and also point out such conclusions as may fairly be drawn therefrom.

**14. Criminal law 🔑1171(3)**

In burglary prosecution, where knife was admitted in evidence, there were scratches on blade of knife, accused admitted possession of the knife, and there was testimony that screens on houses burglarized had been cut with a sharp instrument, remarks of district attorney in argument calling attention to scratches on the knife and referring to fact that in all the burglaries screens were cut out were not prejudicial because of absence of evidence that accused had cut the screens with the knife.

**15. Criminal law 🔑517(4)**

Proof of the corpus delicti beyond a reasonable doubt is not required as a prerequisite to admission of a confession, a prima facie showing being sufficient.

**16. Criminal law 🔑516**

Whether alleged statements of accused were confessions or admissions did not affect admissibility where proper foundation was laid for introduction of statements as though they were confessions.

**17. Criminal law 🔑829(9, 11, 12, 16, 18)**

Failure to give proffered instructions referring to exclusive prerogative of jury to determine weight of evidence and credibility of witnesses, doctrine of reasonable doubt and presumption of innocence, admission of confessions, and possession of property taken by means of burglary, soon after commission of such burglary, was not prejudicial where such subjects were fully, correctly and fairly stated in other given instructions.

**18. Burglary 🔑41(1)**
**Weapons 🔑17(4)**

Evidence sustained conviction of burglary and of violation of the deadly weapon act. Gen.Laws, Act 1970, § 1.

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

George Sparks was convicted under an information accusing him of burglary in three counts and violation of the deadly weapon act in a fourth count, and he appeals.

Affirmed.

Marshall A. Stutsman, of Whittier, for appellant.

Fred N. Howser, Atty. Gen., and John F. Hassler, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused in three counts of the crime of burglary and in a fourth count with a violation of the deadly weapon act Stats.1923, p. 695, Deering's Gen.Laws, Act 1970, sec. 1.

Following the entry of not guilty pleas to all counts the cause proceeded to trial before a jury, resulting in verdicts finding the defendant guilty on each count of the information, and fixing the degree of the three burglaries as of the first degree. From the judgment of conviction defendant prosecutes this appeal.

It is first contended that "the verdict of the jury and the judgment pronounced thereon is contrary to law and is not supported by the evidence". This contention makes it necessary to narrate the facts which gave rise to this prosecution.

As to Count I, H. W. Toone testified that on the night of September 27, 1946, after locking his residence he departed therefrom about 7 P.M. Upon his return around 11 P.M. that night he discovered the back door to his house was open and that a 10-inch gash had been cut in the screen. The house had been thoroughly ransacked, clothing and other articles being disarranged. A desk drawer had been broken open and a .38 Colt revolver, a wallet and several coins were missing. At the trial this witness identified a coin and a .38 Colt revolver as being articles taken from his home, and also identified a holster as being similar to the one taken from his residence.

Concerning Count II, there was testimony by E. C. Wieting, a police officer of the City of San Fernando, that on the evening of October 30, 1946, he departed from his home about 6:30 P.M., that upon returning thereto about 10:15 P.M. that night he noticed the rear door was open and the glass portions thereof broken. A writing desk in the living room had been ransacked as had some other drawers and closets. Some money, a "sap" or blackjack, a bunch of keys, two gold watches and two small baby rings were missing. At the trial this witness identified a small gold Elgin watch and a blackjack as being articles that were taken from his home. He further testified that the baby rings had been recovered.

With reference to Count III, Dr. James C. Campbell testified that on November 1, 1946, he left his house about 7 P.M. Upon returning about 9:30 P.M. he discovered that the bathroom window had been broken, that the screen had been taken off, the wire being cut with some sharp instrument and the window opened. Upon entering the house, Dr. Campbell discovered several drawers open and clothing and other contents thereof scattered about. A diamond engagement ring, a dinner ring and a locket were missing. At the trial this witness identified a locket offered in evidence as the one taken from his home, and testified that one of the rings had been returned to him.

As to Count IV, there was testimony that at the time of his arrest, appellant had in his possession what is commonly known as a blackjack. Testifying in his own behalf appellant admitted possession of the same.

Police officer Jack L. Richards testified he was one of the arresting officers; that he stopped appellant on the evening of November 6, 1946 at about 7:10 P.M.; that he searched the defendant and found a sap in his pocket and a .38 Colt revolver under his belt; that the gun itself was concealed under the clothing; that the sap and the revolver offered as exhibits were the same articles referred to. That at the time the gun was removed it was fully loaded. That the defendant was then taken to the station and questioned. The witness identified a pocket knife, offered as an exhibit, as being the knife in the possession of the defendant. Richards stated that the defendant was carrying a flashlight and gloves in his pocket. The witness stated that the keys offered as an exhibit for identification were found in a canvas bag belonging to defendant and checked in a locker at a bus depot; that defendant had a key to the locker in his pocket; that on searching the locker the keys were found in the canvas bag. The officer testified that immediately after taking the defendant to the station he had a conversation with him; that there was no force or violence used, no promise of immunity or hope of reward extended, and that the statements were made freely and voluntarily. That defendant was asked how he got the gun and stated that he bought it from a soldier; that he did not know any of the houses, and, with reference to the sap, he did not recall where he got it. That possibly the next day the witness had another conversation with defendant at the police station; that the statements were made freely and voluntarily; that there was no force or violence employed, and no promise of immunity or hope of reward was extended. The witness asked the defendant if he went to the home of Mr. Toone, Dr. Campbell and Mr. Wieting, and the defendant stated that he did go into those three. H said that he could probably point them out; however that it was dark at the time he saw them and they would not look the same in the daytime. The day after his arrest, defendant was taken in a car to observe the homes. When he saw the Toone home (Count I), defendant pointed it out and said that he recognized it. He stated, "Yes, I made that place." The defendant stated to Richards that he took out of that home a four-inch Colt commando, the holster, and the coins. He stated it was the same gun he was carrying at the time he was arrested. When the officers and the defendant passed the Wieting home (Count II), the defendant was asked if he recognized the house and he said he did; that there was a light bulb hanging low on the back porch and that he bumped his head on it as he entered. The officer asked the defendant if he knew it was an officer's home and defendant said he did because of the sap. He stated it was the same sap he was carrying when arrested. When they passed Dr. Campbell's home (Count III) the defendant stated that he "made" that house. As they were going by Dr. Campbell's house the officer asked defendant his method. The latter replied that he used the butt of his flashlight to break the glass, reached in, unlatched the window and went in the house. The officer identified two coins, and stated they were in a sock in a canvas bag in a locker of which the defendant had the key in his pocket at the time of his arrest. That the locker was in the bus depot. The officer stated that the locket (People's Exhibit for identification) was in the defendant's pocket. That two cards, one from the Montague Jewelry Company and the other from the Pacific Jewelry Company, were in the pocket of the defendant. The cards were offered for identification. Asked whether he had pawned anything at these addresses the defendant said he had. After the jewelry was recovered, and in the police station, in a conversation at which it was testified no threats, force or violence were used, no promise of immunity or hope of reward was extended, and at which the statements were freely and voluntarily made, the defendant upon being shown the jewelry was asked if he had pawned the same. He stated that he had pawned the articles. The officer testified that the rings were returned to Wieting; that the diamond ring was returned to Dr. Campbell. The officer testified that at the time of the burglary of Dr. Campbell's home he had investigated the same and noticed that the screen had been cut with a clean slash, that the screen had been removed and the glass in the upper part of the window had been broken inwardly. The officer asked the defendant if he had used the knife, offered for identification, to slash the screen. The defendant didn't say anything; "He just grinned."

On the night of the arrest, the officer had two or three conversations with the defendant at the police station, the last one occurring sometime before 11 p. m. In one of the conversations, before the trip in the car, the officer placed the ticket reports of burglaries before the defendant and asked him whether or not he recalled any "jobs". "When he came to the ones that we were just referring to he admitted it." As they drove around in the car, the day after the arrest, defendant identified the houses he had gone into and also a number he would have gone into had there not been a dog or somebody around. With respect to the offenses charged in the information the defendant identified the houses. The gun holster was found in defendant's car; the gun carried by the defendant being unholstered.

The witness Heebing stated he was Chief of Police of San Fernando; that People's Exhibit 11, a card of the Pacific Jewelry Company, was shown to him by an officer and the defendant; that he went to the address given, 552 South Main Street, the day following because defendant stated he left a ring at that establishment which ring he described as an engagement ring.

On cross-examination Heebing testified that he had a conversation with defendant in his office about an hour after his arrest. The chief questioned the defendant with respect to burglaries, the revolver, and the things he had in his possession. Asked on cross-examination whether he told the defendant it would be better for him to tell about the burglaries, the chief replied he did not. Within the hour's time of the conversation the defendant finally admitted he had gone into two places. Defendant picked out two reports and stated, "Those are the ones I committed." The conversation with the defendant was "just general conversation." All the foregoing exhibits were received in evidence.

Testifying in his own defense, defendant admitted that the officers took the gun and sap from his person. He stated he had "quite a few conversations with the officers at the jail." That there was no force or violence used by Officer Richards. That he talked with Chief Heebing and there was no force or violence used, but that "he did give me to understand that if I told them about it it would save a lot of trouble and probably go easier on me." That the next day Officer Wieting came to the jail and said that "you are the s—o—b and grabbed me by the hair, I guess he was going to try to hit me, or something." Defendant stated that he had the holster in his automobile and that he had checked a bag in the bus depot. He stated that he sold some old gold in one establishment, and a ring in another. He stated that in the bag he had a bunch of keys, referring to the foregoing People's Exhibit; that he had a flashlight in his bag, as well as a pair of gloves. Further, that he had a locket at the time he was arrested, and that he had the two coins in his possession. Defendant stated that he was carrying the knife, offered as People's Exhibit, at the time of his arrest. That at the time Officer Wieting pulled his hair he had already "confessed to the Chief". That some three or four weeks earlier he had read in the paper where somebody "was pretty badly beaten by the police and he didn't want to take any chances." That no officer ever struck him. That the gun was loaded when it was found on his person.

In rebuttal Chief Heebing testified that he did not directly or in substance state to the defendant that it "would go easier on him" if he admitted the burglaries. That he showed burglary reports to the defendant who looked them over and picked out those that he had committed. That the defendant had studied the reports and stated, "Well, this is one here that I have committed." With respect to the officer's home, when asked if he knew it was such, defendant stated he did; that there was a picture of the officer on the dresser or chest of drawers. With respect to the Toone residence the Chief stated defendant said he recalled it because in forcing the drawer of a writing desk he splintered the wood. The chief later spoke with Toone who stated that the drawer had been so damaged.

[1-4] In support of his first ground for reversal, appellant asserts that "After examining the whole record here we find confessions involuntarily made, without first laying a proper foundation after inducements made by one officer and an assault by another officer upon defendant while in his cell at City Jail in San Fernando, and long drawn out conversations by several police officers all night long and into the next day, and rides by defendant and police to many

houses which had been burglarized by some person, and a defendant fearful of great bodily harm by reason of another prisoner being beat up by the same police, whom defendant read about just prior to his arrest, and the victim was in the hospital, and the statements made by defendant were made to avoid further danger to himself of such an attack, * * *, which shows the involuntary character of the confessions, and not admissible against him."

After a careful perusal of the record herein we find no substantiation for the foregoing contentions. It becomes unnecessary to determine whether the statements attributed to appellant were merely admissions or amounted to confessions because, in each instance, the police witness testifying to such statements gave testimony that each conversation with appellant was had freely and voluntarily upon his part, without threat, violence, promise of immunity or other inducement. True, the defendant testified that Officer Wieting, whose house was burglarized, called him a vile name and pulled him by the hair, but appellant also testified that all of the incriminatory statements were made by him on the night preceding his claimed encounter with Officer Wieting. Appellant also testified that Chief of Police Heebing said to him, "* * * if I told him I did those robberies or burglaries it would save them a lot of trouble and probably go easier on me," but the Chief testified that he had made no such representations. The only other testimony to the effect that his statements were involuntarily made was that given by appellant when he testified that he was apprehensive of bodily injury because, prior to his arrest, he had read a newspaper account of another prisoner having been beaten by members of the police department in whose custody he was. Thus we have a situation wherein the admissibility of the statements depended upon the credibility of the police officers and the appellant. When the latter testified that his statements were made involuntarily or in response to promises of immunity, his credibility became a matter for determination by the court in the first instance, and then by the jury. It is only when the determination of the triers of fact is so barren of support in the evidence that to adopt it would result in any fundamental unfairness violative of due process that we are warranted in rejecting their determination. In the instant case, in conformity with his duty, the trial judge first determined that the confessions were free and voluntary, made without promise or hope of immunity, and received them in evidence. He thereafter, fully and fairly instructed the jury that they were entitled, under the same evidence, to determine that the confessions were not so made and to refuse to consider them.

[5, 6] Assuming, but not deciding the correctness of appellant's contention that all of his statements to the police amounted to confessions, the record, as heretofore pointed out, discloses that before any conversations between the People's witnesses and appellant were related on the witness stand, there was a sufficient preliminary showing made or foundation laid that such statements were freely and voluntarily made, without any offers of immunity, leniency, threats or inducements. The proper foundation having been laid, the confessions were admissible, subject to the right of appellant to challenge the admissibility thereof by proof that the same were not freely and voluntarily made or were made because of offers of immunity or hope of reward. When, as here, the evidence is conflicting, the decision of the triers of fact is subject to the universal rule applicable to cases on appeal, that the reviewing court will uphold the decision if there is substantial evidence to support it. While the evidence on the question of the admissibility of appellant's statements is conflicting, there was substantial testimony to support the conclusion that no inducement were held out to appellant to elicit the statements he made, and that such statements were voluntary. Hence, we can not say that in resolving the conflict thereon against appellant the triers of fact committed reversible error. The jury was clearly instructed that the ultimate question whether the statements were confessions or admissions, and if the former, whether they were given freely, voluntarily and without promise of immunity or hope of reward, was for the jury to decide and in any event, as herein-

before stated, whether the statements were admissions only, or constituted confessions, the proper foundation was laid for their reception as confessions. Hence, no prejudice to appellant resulted.

In support of his claim that the record shows "confessions against defendant, constant pressure and long drawn-out fruitless attempts * * * to get confession and constant denials of defendant showing involuntary character," and "inducement of the Chief of Police," appellant refers us to certain portions of the reporter's transcript. We refrain from here setting forth in detail the testimony just referred to because, for the most part, it is hereinbefore set forth and discussed, and furthermore, the testimony in question does not support appellant in his contention last above set forth. In his brief appellant fails to point out wherein the testimony in question supports his assertions with reference to it.

[7-12] Appellant next claims that the court erred in denying his motion that the jury be advised that the court deemed the evidence insufficient to warrant a conviction and that the jury should acquit him Penal Code, Sec. 1118. It is here urged that the motion should have been granted for the reason that (a) the corpus delicti was not established by evidence other than the extra-judicial statements of appellant, and (b) that the confessions, having been improperly obtained, were not admissible in evidence.

As to the first of these claims it may be said that the corpus delicti in counts I, II and III was amply proven by the three householders who testified to the essentials of burglary, and count IV presents no problem, because not only was there testimony by the arresting officers that at the time of his arrest appellant was armed with a blackjack, but appellant at the trial, when testifying, admitted such possession. It is not necessary that the corpus delicti be proved by direct, positive evidence. It may be proved by circumstantial evidence and reasonable inferences drawn therefrom. When prima facie evidence was presented that the homes in question were entered with the intent and purpose of committing larceny, the evidence in support of the corpus delicti was sufficient. The connection of appellant with the crimes charged against him is not part of the corpus delicti. People v. Carter, 10 Cal.App.2d 387, 388, 52 P.2d 294. In the instant case, it is obvious, from the foregoing summary of the evidence, that the facts forming the basis of the several counts charged against appellant were proven, together with the existence of a criminal agency. Having held that the admissions, or if considered as confessions as urged by appellant, were legally receivable in evidence, they could properly be considered for the distinct purpose of showing that appellant was a participant in the crimes charged against him. The motion for an advisory verdict was therefore, properly denied.

[13, 14] The next point urged for a reversal is that "The court erred by permitting the District Attorney to use extrinsic evidence not in the record as argument to the jury." In this respect it appears that the District Attorney in his argument to the jury said:

"Now, certainly, I do not see how anybody could condemn the police department for questioning at some considerable length when they find the defendant at the time he is arrested has in his possession this knife, and this knife, I think, is of some interest, because you can see, in the light, that there are a number of what appears to be scratches on it, and you know that in all of these burglaries the screens were out—"

Whereupon appellant's counsel stated:

"I move that the Court instruct the jury to disregard that. There is no evidence in the record that I know about him cutting the screens with that knife."

The knife itself was admitted in evidence. There were scratches on the blade of the knife. Appellant admitted possession of the knife, and there was testimony that screens on the houses burglarized had been cut with a sharp instrument. When one of the police officers inquired of appellant whether he had used the knife to cut the screens on the houses he said nothing. According to the officer, "* * * he just grinned."

In an argument before the jury counsel may draw any reasonable inferences from the evidence and give to the jury his version of what is shown by the evidence, and also point out such conclusions as may be fairly drawn therefrom. Under the foregoing testimony, it must be held that the argument of the district attorney did not amount to prejudicial misconduct so far as the defendant's rights are concerned. People v. Eggers, 30 Cal.2d 676, 185 P.2d 1.

[15] Finally, appellant challenges the correctness of certain instructions. He asserts that the court's instructions defining admissions and confessions are erroneous, but gives us no reason to support such claim. We find such instructions to be correct statements of the law. Neither are we cited to any cases nor are we presented with any argument in support of appellant's claim that the court's instructions on the admissibility of confessions were erroneous. We find support for such instructions in numerous cases.

Error is next predicated on the claim that the court failed to instruct the jury that the extra-judicial statements of appellant were not to be considered until the corpus delicti was proved beyond a reasonable doubt. As heretofore pointed out, proof beyond a reasonable doubt of the corpus delicti is not required as a prerequisite to the admission of a confession. A prima facie showing is sufficient.

[16] Appellant argues that certain of the statements were confessions and not admissions. As heretofore indicated, this question becomes unimportant because whether admissions or confessions, a proper foundation was laid for the introduction of all appellant's statements as though they were confessions. In view of the verdicts rendered, it must be held on appeal that the jury determined that all of appellant's statements were freely and voluntarily given, and were not made in response to any offer of immunity or hope of reward.

With reference to appellant's contention that the instructions given as to the presumption of innocence, degrees of burglary, possession of stolen property and possession of a blackjack are erroneous, suffice it to say that no authorities are cited supporting his contentions, while many cases sustain the correctness of the instructions given.

[17, 18] Appellant's claim that prejudicial error ensued from the failure of the court to give five instructions proffered by him is without merit. These instructions referred to the exclusive prerogative of the jury to determine the weight of evidence and the credibility of witnesses; the doctrine of reasonable doubt and the presumption of innocence; the admissibility of confessions and the possession of property taken by means of burglary, soon after the commission of such burglary. These subjects and principles of law were fully, correctly and fairly stated in other instructions given by the court.

Upon this review of all the points urged by appellant, we discover no error in the record, and the judgments appealed from are, and each of them is therefore, affirmed.

YORK, P. J., and DORAN, J., concur.

82 Cal.App.2d 108

## In re O'CALLAGHAN'S ESTATE.
## GLASS et al. v. O'CALLAGHAN.
Civ. 13362.

District Court of Appeal, First District,
Division 2, California.
Oct. 29, 1947.

Rehearing Denied Nov. 28, 1947.
Hearing Denied Dec. 22, 1947.

**1. Appeal and error** ⇨996

When two or more inferences can be reasonably deduced from the facts, reviewing court is without power to substitute its deductions for those of trial court.

**2. Wills** ⇨166(1)

Evidence warranted refusal to probate will on ground of undue influence.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Proceeding in the matter of the estate of Margaret O'Callaghan, deceased, wherein John F. Glass, as executor and legatee, and another, were proponents of a will and codicil, contested by Daniel O'Callaghan, from an adverse judgment, the proponents appeal.

Affirmed.

John Guthrie Heywood, of San Francisco, for appellants.

Heller, Ehrman, White & McAuliffe, Lloyd W. Dinkelspiel and F. Whitney Tenney, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an appeal from a judgment on a unanimous verdict rendered against appellants who were the proponents of a will and codicil contested on the ground that they were procured by undue influence exerted on decedent by proponents.

Decedent, Margaret O'Callaghan, was at the time of her death on December 12, 1945, more than 85 years of age and her sister Annie O'Callaghan, the sole survivor of the immediate family, was then about 80 years old. The contested will left the entire estate to Annie with the exception of a portrait which was bequeathed to John Glass, a third cousin, who was also named executor. No provision was made for Dan O'Callaghan, nephew of Margaret, and only offspring of the O'Callaghan family.

Appellant, John Glass, and his wife met the O'Callaghan sisters first in 1926, and on a few other occasions in later years, but it was not until about the time of the death of the third O'Callaghan sister, Mrs. Mamie Pitcher, that the relationship between the Glasses and the O'Callaghans became at all intimate. In 1941 Glass began to perform minor tasks for Annie, "liason" for her, as she termed it. Later he acquired a power of attorney from her with the right to draw on her bank account, and also became joint renter of her safety deposit box. Six months after acquiring power of attorney from Annie he secured Margaret's power of attorney and in 1945, the year of Margaret's death, he became joint renter of Margaret's safety deposit box.

The testimony offered at the trial brought out the diverse characteristics in the personalities of the sisters Margaret and Annie. Margaret was a lady of culture and leisure, had been rather an accomplished pianist, and was greatly interested in art and religion. She had been crippled early in life, and in her later years suffered from arthritis, high blood pressure and a bad heart. Her hearing and eyesight were also somewhat impaired. During all the later years of her life she exhibited a great affection for her nephew Dan, his wife and children.

Annie was a tiny but forceful person, who lost her temper when opposed and talked in a shrill voice, occasionally brandishing her fists. She worked hard about the home, performing many of the household tasks. It was her belief that her efforts were largely responsible for the building up of the O'Callaghan estate. At the time of Mrs. Pitcher's death, Annie asserted a claim against the Pitcher estate for $30,000 for alleged services which was not pressed as she secured the entire estate. She frequently claimed that she would collect $20,000 from Margaret's estate for similar services.

From 1929 on both sisters lived at 2529–31 Baker Street, San Francisco, each occupying a separate flat. Margaret often expressed her fear of Annie's temper tantrums to various persons, among them her doctor, Dr. Fred Zumwalt, and her attorneys. A neighbor testified to having often heard Annie screaming at her sister. It was Margaret's habit to give up in arguments with Annie when she became too difficult. When Margaret communicated with her attorneys during the last years of her life, she would have someone take the messages out of the house without Annie's knowledge.

The most important item in the O'Callaghan estate was a piece of real property at 12th and Mission Streets, San Francisco, under lease to Firestone Tire & Rubber Co. This had been inherited from their mother by the three sisters in equal undivided shares. Florence McAuliffe of Heller, Ehrman, White & McAuliffe, was first employed by the O'Callaghans on a matter concerning this property in 1928, and from that time until about a year and a half before Margaret's death the firm continued to perform legal services for Margaret.

In 1941, upon Mamie Pitcher's death, it was discovered she had left a will bequeathing everything to Annie. Annie was also named executrix. Margaret, surprised at this disposition contemplated contesting the will. She told Florence McAuliffe at this time that she cared nothing herself for the property or money involved as she had sufficient for her needs, "but I know that if I do not get half of it * * * it will not go to Dan and his children, it will go elsewhere." An agreement between Annie and Margaret was executed February 5, 1941, under which Margaret was to receive a portion of Mamie's estate in consideration of Margaret waiving her right to contest the will

Glass, subsequent to the incident, began appearing as Annie's representative in the attorney's office. He informed McAuliffe that he was Annie's business manager and showed McAuliffe a letter from Annie requesting that Glass be given all papers, agreements and deeds in the Pitcher estate of which Annie was executrix. On December 6, 1941, all such papers were turned over to Glass, and on January 26, 1942, Annie wrote McAuliffe informing him that she did not recognize the agreement of February 5, 1941, in re the Pitcher estate. Glass had taken Annie to his wife's attorney who had prepared an agreement purporting to cancel the agreement of February 5, 1941. The typewritten date on the cancellation agreement is August 1, 1942, but it was changed in ink to 1943, when it was apparently executed. Margaret, while confined in a hospital, on August 1, 1943, wrote McAuliffe that Annie had brought out a document for her to sign abrogating the contract of February 5, 1941. Margaret wrote: "I asked her would she promise to leave that amount to Dan's two children. She promised before Dr. Aalders, so hold her to it when the paper comes to you." On December 5, 1943, Margaret wrote Attorney Toohig of McAuliffe's firm as follows: "Since 'phoning you the other day about the gravestone on my father's grave, my sister complains of being very ill, and as the doctor warned me sometime ago, she was in danger of a collapse, I have decided to let her have her way and I will ask you to finish the business of the contract. Tell Mr. Glass I have so decided, if he has the direction from my sister. I regret to have troubled you but my hands are tied for fear of consequences."

Margaret had shown a great interest in her nephew Dan and his family and frequently had stated that Dan and his children would be taken care of after her death. In the various wills and codicils which she executed, Dan, and later his children, were always provided for, with the exception of the will and codicil contested herein.

Numerous wills and codicils, both holographic and formal, executed by Margaret in the period beginning with 1933 up to the execution of the contested will of December 3, 1944, were introduced as exhibits by respondents. The will of June 1, 1933, left the income of the residue of Margaret's estate to various persons, among them her sisters Mamie Pitcher and Annie, her brother Charles, providing that upon the death of the last survivor the trust was to cease and the principal vest in the Catholic Foreign Mission Society, known as the Maryknoll Fathers, provided that $60 per month be paid to her nephew Dan as long as he should live

On June 12, 1937, Maragret wrote: "I made a will, now in custody of Florence McAuliffe, but since that time all but two mentioned in the will have died so I write out my wishes as clearly as possible and ask that this inclosed will be followed out." Said inclosed will left her entire estate in trust to pay income to her two sisters; upon their death the trust was to vest in the Maryknoll Fathers who were to pay half the income to her nephew. Attorney Toohig prepared a formal will for Margaret dated June 17, 1938, which created a trust of the residue of the estate for Mamie and Annie, providing upon their deaths the net income of the trust was to be divided equally between Dan for life and the Maryknoll Fathers; upon Dan's death half the trust estate was to vest in Dan's issue, if any, the other half, or all if Dan had no issue, to vest in the Maryknoll Fathers. On

January 18, 1941, after Mamie's death, a holographic codicil was added providing that since Margaret had just learned that Annie received by Mamie's will all of her estate, she now left the share she had previously alloted to her two sisters to her nephew, Dan O'Callaghan. The codicil concluded: "I ask my trustees to see that the best income available is secured so that he, Dan and his family, may use the income now. My sister Annie is amply provided for and will not need further income."

In a will prepared by Toohig for Margaret dated February 5, 1941, there was a bequest of the residue of pictures, paintings, household furnishings to Dan, and trusts for Dan and the Maryknoll Fathers similar to those in previous wills. As to Annie, the will recites: "I have purposely made no provision in this will for my sister Annie O'Callaghan for the reason that she is amply provided for."

In another will of March 31, 1941, and one of June 5, 1941, with a codicil dated July 5, 1944, this latter will and codicil prepared by Attorney Toohig, the same pattern is followed out as in the earlier wills. The codicil of July 5, 1944, makes detailed bequests of personal items such as pictures, an interest in a Steinway piano, statuettes, etc. It also changes the provision for the Maryknoll Fathers from an interest in a trust to a specific bequest of $5,000 cash. With this codicil she sent a letter of instructions to McAuliffe, ending as follows: "After a few days I will ring you up, when I have the privacy of the telephone here." All of the wills up through that of July 5, 1944, made very careful instructions for burial, the saying of masses, the disposition of specific paintings to certain galleries.

The contested will of December 3, 1944, and codicil of September 28, 1945, provides simply for the gift of all Margaret's estate to Annie, except the bequest of a miniature portrait to Glass, and names Glass executor thereof.

Dan O'Callaghan testified that in June, 1945, when Margaret was spending a week at Dan's home, she told him not to work so hard as everything she had would go to him and the children, "because Annie is going to leave everything she has to Glass." She told Dan that everything that Annie had was going to the Glasses and she wanted him and his children to get one-third. Dr. Zumwalt, Margaret's physician, also testified that Margaret told him on several occasions that Annie was leaving her estate to Glass but that she (Margaret) had made a will leaving her estate to Dan. She also told the doctor that Annie was money hungry; she had already secured control of two-thirds of the O'Callaghan estate, and that since she had "hooked up" with John Glass she had become more money hungry than ever.

Glass testified that sometime before December 3, 1944, Margaret sent for him and informed him that she wished him to type a will for her, and delivered to him certain memoranda in her handwriting from which he typed the will. The memoranda were not produced and Glass stated that they had been returned to Margaret and that since then he had not seen them. In a deposition taken before trial, Glass testified that he did not know who *drew* the contested will. On the stand he testified that he typed the will. When confronted with the deposition, Glass explained that when he said he did not know who *drew* the will, that he had not actually seen Margaret writing it, though he had testified that it was in her handwriting. In the deposition he had stated that he had not prepared the will. He admitted having given this testimony, but on a later examination by his own counsel he explained that his answer that he had not prepared it was correct since he had just typed it from Maragret's memoranda. The same explanation applied to the codicil. He testified that he did not know McAuliffe's firm were attorneys for Margaret although he had made many visits there for Annie in connection with the Pitcher estate, and that he did not know Margaret had an attorney. McAuliffe testified that he had told Glass that he was Margaret's attorney, and Jose Mass, witness for proponents, testified that he was present at the Glass home in Los Altos when attorney Toohig called upon Margaret there in connection with the codicil of July 5, 1944. He stated that the

Glasses were there when it was announced that one of the two gentlemen calling was Margaret's lawyer. Glass testified that sometime after he had typed and returned the will to Margaret she telephoned him that she wanted to go for an automobile ride, that she sounded "lonely," so he drove her to the beach and during the ride Margaret said she would like to have the will executed. He telephoned his friend John Murphy and arranged to have Mr. Murphy and his daughter Dorothy come out to the car to witness the will. He explained that there were numerous stairs leading up to the Murphy home, and because of Margaret's arthritis he would not ask her to go in. The Murphys came out to the car, Margaret produced the will from her handbag and the Murphys witnessed it. The codicil was executed in a similar manner. On this occasion Glass, his wife, Annie and Margaret were preparing to go to the country, when Margaret spoke to Glass about executing the codicil. He called up the Murphys, brought Margaret over to their home, had them witness it in the car, and then returned to the Glass home. Annie and his wife knew nothing about the incident, he said. On both occasions Glass remained present during the witnessing of the documents.

Margaret had been seriously ill in Franklin Hospital beginning June 9, 1945, and for a time thereafter at home; Stanford Hospital from October 28, 1945, to November 28, 1945; and entered Don Ra Doe Hospital November 30, 1945, where she died December 12, 1945 at the age of 85. She had been ill at Calistoga in July and August 1943, was in a sanitarium in June, 1944, and in October 1945.

Appellants contend that the evidence is insufficient to support the verdict; that the court erred in denying their motion for a non-suit. They maintain that the facts set forth by respondent do not raise a presumption of undue influence and therefore do not impose upon appellants the obligation of presenting evidence of volition, citing In re Estate of Hull, 63 Cal.App.2d 135, 146 P.2d 242. That case follows the rule that before the question of undue influence becomes one of fact for determination by the jury or court there must be evidence establishing (1) the relations between the one charge with undue influence and the decedent, affording the former opportunity to control the testamentary act; (2) decedent's condition must be such as to permit subversion of her freedom of will; (3) activity on the part of the person charged with exercising undue influence; and (4) such person must have unduly profited as beneficiary under the will; that a presumption of undue influence is not created by any one of these circumstances alone, but only when a combination of all are present is the denial of a nonsuit justified, placing upon proponent the burden of showing that it was executed free of undue influence. See also In re Estate of Graves, 202 Cal. 258, 262, 259 P. 935; In re Estate of Burns, 26 Cal.App.2d 741, 749, 80 P.2d 77.

Respondent does not quarrel with these rules of law, but answers that the evidence adduced herein sufficiently raises a presumption of undue influence. The evidence is reviewed showing proof of the confidential relationship, the physical and mental condition of the decedent, activity on the part of the beneficiary Glass in procuring execution of the will and codicil which respondent argues is sufficient under authority of In re Estate of Baird, 176 Cal. 381, 168 P. 561; In re Estate of Gallo, 61 Cal.App. 163, 214 P. 496; In re Estate of Nutt, 181 Cal. 522, 185 P. 393; In re Estate of Miller, 16 Cal.App.2d 154, 60 P.2d 498, and see In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689; In re Estate of Teel, 25 Cal.2d 520, 154 P.2d 384.

[1] If we were disposed to follow the practice of briefing the case we could argue at length on the question of the sufficiency of the evidence. But our function is merely to determine whether error was committed in the trial court. It should suffice therefore to merely recapitulate the evidence upon which the verdict is based disregarding the conflicts and according to the jury the assumption that is believed the testimony of respondent's witnesses. It should be said, however, that the parties argue the case from the erroneous premise that it is

a "presumption" of undue influence which must be shown. Though cases have been cited to support this theory the true rule is emphasized in Estate of Bristol, supra, that, when two or more "inferences" can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.

Briefly the facts upon which the jury's "inference" of undue influence rests are: There is a definite pattern in all the formal wills executed by deceased from June 1, 1933, to July 5, 1944, to provide for the descendants of her deceased brother, to contribute to the aid of Maryknoll Fathers, to provide for masses and adequate burial, and to distribute among numerous friends her many valuable objects of art. There is the oft-repeated assertions to her attorneys and friends of her intentions to make such disposition of her estate, of her belief that her sister Annie was well provided for, of her fear of this sister, and of her distrust of Glass. All these wills were prepared by a firm of attorneys in which she had complete trust and with whom she consulted in reference to her legal matters. There is the evidence of the activities of Glass first in relation to Annie then as to deceased which disclosed a premeditated plan to ingratiate himself with the two sisters for his own benefit; and the expressed fear of the deceased that he had succeeded in becoming Annie's legatee and was acting for her to get possession of decedent's estate. There is the unescapable fact that Glass' testimony was discredited on so many occasions that the jury would have been justified in rejecting his entire testimony.

[2] These facts fully support the inference that Glass acting for himself and as attorney in fact for Annie exerted undue influence over the deceased in procuring the will from which both he and his principal would have benefited. The facts are such that, if the jury did reject the testimony of Glass as untrue, it could have fairly inferred that he prepared the contested will himself and that the deceased was in such poor physical and mental health as to render her readily susceptible to undue influence or imposition.

There is no question of error raised by appellant except that the evidence does not support the verdict and that the motion for a nonsuit should have been granted. The evidence is sufficient under the rule of In re Estate of Teel, supra. This being so it follows that the motion for a nonsuit was properly denied.

Judgment affirmed.

GOODELL, and DOOLING, JJ., concur.

82 Cal.App.2d 100

## WILLIAMS et al. v. SUTTER-BUTTE CANAL CO.

Civ. 7403; Sac. 5853.

District Court of Appeal, Third District, California.

Oct. 27, 1947.

**1. Eminent domain 🔑280**

Landowner granting a right of way thereby estops himself from afterwards prosecuting any action for past, present, or future damages that may have occurred, or may reasonably be expected to occur, by reason of the necessary, natural, and ordinary use of the utility or public service for which the right of way was granted, including natural, reasonably to be anticipated, and ordinary injury resulting to adjacent land from seepage, if land is of a character that admits of or may be reasonably expected to admit of such action of waters taking place.

**2. Waters and water courses 🔑263**

In action for damage to land caused by seepage from canal of defendant which had acquired a right of way from plaintiffs' predecessor for purpose of constructing and maintaining a canal for a conveyance of water for irrigation purpose in usual and customary manner, evidence of negligence of defendant in construction and operation of canal was insufficient for jury.

Appeal from Superior Court, Sutter County; J. O. Moncur, Judge.

Action by Madison L. Williams and another against Sutter-Butte Canal Company for damages to land and for an injunction prohibiting defendant from diverting water into a canal. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Manwell & Manwell, of Marysville, for appellants.

Seth Millington, of Gridley, for respondent.

ADAMS, Presiding Justice.

Plaintiffs bought this action seeking damages for injuries to their land claimed to have been caused by the negligence of defendant in the construction and operation of its canal along the west side of plaintiffs' land, and also prayed for an injunction prohibiting defendant from further diverting water into the canal.

Defendant is a public utility engaged in the business of selling water for irrigation.

The allegations of count one of plaintiffs' complaint regarding negligence are as follows:

"That in that portion of said main canal which lies adjacent to the lands of plaintiffs said defendant maintains, and during all of the times herein mentioned, a head gate for purpose of regulating the heights and volume of water in said main canal.

"That, heretofore, within two years last past, to-wit: During the irrigation season of the years 1944 and 1945, the said defendant so wilfully, unlawfully and negligently constructed its said canal, and the said defendant so wilfully, unlawfully and negligently maintained and controlled its said canal and the water flowing therein, and the said defendant so wilfully, unlawfully, and negligently so regulated said head gate so as to cause the water in said canal to stand, raise and be above the level at which said canal was designed and constructed to carry water, for a long length of time, that the waters from said canal seeped and percolated through and under the banks thereof and into and upon the lands of these plaintiffs and injured and damaged plaintiffs' land and the fruit trees and vines grown thereon to the damage of plaintiffs and of said land in the sum of Fifteen Thousand ($15,000.00) Dollars."

In their second count they alleged:

"That heretofore during the irrigation seasons of the years 1944 and 1945 defendant diverted a large stream of water into the said canal and by a regulation of the defendant's head gate herein causes the water to stand, raise and be above the level at which said canal was designed and constructed to carry water for a long length of time. * * *

"That the water thus diverted into said canal by said defendant escapes therefrom on lands owned by the plaintiffs by reason of the loose character of the soil lying beneath the same and that the said water percolates through the soil under and about said canal and over and upon and through the lands of plaintiffs so as to kill plaintiffs' fruit trees and further so as to fill or flood plaintiffs' cellar to such an extent that plaintiffs must maintain a pump therein to keep the water from said cellar."

The evidence shows that on November 4, 1920, while one Clive B. Kelly and his wife, Mary Kelly, were owners of the land now owned by plaintiffs and that occupied by the canal of defendants, they executed deeds conveying to defendants in fee a strip of land 70 feet in width along the west line of their said land. The deeds also granted to the grantee, and to its successors and assigns, the right of ingress and egress to and from the land conveyed over the adjoining lands of the grantors for the purpose of constructing, maintaining, repairing, enlarging, using and operating on the land thereby conveyed, an earthen canal or ditch, and other works and facilities for the flowing and conveyance of water therein for irrigation purposes, in a usual and customary manner, said right of ingress and egress to be exercised with due regard for the rights of the grantors. The grantors expressly declared and agreed that the convenants made by them with said grantee were made for the benefit of the above described land granted to the grantee, and were made for the assigns and the successors in interest of the grantors and to the assigns and successors in interest of the grantors and to the assigns and successors in interest of the grantee, and should run with said adjoining lands owned by the grantors. The canal in question was constructed in 1921 and has been in operation ever since. In December, 1942, plaintiff, through mesne conveyances, acquired the remainder of the Kelly land.

The action was brought to trial before a jury. In an opening statement counsel for plaintiffs stated in effect that he would rely alone upon the construction and operation of the headgate constructed in 1943 as the cause of seepage onto plaintiffs' lands, which seepage caused the damage of which they complained. At the conclusion of plaintiffs' presentation of evidence the trial court granted a motion for a nonsuit, saying that the plaintiffs had failed to meet the burden of proof cast upon them to show negligence. Judgment was entered in favor of defendant, and from that judgment this appeal was taken.

[1] It seems to be conceded by both parties that the general rule applicable to the case is that set forth in Sternes v. Sutter Butte Canal Co., 61 Cal.App. 737, 743, 216 P. 66, and approved in Groff v. Reclamation District No. 108 (and consolidated cases), 97 Cal.App. 22, 24, 274 P. 993, to wit, that whenever a grant of a right of way is executed by a landowner, he thereby estops himself from afterward prosecuting any action for the past, present, or future damages that may have occurred, or may reasonably be expected to occur, by reason of the necessary, natural, and ordinary use of the utility or public service for which the right of way is granted; and this includes the natural, reasonably to be anticipated, and ordinary injury resulting to adjacent land from seepage, if the land is of a character that admits of or may be reasonably expected to admit of such action of the waters taking place. Also see Sutro Heights Land Co. v. Merced Irr. Dist., 211 Cal. 670, 692, 693, 296 P. 1088; Edmonds v. Glenn-Colusa Irr. Dist., 217 Cal. 436, 442, 443, 19 P.2d 502; Hume v. Fresno Irr. Dist., 21 Cal.App.2d 348, 351, 69 P.2d 483; Ketcham v. Modesto Irr. Dist., 135 Cal.App. 180, 188, 189, 26 P.2d 876.

Appellants recognize the foregoing rule, but urge that, nevertheless, damages are recoverable where they are caused unnecessarily by negligent or improper maintenance of or construction of a canal, citing Edmonds v. Glenn-Colusa Irr. Dist., supra, 217 Cal. at page 444, 19 P.2d 502, and Hume v. Fresno Irr. Dist., supra; and they urge that the evidence introduced by them raised an issue as to whether or not defendant had been negligent under the circumstances of the case; and that this issue should have been submitted to the jury.

A summary of the evidence upon which they rely, as set forth in their own brief, is as follows: Plaintiff Madison Williams testified that he acquired his property in 1942 from the Federal Land Bank; that in addition to a house and barn, there were approximately eight acres of prunes, twelve acres of peaches and some wheat; that the eight acres of prunes and a portion of the peach orchard lay adjacent to the canal; that in the year 1943, the plaintiff obtained a crop of peaches from his peach trees, but has had no crop since that date, and that his prune crop in 1943 was much larger than he had since been able to harvest; that he lost no trees in 1943, and he noticed no water in his orchard in 1943; that he observed the banks of the canal throughout the summer of 1943 and saw nothing wrong; that there was a cellar under his house and that he noticed no water in his basement in 1943; that in 1944 the defendant constructed a new weir south of the bridge, which bridge crosses the canal on Franklin Road, the county road which runs along the south side of plaintiffs' land; that thereafter the water in the canal would get as high as 16 to 22 inches above the floor of the roadbed on Franklin Road; that there was water in the canal from about March or April of each year until October or November; that water backed up down the road for one hundred feet until the defendant constructed a sump along the canal; that in 1944 plaintiff noticed three feet of water in his basement or cellar; that thereafter he bored test holes at various places on his property and kept measurements of the water level, and that the water level in these holes varied from six inches to two and a half feet from the surface; that in 1944 the ground became so boggy and soft that tractors and even horses bogged down; that the condition recurred in 1945; that in 1944 the water level in the canal was higher and that in 1944 he observed water seeping through the banks; that about June of 1944, defendants constructed a sump ditch along the east side of the canal bank, and installed a pump in an effort to remove the seepage, but that the situation was not relieved; that he once found water was seeping through the levee through gopher holes, and over the grass roots and stumps; that he complained to the defendant and that thereafter it lined the inside of the canal bank with red clay without effect; that substantially the same condition existed in 1945 and 1946.

Plaintiffs called an engineer, Edward Von Geldern, and introduced a map of plaintiffs' lands and the canal, and a scale graph or profile showing the water level under plaintiffs' property. This witness also testified that the water on plaintiffs' property came directly from the canal; that he found that the main canal is dug below the hardpan and permits water to escape under the hardpan.

Respondent points out in its brief the following testimony, also adduced by plaintiffs: That Williams testified that the only water that came from the canal was seepage; that a trickle came out at one place approximately double the amount of a garden hose, at a point north of the old weir; that there was one other place where seepage occurred which was between the old weir and the road; that amount he estimated at about the amount of a garden hose; that plaintiff made no claim, nor did he ever testify that any water came out of gopher holes, squirrel holes, or any of the things that could have been prevented; that under cross-examination he definitely limited the source of water and the method by which it escaped the bank to these two seepage spots; that he made no claim nor did any witness give any testimony that shows anything in the operation of the canal that was negligent in any particular; that plaintiff's witness, Elmer C. Smith, testified that there were no holes in the levee, no water was gushing out, no water was topping the levee, and that there were no squirrel or gopher holes where water was running out; that from a construction angle the canal was in good shape; that that type of soil will seep.

Also that plaintiff's witness, W. J. Vanderburg, testified that at a point about five hundred feet north of the road along the bank for two or three hundred feet the levee was wet, but there was no water that could be measured; that there was just a wet bank, and no place where water was gushing out of the bank through a squirrel or gopher hole; that the soil was porous and seeps; that no witness testified to anything else regarding the seepage; that the facts before the court show that the canal was built in a soil that was porous; that it was well constructed; that no water escaped from any controllable source, and the strongest testimony as to the amount was furnished by the plaintiff himself—namely, at one point, approximately double the volume of a garden hose and at the other point approximately the volume of a garden hose; that the other witnesses who testified to the amount merely stated that there was a wet bank and no measurable amount of seepage; that not one witness testified that the construction of the weir south of plaintiffs' lands is not in complete harmony with the best irrigation practices; that the evidence developed the fact that there was a weir a couple of hundred feet north of the Franklin Road and at a point where the ditch joins on the lands of the plaintiffs, which weir had been there for many years; that the testimony also shows that prior to 1944 the plaintiffs took their water for the irrigation of their lands from a headgate a short distance north of the old weir, but that in 1944 they changed the diversion point to a place well up toward the north end of their lands which point was higher than the old diversion point, and that at their request water was furnished at the new diversion point which necessitated the raising of the water level in the canal north of the old weir; that plaintiff Williams testified that one year, which, of course, would have been 1943, he took the water out of the canal for his irrigation north of an old weir which was situated north of the county road, but that at his request the intake was changed to where it is today, and the change was made because he wanted it.

Appellants filed no reply brief, did not argue the case, and do not deny the existence of the testimony referred to by respondent.

From the foregoing evidence and in view of the rules of law laid down in the cases above cited, can it be said that the trial court erred in granting defendant's motion for a nonsuit? Obviously the only water from the canal which penetrated plaintiffs' land, except such as they diverted themselves for irrigation purposes, was the result of seepage through a soil that is admittedly a type of soil that will seep. There is no evidence that the canal itself was not properly constructed, maintained or operated. There is no evidence that any changes were made in same after plaintiffs acquired their land in December, 1942, except the construction of the weir south of the county road below plaintiffs' land; is no evidence that said weir was improperly constructed or operated. Plaintiffs' witness Smith testified that in August, 1945, there were no holes in the levee, that the water in the canal was not topping the levee, that there were no squirrel or gopher holes, and that aside from a few places where he could see seepage, there was no place that water was coming from the canal; that the canal was well constructed and there was nothing unusual about its operation.

Aside from the testimony of Williams that he did not suffer any damage in 1943, there is no evidence that there had not been seepage in prior years, after the canal was constructed in 1921. And Williams testified that shortly after he bought the place he pulled out about 4½ acres of peaches because the trees were not productive and weeds and grass "were in there." And as for the boggy condition of plaintiffs' land, one of their witnesses testified that in January or February, 1945, he tried to spray some of the orchard when there was no water in the canal, but found it too boggy to operate his equipment. Also, as contradicting allegations of negligence on defendant's part, the testimony shows that it endeavored to protect plaintiffs against seepage by digging a sump ditch, installing a pump and lining the inside of the canal on the side next to plaintiffs' land.

As hereinabove stated, appellants rely upon certain language used in Edmonds v. Glenn-Colusa Irrigation Dist., supra, 217 Cal. at page 444, 19 P.2d 502, to the effect that in cases similar to this damages are recoverable where they are caused unnecessarily by negligent or improper maintenance or construction of a canal. But in that case the court, in reversing a judgment against the defendant, said, 217 Cal. at page 442, 19 P.2d at page 504: "The record does not contain any evidence as to any structural changes made in the canal since its construction, or as to any structural defects. The canal or ditch is maintained and operated as are other irrrigation ditches of a similar character, and no specific act or acts of negligent operation have been pointed out. The most that was shown is that the water in the canal was occasionally raised in order to conduct water to farm lands by laterals to a height of some 12 or 14 inches above its height in 1925, at which time some 10½ acres of plaintiff's lands along or near the canal became permeated with waters which the trial court, in view of the issues presented, undoubtedly found in the condemnation proceeding, was seepage from said canal." Also, 217 Cal. at page 443, 19 P.2d at page 505, it said: "The checking of the canal at certain places to raise the water level for the purpose of irrigating farm lands does not seem, under the circumstances, to have been an unreasonable use of the canal, but an incident to its use. If seepage was more likely to occur under such conditions, it would not seem that any particular adjacent owner of land would have the right to demand that the checking be done at such points as would divert seepage waters from her lands to the lands of another, especially in a case, as here, where plaintiff had had her day in court as to the damage she would sustain by reason of seepage waters."

Hume v. Fresno Irrigation District, supra, is also relied upon by appellants; but in that case, while a judgment for plaintiffs was affirmed, the court pointed out in support thereof that there was evidence in the case that there had been recent changes in the canal itself just prior to the time that plaintiffs suffered damage to their crops, in that the bed of said canal where it adjoined plaintiffs' land had been lowered to a depth varying from 4 inches to 18 inches along the entire section, and that this increased the seepage because the deeper the water in the canal, the greater the pressure and the greater the seepage.

[2] No such situation exists in the case before us. No changes were made in the canal, and, as above stated, plaintiffs' own witness testified that it was operated in the usual way; and there is no evidence to the contrary. Furthermore, as before stated, the two deeds by which respondent acquired the right of way for the canal in 1920 from appellants' predecessor in interest, specifically provided that the grant was "for the purpose of constructing, maintaining, repairing, enlarging, using and operating on the land hereby conveyed, an *earthen* canal or ditch, *and other works and facilities* for the flowing and conveyance of water therein for irrigation purposes, *in a usual and customary manner* * * *," and that "grantors expressly declare and agree that the covenants herein made by them with said grantee are made *for the benefit of the above described land granted to the grantee,* and are made *for the assigns and the successors in interest of the grantors* * * * *and shall run with said adjoining lands* owned by the grantors." (Italics added.) In the light of the above covenants contained in the deeds by which respondent acquired the right of way for the canal, under the conceded rule stated in the cases first herein cited appellants did not prove a case against respondent. No negligence on its part was shown, and while plaintiffs may have suffered injury by reason of the natural seepage from the canal, respondent is not liable therefor.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

30 Cal.2d 785

### SCHUBERT et al. v. BATES et al.

### L. A. 20018.

Supreme Court of California, in Bank.
Oct. 24, 1947.

**1. Appeal and error ⟹1203(5)**

After reversal of judgment for plaintiff in unlawful detainer action, parties are restored to their original rights, including plaintiff's right to dismiss action, by request filed with clerk or by motion addressed to court, if dismissal will not interfere with defendant's right to appropriate affirmative relief, and subsequent filing of cross-complaint or answer requesting affirmative relief will not defeat plaintiff's right, nor will the right be lost by clerk's refusal to perform his duty. Code of Civ. Proc. § 581.

**2. Appeal and error ⟹873(1)**

An order following reversal of a judgment and remanding for new trial is reviewable on appeal from final judgment on retrial. Code Civ.Proc. § 983, subd. 7.

**3. Certiorari ⟹70(6)**

Where landlords were successful in unlawful detainer action, but judgment was reversed and cause was remanded for new trial, and landlords then dismissed the action, Supreme Court assumed that subsequent order of restoration in favor of tenant was not appealable, that there would not be a further trial or a final judgment in the case, and that certiorari proceeding was therefore available to test validity of order of restoration. Code Civ.Proc. §§ 581, 983, subd. 7, 1068.

**4. Appeal and error ⟹1179, 1208(2)**

The power of appellate courts to restore benefits lost pursuant to a judgment modified or reversed exists by virtue of statutes, but power of court whose order or judgment has been reversed to order restoration after reversal is inherent in that court. Code Civ.Proc. §§ 957, 988f.

**5. Courts ⟹190(9)**

Where landlords prevailed in unlawful detainer action in municipal court, and tenant, without being forcibly evicted, moved from leased premises and appealed to superior court which reversed the judgment and remanded the cause for new trial, and landlords then dismissed action, dismissal did not deprive municipal court of jurisdiction to enter order of restitution in favor of tenant. Code Civ.Proc. § 581.

**6. Appeal and error ⟹1208(1)**

Though a plaintiff has the right to dismiss an action before trial, where no counterclaim or request for affirmative relief has been filed, that right, after a trial and reversal of the judgment, is subject to defendant's right to restoration of benefits lost by virtue of the erroneous judgment. Code Civ.Proc. § 581.

**7. Courts ⟹190(8)**

Where landlords did not contend in certiorari proceeding to review municipal court's action in issuing order of restitution in favor of tenant in unlawful detainer action that municipal court failed to afford due process to landlords, and record showed that municipal court considered the merits of the tenant's motion for restoration, and that its action in ordering restoration was within its discretionary powers, the restoration order could not be annulled in the certiorari proceeding.

SCHAUER, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Hartley Shaw, and Clarence L. Kincaid, Judges.

Certiorari proceeding by Edward F. Schubert and Eleanor Schubert against Lucille Bates and the Municipal Court, City of Los Angeles, County of Los Angeles, State of California, to review Municipal Court's action in issuing an order of restitution in an unlawful detainer action in Municipal Court. From a judgment of the Superior Court affirming the order of restitution, the petitioners appeal.

Judgment affirmed.

Prior opinion 173 P.2d 697.

George R. Larwill and Charles W. Wolfe, both of Los Angeles, for appellants.

John F. Poole, of Los Angeles, for respondent.

SHENK, Justice.

This is an appeal from a judgment of the superior court in a certiorari proceeding which affirmed an order of restitution in an unlawful detainer action in the Municipal Court of the City of Los Angeles. The plaintiffs in that action (petitioners in the certiorari proceeding) purchased the property in question on October 8, 1943. Prior to that time Lucille Bates, the defendant in that action, had occupied the premises with her family on a month to month tenancy. The parties will be referred to by their designations in the unlawful detainer action. On October 13, 1943, the plaintiffs procured from the Office of Price Administration a certificate authorizing them to evict the tenants at the expiration of three months from that date. The plaintiffs did not serve the defendant with a notice to surrender possession for almost a year. A notice to quit the premises on November 1, 1944, was served on September 28, 1944. The defendant did not vacate and the action in unlawful detainer was commenced on November 16, 1944. The defendant filed an answer which did not contain any request for affirmative relief. On November 30, 1944, the respondent municipal court rendered judgment for the plaintiffs for recovery of possession, damages and costs. On the defendant's application execution on the judgment was stayed until December 27, 1944. No writ or other process was issued or served to enforce the judgment. On December 26, 1944, the defendant vacated the premises. The plaintiffs took possession on January 10, 1945. The defendant appealed from the judgment. On October 11, 1945, the Appellate Department of the Superior Court reversed the judgment and remanded the cause for a new trial on the ground that service of the notice terminating the month to month tenancy was insufficient.

On October 15, 1945, the plaintiffs moved in the municipal court to dismiss the action. On October 22nd they filed with the clerk of that court, pursuant to section 581 of the Code of Civil Procedure, a request to dismiss and a dismissal was entered in the register of actions. On the same day the defendant, without first obtaining leave of court, filed a supplemental answer seeking affirmative relief. Concurrently she filed a motion to be restored to possession of the premises basing her request on the reversal of the judgment. On that date the hearing on the plaintiffs' motion to dismiss was continued to, and the defendant's motion for restoration of possession was set for hearing on, October 29, 1945. On the latter date, after hearing, the court took both motions under advisement, and on November 19th denied the plaintiffs' motion to dismiss and granted the defendant's motion to be restored to possession. On November 21, 1945, the plaintiffs moved to vacate the order of restitution and to reconsider the motion to dismiss. That motion was denied. On November 27, 1945, they filed in the superior court the present proceeding in certiorari. The petition alleged the foregoing facts and prayed that the order of November 19th, granting the motion for restitution be annulled. It is that order and none other that is the subject of attack in the certiorari proceeding. When that order was made there was no showing, although it was subsequently sought to show, that the plaintiffs were not then in possession of the property. If there were bona fide purchasers in possession at that time whose rights were superior to those of the defendant their interests, it is assumed, would not be affected by the order under review.

A preliminary question is whether certiorari was available to the plaintiffs. It was not if the order of restoration was appealable, or was reviewable on appeal from a final judgment.

[1] The minute entry of November 19, 1945, shows that the denial of the plaintiffs' motion to dismiss was based on the opinion of the court that the dismissal by request was effective (citing Richards & Knox v. Bradley, 129 Cal. 670, 62 P. 316). The cited case indicates that after reversal of a judgment the parties are restored to their original rights, including the right of the plaintiff to dismiss the action pursuant to section 581, subd. 1, Code of Civil Procedure, if its exercise would not interfere with the right of the defendant to any ap-

propriate affirmative relief; also that the right to dismiss pursuant to that section may be exercised with the same effect either by request filed with the clerk or by motion addressed to the court. See also McDonald v. California Timber Co., 2 Cal. App. 165, 166, 83 P. 172; cf. Huntington Park Imp. Co. v. Superior Court, 17 Cal. App. 692, 121 P. 701. The subsequent filing of a cross-complaint or answer requesting affirmative relief will not defeat the right (Hinkel v. Donohue, 90 Cal. 389, 27 P. 301), nor will the right be impaired or lost by the refusal of the clerk to perform his duty. Kaufman v. Superior Court, 115 Cal. 152, 46 P. 904.

**[2, 3]** The plaintiff proceeded by both methods, first by motion and then by request to the clerk before the motion was determined. The record indicates that the defendant's supplemental answer and her motion for restoration were filed after the plaintiffs' requested dismissal was entered. If that dismissal be deemed effective, we have a case where there is no final judgment and the order of restoration of possession may be said not to be appealable as an order made after final judgment. Section 983, subd. 7, Code of Civil Procedure; Sharp v. Miller, 66 Cal. 98, 4 P. 1065; Tripp v. Santa Rosa Street R. Co., 69 Cal. 631, 633, 11 P. 219. An order following the reversal of a judgment and remanding for new trial, would be reviewable on appeal from a final judgment on retrial. In re Kling, 48 Cal.App. 739, 192 P. 453. But compare Pico v. Cuyas, 48 Cal. 639; Bank of America, etc., v. McLaughlin, 37 Cal.App.2d 415, 99 P.2d 548; First-Trust, etc., Bank v. Meredith, 19 Cal.App.2d 103, 105, 64 P.2d 977; Hansen v. d'Artenay, 13 Cal.App.2d 293, 57 P.2d 202, where without discussion appeals from orders made after reversal of the judgment were entertained. For purposes of disposing of the contentions on this appeal, however, we shall assume that the order of restoration was not appealable, that there will not be a further trial or a final judgment in the case, and that the present certiorari proceeding was therefore available to test the validity of the order of restoration. Section 1068, Code of Civil Procedure; Burlingame v. Justice's Court, 1 Cal.2d 71, 133 P.2d 669. The superior court determined that the order of restoration was not in excess of the jurisdiction of the municipal court. The correctness of that determination is the subject of inquiry on this appeal.

**[4-6]** The power of the appellate courts to restore benefits lost pursuant to a judgment modified or reversed exists by virtue of sections 957 and 988f of the Code of Civil Procedure. But the power of a court whose order or judgment has been reversed to order restoration after reversal is inherent in that court. Reynolds v. Harris, 14 Cal. 668, 680, 681, 76 Am.Dec. 459; Polack v. Shafer, 46 Cal. 270, 276; Hewitt v. Dean, 91 Cal. 617, 620, 28 P. 93, 25 Am.St.Rep. 227; Heydenfeldt v. Superior Court, 117 Cal. 348, 49 P. 210; Kenney v. Parks, 120 Cal. 22, 24, 52 P. 40; Levy v. Drew, 4 Cal.2d 456, 459, 50 P.2d 435, 101 A.L.R. 1144; Oldfield v. Bank of America, etc., Ass'n, 6 Cal.2d 103, 107, 112, 56 P.2d 1235; Hansen v. d'Artenay, supra, 13 Cal. App.2d 293, 297, 57 P.2d 202; Bank of America, etc., v. McLaughlin, supra, 37 Cal.App.2d 415, 417, 99 P.2d 548; see also cases collected in Seavey and Scott's Notes to Restatement of the Law of Restitution, p. 84. Thus that power of the court and the right of the party prevailing on the appeal to have it exercised exist independently of the request for its exercise. Therefore the plaintiffs' requested dismissal, if otherwise proper pursuant to section 581, subd. 1, Code of Civil Procedure, would not deprive the municipal court of jurisdiction to grant the appropriate relief to which the defendant is entitled after reversal of its judgment in the unlawful detainer action. In other words, while the plaintiff has the right to dismiss the action before trial, where no counterclaim or request for affirmative relief has been filed that right, after a trial and reversal of the judgment, is subject to the right of the defendant to restoration of benefits lost by virtue of the erroneous judgment. The court has inherent power to enforce that right, unaffected by the right of the plaintiff to dismiss the action. The existence of the power to restore benefits after reversal flows from the rule that upon reversal the action is as though it had never been tried and the court will, where justice requires it, place the parties as nearly as may be in the condition in which they stood previously. Cowdery v. London, etc., Bank, 139 Cal. 298, 304, 305, 73 P. 196, 96 Am.St.Rep. 115. While the rule again opens up the plaintiffs' opportunity to dismiss, it is likewise applicable to prevent the dismissal from depriving the defendant of any relief to which she may be entitled by virtue of the reversal. Its application has so been limited to guard a defendant's right to statutory costs. Hopkins v. Superior Court, 136 Cal. 552, 69 P. 299; Matson v. Fortuna High School Dist., 54 Cal.App. 586, 202 P. 167; Spinks v. Superior Court, 26 Cal.App. 793, 148 P. 798. A similar result should obtain in the present case, wherein a dismissal by the plaintiff may not be deemed to divest the court of jurisdiction to enforce upon reversal the defendant's right to restoration of benefits lost pursuant to the erroneous judgment. That the municipal court correctly viewed the continuance of its jurisdiction for the purpose of considering the defendant's right to restoration is indicated by the denial of the plaintiffs' motion to reconsider the order denying their motion to dismiss.

The plaintiffs contend, however, that the jurisdiction of the municipal court in that respect could be invoked and exercised only where the defendant had lost possession through compulsion, as by forcible eviction under execution process; that the vacation of the premises by the defendant was a voluntary surrender of the premises; that the order for restoration was therefore an exercise of power in excess of jurisdiction. The plaintiffs thereby seek a declaration that forcible eviction pursuant to execution process constitutes a jurisdictional fact which must exist before the power attaches to make the order of restoration.

The absence of the claimed jurisdictional fact is conceded. The question is whether, as a basis for the exercise of jurisdiction to determine the merits of the defendant's motion for restoration, there must have been a forcible ouster pursuant to execution process.

The exercise of power to restore benefits after reversal has been declared to be discretionary. Spring Valley Water Works v. Drinkhouse, 95 Cal. 220, 30 P. 218; Yndart v. Den, 125 Cal. 85, 57 P. 761; Hansen v. d'Artenay, supra, 13 Cal.App.2d 293, 297, 57 P.2d 202; Bank of America, etc., v. McLaughlin, supra, 37 Cal.App.2d 415, 418, 99 P.2d 548. The discretionary element is inconsistent with an assertion that the relinquishment of possession pursuant to a judgment declaring the parties' rights must in addition have been by forcible means before the court has power to place the parties where they were before the rendition of the erroneous judgment. In Bank of America, etc., v. McLaughlin, supra, 37 Cal.App.2d 415, at page 417, 99 P.2d 548, at page 550, it was indicated that "a party is ordinarily entitled to restitution after a reversal of a judgment if he has been deprived of property by virtue of said judgment or by virtue of process issued upon said judgment." The rule is stated as follows in Restatement of the Law of Restitution, section 74: "A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable or the parties contract that payment is to be final; if the judgment is modified, there is a right to restitution of the excess." Under comment b. the rule is stated to be applicable although no execution was issued and although a stay of execution was obtainable; the statement being added that coercion exists only in the sense that performance was a legal duty at the time. Cases in support of the rule and the statement of its application are collected in Seavey and Scott's Notes to Restatement of the Law of Restitution at page 86. In this state, in Ashton v. Heydenfeldt, 124 Cal. 14, 17, 56 P. 624, it was recognized that delivery of personal property by executors pursuant to a decree of distribution was not a voluntary or gratuitous act which would preclude their right to restitution when the decree was reversed. In Ward v. Sherman, 155 Cal. 287, 291, 100 P. 864, the rule was also recognized and, though the balancing of accounts showed nothing due, must be deemed to have been applied where possession of real and personal property had been relinquished pursuant to a judgment subsequently reversed, without any showing that the relinquishment was pursuant to execution process. In Fritz v. Mills, 170 Cal. 449, 455, 150 P. 375, the court expressed the opinion that the plaintiff's payment pursuant to judgment, without more, was not voluntary and that it would be inequitable for the defendant after reversal on appeal to profit by the payment which the plaintiff was otherwise than by the judgment under no obligation to make. In similar vein are the cases of Warner Bros. Co. v. Freud, 131 Cal. 639, 63 P. 1017, 82 Am.St.Rep. 400; Mortgage Securities of California v. Pfaffman, 47 Cal.App. 383, 190 P. 641; and Erickson v. Boothe, 79 Cal.App.2d 266, 179 P.2d 611, holding that payment of money pursuant to decree or surrender of possession of property pursuant to an adjudication of unlawful possession, although no execution issued, are not voluntary acts depriving the parties of rights relative to appeal or for restoration upon reversal of the judgment. The fact that in some cases benefits had been lost under the erroneous judgment pursuant to execution process, does not render futile the exercise of the power in cases where the only coercion was that of a judgment declaring the parties' rights and duties.

The plaintiffs place reliance upon the case of Black v. Knight, 176 Cal. 722, 169 P. 382, L.R.A.1918C, 319, which involved an action for damages for alleged unlawful eviction. The asserted unlawful eviction was the vacation of the premises by the tenant pursuant to a judgment in unlawful detainer before the issuance of a writ of execution. That judgment subsequently was reversed whereupon the landlord tendered repossession of the premises to the tenant, but the tender was refused and the action was thereupon dismissed. The tenant did not seek restoration to possession, nor any benefits lost by the erroneous judgment. The case indicates the showing necessary in an action for damages for unlawful eviction and is not controlling in the present certiorari proceeding, the sole purpose of which is to test the power of the municipal court to act in the premises.

We conclude that there was no requirement in law that the dispossession of the defendant be forcible or pursuant to execution process before the court could exercise its inherent power to restore possession lost pursuant to a judgment reversed on appeal. It is sufficient that possession was relinquished pursuant to the judgment declaring the rights of the parties.

[7] It is not contended that the respondent court failed to afford due process to the plaintiffs on the hearing of the motion for restoration. The record shows that that court considered the merits of the motion—a subject not proper for consideration here; that its action was within its discretionary power; and that the order may not be annulled in a certiorari proceeding. Halpern v. Superior Court, 190 Cal. 384, 387, 212 P. 916; Kupfer v. Brawner, 19 Cal.2d 562, 565, 122 P.2d 268. There was therefore no error on the part of the superior court in affirming the order.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

I dissent. The record shows that after the unlawful detainer judgment was rendered in favor of plaintiffs-petitioners and against defendant-respondent (hereinafter called plaintiffs and defendant, respectively) followed by defendant's surrender of possession of the premises, the rights of third parties who purchased the premises intervened. It is apparent that a complete determination of the controversy cannot be had without the bringing in of such third parties; their presence in the proceeding is jurisdictional (see authorities cited, infra). Consequently, the judgment of the superior court affirming on certiorari the order of the trial court that the defendant be placed again in physical possession of the premises, necessarily ousting the third parties, should be reversed.

The record discloses the chronological order of the material events in this controversy as follows:

October 8, 1943. Plaintiffs purchased the property in question, which at that time was being occupied by defendant as a month-to-month tenant.

October 13, 1943. Plaintiffs obtained from the Office of Price Administration a certificate authorizing eviction of defendant at the expiration of three months from that date, in order that plaintiffs might occupy the premises.

September 28, 1944. Plaintiffs gave notice terminating the tenancy and demanding that on Nevember 1, 1944, defendant quit the premises. Defendant failed to do so.

November 16, 1944. Plaintiffs filed their complaint in unlawful detainer against defendant.

November 18, 1944. Defendant filed her answer to the complaint.

November 30, 1944. Respondent municipal court rendered judgment in plaintiffs' favor for possession of the premises, damages, and costs. On application of defendant, execution was stayed as to possession, to and including December 27, 1944.

December 26, 1944. Defendant vacated the premises.

January 10, 1945. Plaintiffs took possession, and thereafter had the premises redecorated, repaired and renovated.

January 25, 1945. Plaintiffs moved into the premises.

February 9, 1945. Defendant filed notice of appeal from the judgment.

August, 1945. Plaintiffs "negotiated for the sale of the premises," and thereafter delivered possession to the purchaser.

October, 1945. The sale of the premises "was consummated."

October 11, 1945. The appellate department of the superior court reversed the unlawful detainer judgment in plaintiffs' favor and remanded the cause for a new trial, on the technical ground that the notice terminating tenancy was not properly served.

October 15, 1945. Plaintiffs filed a notice of motion to dismiss the action in the municipal court.

October 19, 1945. Remittitur filed on the appeal to superior court.

October 22, 1945. Plaintiffs' motion to dismiss came on for hearing and was continued by the court because the files and papers in the action had not yet been returned to the municipal court from the appellate department of the superior court.

October 22, 1945. Plaintiffs, relying upon the provisions of subdivision 1 of section 581 of the Code of Civil Procedure, filed with the clerk of the municipal court their request to dismiss the action. The clerk entered a dismissal.

October 22, 1945. Subsequent to entry of dismissal, defendant filed a notice of motion "for an Order placing her in actual physical possession of the premises," by reason of the reversal of the unlawful detainer judgment. Concurrently, without first seeking leave of court, she filed a supplemental answer asking the same relief.

November 19, 1945. Defendant's motion for restitution of the premises was granted by the court, with execution stayed until November 26, 1945. Plaintiffs' motion to dismiss (filed October 15) was denied by the court with a minute order notation: "Dismissal on file effective."

November 21, 1945. Plaintiffs filed notice of motion to vacate the order of restitution and reconsider the motion to dismiss; and also filed supporting affidavits in which, for the first time, the fact was brought to the attention of the court that some weeks previously plaintiffs had sold the premises and delivered possession to the purchaser.

November 23, 1945. Court denied the above motion, and extended the stay of execution on the order of restitution to December 19, 1945.

November 27, 1945. Plaintiffs filed petition for certiorari in the superior court, challenging jurisdiction of municipal court to make the order of restitution.

March 13, 1946. Superior court affirmed on certiorari the order of restitution.

March 20, 1946. Plaintiffs filed notice of appeal from the judgment of the superior court in the certiorari proceeding.

Plaintiff Edward F. Schubert states, in his affidavit filed in support of plaintiffs' motion to vacate the order of restitution of the premises to defendant, that "In August, 1945, plaintiffs * * * negotiated for the sale of the premises. * * * In October, 1945, and prior to the hearing of the Motion to Dismiss * * * the sale of said premises was consummated and plaintiffs are no longer the owners of said premises and would be unable to deliver the same to defendant even if requested to do so.

"Plaintiffs lived in said premises during the time required by the OPA before selling said property and the purchaser has taken the property in good faith and without notice of the right as claimed by defendant to possession of the property.

"At the time the present owner negotiated for the purchase of the premises plaintiffs were in possession of the same and shortly after the escrow was opened for the sale of said property the present owner was placed in possession of the premises and has, ever since, been occupying and is now occupying the same as her home and dwelling."

Plaintiffs' attorney stated, also by affidavit, that "At the time of the original hearing [of defendant's motion for restitution and of plaintiffs' motion to dismiss] it was not shown to the Court * * * that it would be impossible to comply with the order of restitution for the reason that the plaintiffs were no longer in possession of * * * [the premises], having sold same in good faith to a third person after defendant had voluntarily left the premises in December of 1944, which was not brought to the attention of the Court for the reason that these facts were deemed immaterial on the argument on motion to dismiss, the arguments being directed to the law in connection with the rights to dismiss the action and for the further reason that plaintiffs and their counsel understood and believed that the dismissal filed in said action would appear of record before the filing of the Supplemental Answer."

It thus appears that at the time of the hearing on plaintiffs' motion to vacate the order of restitution the fact that the rights of third parties in possession of the premises had intervened was affirmatively brought to the attention of the court. The fact was not disputed. Nevertheless, without the bringing in of such third parties the court denied the motion and the superior court affirmed the order of restitution. In my opinion, the provisions of section 389 of the Code of Civil Procedure require that the third parties be brought in. That section provides, so far as here material, that:

"The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in * * *".

That bona fide purchasers of the property have rights which are entitled to protection is established by an abundance of authority. At page 1544 of 5 C.J.S., Appeal and Error, § 1982, it is stated that "good faith purchasers of property, which has been taken under judgment, usually cannot be compelled to make restitution upon subsequent reversal or modification." (See also 3 Am.Jur. 744, § 1248.) Even a purchaser at an execution sale may not be required to restore the property upon reversal of the judgment. The rule in such a case is set forth as follows at page 312, section 74, of Restatement of the Law of Restitution: "A person, other than the judgment creditor or his attorney, who purchases at a valid execution sale upon a judgment which is not void but which is subsequently reversed is entitled to retain the subject matter if, before reversal, he has obtained the legal title and has paid value therefor. * * * Since the sale was lawful he is protected as a bona fide purchaser * * *. A person is not prevented from being a bona fide purchaser by the fact that he has knowledge that an appeal is pending or even that he has knowledge of the grounds for appeal * * *." (Cf. Reynolds v. Harris (1860), 14 Cal. 667, 679, 76 Am. Dec. 459; Polack v. Shafer (1873), 46 Cal. 270, 276; Cowdery v. London etc. Bank (1903), 139 Cal. 298, 304-305, 73 P. 196, 96 Am.St.Rep. 115.) And at page 692, section 172, of the same work, appears the statement that "The principle that a person who innocently has acquired the title to property for which he has paid value is under no duty to restore it to one who would be entitled to reclaim it if he had not been innocent or had not paid value therefor, is of wide application, being a limitation upon the principle that a person who has been wrongfully deprived of his property is entitled to restitution. The question in such cases is which of two innocent persons should suffer a loss which must be borne by one of them. The principle which is applied by courts of equity is that they will not throw the loss upon a person who has innocently acquired title to property for value."

The same principle has peviously been applied in this state where, as here, a judgment of eviction was reversed. In Kennedy v. Hamer (1861), 19 Cal. 374, possession of real estate had been taken from Kennedy (as defendant) after a writ of possession had issued upon a judgment of eviction. The plaintiff in the eviction suit then leased the land to Hamer. Subsequently the judgment of eviction was reversed, and Kennedy brought an independent action seeking restitution. In affirming judgment in favor of Hamer, this court observed (pp. 387, 388 of 19 Cal.), "it seems to us that the proceeding cannot be maintained as against the lessee, who, so far as appears, had no connection with the original tortious act [ejecting Kennedy] * * * Hamer was not a trespasser at all. For all that appears, he leased the premises from the lawful owner of them, that owner having a right of entry, though, as we might concede, no right to dispossess Kennedy by force. It would be very unreasonable to hold that Hamer should be held to a quasi criminal responsibility under these circumstances."

Despite the fact that the interest of allegedly bona fide purchasers of the premises was brought to the attention of the court, no action was taken to bring them in in order that "a complete determination of the controversy" could be had. As declared in Ambassador Petroleum Co. v. Superior Court (1930), 208 Cal. 667, 671, 284 P. 445, 447, "when the trial court finds, or the record indisputably shows, that a 'complete determination of the controversy cannot be had without the presence of other parties' such parties become necessary and indispensable parties, and the section is mandatory, and the question then becomes one of jurisdiction in that the court may not proceed without bringing them in." (See also 20 Cal.Jur. 534, 21 Cal.Jur. 82, 83, and cases there cited.) Thus, the jurisdictional writ of prohibition will issue to prevent the court from proceeding until such necessary parties are brought in. (Ambassador Petroleum Co. v. Superior Court (1930), supra; Bank of California Nat. Ass'n v. Superior Court (1940), 16 Cal.2d 516, 523, 106 P.2d 879; Ash v. Superior Court (1917), 33 Cal.App. 800, 166 P. 841; Morrow v. Superior Court (1935), 9 Cal.App.2d 16, 26, 48 P.2d 188, 50 P.2d 66; Bayle-Lacoste & Co. v. Superior Court (1941), 46 Cal.App.2d 636, 646, 116 P.2d 458.) And the "objection that an indispensable party has been omitted may be raised at any time by the trial or appellate court of its own motion if the parties fail to make the objection. The requirement that indispensable parties be before the court is mandatory. [Citations.]" (Hartman Ranch Co. v. Associated Oil Co. (1937), 10 Cal.2d 232, 265, 73 P.2d 1163, 1179.)

Obviously no binding adjudication can be reached concerning possession of property without the bringing in of those who are actually in possession under a claim of bona fide ownership and certainly bona fide purchasers in actual possession should not be put out of possession under a writ issued in proceedings to which they are not parties. Consequently it is apparent that such purchasers are indispensable parties to this proceeding, and that inasmuch as that fact appears of record this court in affirming an order or judgment that possession be restored to another without the bringing in of such parties and the protection of their rights approves the violation by the trial court of a mandatory duty to bring in the purchasers.

The judgment of the superior court should be reversed and the cause remanded with directions that that court enter its order annulling the order of the municipal court.

30 Cal.2d 811

### In re TRAUNG'S ESTATE.

S. F. 17220.

Supreme Court of California, in Bank.

Nov. 5, 1947.

**1. Corporations** 🔑603

Where contract provided for sale by stockholders to buyers of all capital stock of corporation, and not for the transfer of corporate assets, sale was not in effect a liquidation of corporation, notwithstanding that buyers subsequently dissolved corporation.

**2. Corporations** 🔑603

The sale of all property of a corporation does not work a dissolution or liquidation, since "liquidation" is the operation of winding up corporation's affairs by realizing its assets, paying its debts, and appropriating amount of profit or loss.

See Words and Phrases, Permanent Edition, for all other definitions of "Liquidation".

**3. Corporations** 🔑610(1)
**Sales** 🔑3

"Liquidation" of a corporation is distinguished from a "sale", in that a sale is a bilateral act, while liquidation is accomplished by means of unilateral action of corporation.

See Words and Phrases, Permanent Edition, for all other definitions of "Sale".

**4. Trusts** 🔑272(3)

Where corporate stock forms a part of trust estate, income of which is to be paid to one for life with remainder to another, with regard to stock dividends based upon earnings, under "Pennsylvania rule", a determination is made as to whether dividend or other distribution was declared from earnings which accrued before or after trust began, and dividend is apportioned between corpus and income accordingly.

See Words and Phrases, Permanent Edition, for all other definitions of "Pennsylvania Rule".

**5. Trusts** 🔑272(1)

As respects allocation between life tenant and remaindermen, gains in value of investments, including securities, belong to capital and are to be credited to corpus of trust rather than to income.

**6. Trusts** 🔑272(3)

Where shares of stock of a corporation are held in trust to pay income to life tenant and principal to remaindermen, except as otherwise provided by terms of trust, earnings of corporation not distributed during designated period, either as dividends or on partial or total liquidation of corporation, are not income.

**7. Trusts** 🔑272(3)

The Pennsylvania rule relating to the allocation between life tenants and remaindermen of fruits of corporate investments, although applied in California in the case of extraordinary dividends, is rejected as to proceeds of sale of securities.

**8. Trusts** 🔑272(2)

Under the Uniform Principal and Income Act, proceeds of a sale by testamentary trustees of corporate stock, wherein all stockholders joined in transferring entire capital stock of corporation to buyer, are deemed to be principal and no part is apportionable to income even though a profit is realized on the sale. Gen.Laws, Act 8696, § 3(2).

**9. Trusts** 🔑272(1)

The fact that Uniform Principal and Income Act does not expressly bring within its provisions irrevocable or nonamendable trusts which were being administered at time act became effective does not prevent application to such trusts of the apportionment principle declared in Act nor necessarily codify an existing rule governing such trusts. Gen.Laws, Act 8696.

**10. Wills** 🔑680

Intention of testator, in construction of testamentary trust, if ascertainable, was controlling.

**11. Wills** 🔑684(3)

Declaration in provision of will creating a testamentary trust that stock dividends and proceeds from sale of stock rights should be credited to principal and added to trust estate did not disclose testator's intent with reference to apportionment of proceeds of any sale by testamentary trustees of corporate stock held by trust estate, so that apportionment according to law was required. Gen. Laws, Act 8696.

**12. Wills ⚷684(3)**

Life beneficiary of testamentary trust was not aided by Pennsylvania rule relating to allocation between life tenants and remaindermen of fruits of corporate investments, even if such rule were applicable, where evidence as to amount of net operating profits of corporation, the stock of which was sold by trustees, was conflicting.

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Charles F. Traung, deceased. From an order approving the third account of Louis Traung and another as testamentary trustees, Mae Percival Traung, the widow and life tenant, appeals.

Order affirmed.

Prior opinion 174 P.2d 476.

Hugh K. McKevitt and Jack M. Howard, both of San Francisco, for appellant.

Philip S. Ehrlich, Albert A. Axelrod, and R. J. Hecht, all of San Francisco, for respondents.

EDMONDS, Justice.

The will of Charles F. Traung established a trust for the purpose of paying "the net income, revenue and profit" of specified property to Mae Percival Traung, his widow, for her life. The remaindermen are his two adopted children. The sale of shares of stock which were a part of the corpus of the trust occasioned the present controversy between the trustees and the life tenant. The trustees credited the proceeds of the sale to the corpus of the trust. Mrs. Traung's appeal is from an order settling their third account.

Among the property left in trust were 45,342 shares of Traung Investment Company. These represented approximately 20.16 per cent. of the outstanding stock of that corporation. At the time of the testator's death, the Traung company, as its only asset, owned 94 per cent. of the capital stock of Mt. Tivy Winery, Inc. During the administration of the trust estate all of the stockholders of the Traung company sold their stock to Joseph E. Seagram and Sons, Inc., and Carstairs Bros. Distilling Co., Inc. This sale was expressly conditioned upon the delivery to the purchasers of all of the issued and outstanding stock of the Traung company, and the purchase price was based upon the excess in value of the assets over the liabilities of the Mt. Tivy corporation.

The second account of the trustees showed the receipt of $74,440.28 on account of the sale, all of which was allotted to the corpus of the trust. The account was settled and approved without objection. The third account included the receipt of $17,750.51 as the final payment for the stock, and also credited it to corpus. The life tenant objected to the settlement of this account upon the ground that the amount represented earnings which had accrued after the death of the trustor and should be credited to income. Mrs. Traung's appeal is from an order settling the account.

Challenging this disposition of the money, the life tenant contends that the Traung company was, in effect, liquidated through the medium of a sales agreement affecting all of the issued and outstanding capital stock. In such cases, she argues, the Pennsylvania rule, providing, as between the life tenant and the remainderman, for an equitable apportionment of corporate dividends declared from accumulated earnings and profits should be applied. She also asserts that, although there is no controlling precedent in this state, California is committed to the Pennsylvania rule as to the apportionment of dividends based upon earnings. But regardless of this rule, says Mrs. Traung, the testator intended that she should have the earnings represented by the purchase price of the stock sold and the amount should be allotted to her as income of the trust.

The trustees, on the other hand, justify their allocation of the amount as a sale of corporate stock which, they maintain, is not equivalent to a liquidation. Under such circumstances, it is said, the life beneficiary is not entitled to any of the earnings of the corporation which are not distributed by the corporation to the shareholders.

Another point relied upon by the trustees is that, even if the life tenant is entitled to an apportionment of the profit of a sale of shares, in the present estate it has not been established that the Traung company earned any net profits. The fact that the Mt. Tivy corporation made a profit does not mean that the Traung company had earnings which the trustees realized upon by the sale of the shares. The trustees also argue that the decree settling the trustees' second annual account, in which the proceeds of the sale were allocated to principal, is conclusive in favor of their action.

[1–3] The contention that the Traung company was, in effect, liquidated by the sale of its capital stock is not well taken. Carstairs and Seagram dissolved the corporation, but that action does not affect the rights of the sellers. The contract of sale did not require nor contemplate the liquidation or dissolution of the corporation; the agreement provided for the sale of all of its capital stock, and not the transfer of the corporate assets. Furthermore, even the sale of all of the property of a corporation does not work a dissolution or liquidation of it. South Pasadena v. Pasadena Land etc. Co., 152 Cal. 579, 93 P. 490; Sullivan v. Triunfo Gold & Silver Min. Co., 39 Cal. 459. "Liquidation of a corporation is defined as 'the operation of winding up its affairs by realizing its assets, paying its debts and appropriating the amount of profit or loss.' W. E. Guild, 19 B.T.A. 1186. It is in contemplation of law a strictly corporate act, not of any agent or officer who fortuitously executes its mechanics, but of the corporate entity itself * * *." William C. Hay, 2 T.C. 460, 470. A further distinction between a sale and a liquidation made in the Hay case, is that a sale is a bilateral act; the liquidation of a corporation is accomplished by means of unilateral action of the corporation. The fact that the trustees joined with all of the other stockholders in effecting the sale does not make the transaction a liquidation. After the sale was consumated, the Traung company continued to be a corporation owning the corporate stock of its subsidiary.

[4] With regard to stock dividends based upon earnings, there are three rules, each of which is known by the name of the jurisdiction in which it was first applied. Under the Pennsylvania rule, a determination is made as to whether the dividend or other distribution was declared from earnings which accrued before or after the trust began, and the dividend is apportioned between corpus and income accordingly. California has followed this rule in determining the ownership of extraordinary dividends. In re Estate of Gartenlaub, 185 Cal. 375, 197 P. 90, 24 A.L.R. 1; In re Estate of Duffill, 180 Cal. 748, 183 P. 337.

In some jurisdictions, the Pennsylvania rule has been extended to the proceeds of a sale of securities. In re Nirdlinger's Estate, 290 Pa. 457, 139 A. 200, 56 A.L.R. 1303; Simpson v. Millsaps, 80 Miss. 239, 31 So. 912; In re Sherman Trust, 190 Iowa 1385, 179 N.W. 109; Gist v. Craig, 142 S.C. 407, 141 S.E. 26; Wallace v. Wallace, 90 S.C. 61, 72 S.E. 553. But by the weight of authority, in those jurisdictions which have followed the rule to determine the right to extraordinary dividends, the beneficiary does not share in the amount received by the trustee from the sale of stocks or bonds constituting trust corpus. Long v. Rike, 7 Cir., 50 F.2d 124, 81 A.L.R. 521; Smith v. Hooper, 95 Md. 16, 51 A. 844, 54 A. 95; First National Bank of Canton v. Mulholland, 123 Miss. 13, 85 So. 111, 13 A.L.R. 1000; Guthrie's Trustee v. Akers, 157 Ky. 649, 163 S.W. 1117; Olcott v. Estate of Charles F. Hoffman, Inc., 127 Misc. 399, 216 N.Y.S. 267; McCoy v. McCloskey, 94 N.J.Eq. 60, 117 A. 473; Berger v. Burnett, 97 N.J.Eq. 169, 127 A. 160; Matter of Kernochan, 104 N.Y. 618, 11 N.E. 149; other cases are collected in Re Kink, 349 Pa. 27, 36 A.2d 504, 153 A.L.R. 491; Long v. Rike, 7 Cir., 50 F.2d 124, 81 A.L.R. 542; 56 A.L.R. 1315 and First National Bank v. Mulholland, 123 Miss. 13, 85 So. 111, 13 A. L.R. 1004.

[5] It is generally conceded that gains in value of investments, including securities, belong to capital and are to be credited to the corpus of a trust fund, rather than to

income. In re Estate of Gartenlaub, 198 Cal. 204, 244 P. 348, 48 A.L.R. 677; In re Estate of Eilert, 131 Cal.App. 409, 21 P.2d 630; In re Estate of Canfield, 104 Cal.App. 181, 285 P. 363. For example, in Re Estate of Eilert, supra, a corporation, in which the trust estate was a stockholder, sold all its assets, including improved real estate. It was held that, as between the life tenant and the remaindermen, the increase in the value of the corporate assets was an addition to the corpus of the trust estate.

[6] The rule in regard to a sale of securities is stated in section 236 of the Restatement of the Law of Trusts as follows: "Except as otherwise provided by the terms of the trust, if shares of stock of a corporation are held in trust to pay the income to a beneficiary for a designated period and thereafter to pay the principal to another beneficiary, * * * (e) the earnings of a corporation not distributed by the corporation during the designated period either as dividends or on partial or total liquidation of the corporation are not income; * * *." This rule is based upon sound reasoning. Although the corporate stock might have increased in value because of earnings accrued since the creation of the trust, the beneficiary does not become entitled to income or profits until a dividend has been declared and the amount separated from the capital of the corporation for distribution to its shareholders.

[7] Professor Bogert, in his work on Trusts, condemns the apportionment rule as being impossible of application in the case of a sale of securities and states his objections to it as "(1) the uncertainty of the causes for an increase in the market price of stock; (2) the vexation and expense caused to the trustee in disposing of gains on stock sales." 4 Bogert, Trusts and Trustees, § 824. Mrs. Traung declares that the difficulties of applying the apportionment rule generally should not be determinative of the question. Apportionment being the more equitable and just solution of the problem, should be followed, she argues, where, as in the present case, the profit can be ascertained, and the life tenant successfully carries the burden of proof as to the amount of the profit. But the use of that formula would require litigation in every case and a logical distinction may be made between its application to extraordinary dividends and the proceeds of a sale of securities. That distinction fully justifies the rejection in this state of the Pennsylvania rule in so far as such sales are concerned.

[8, 9] Since the enactment, in 1941, of the Uniform Principal and Income Act (Act 8696, Deering's Gen.Laws; Stats.1941, ch. 898, p. 2476), the proceeds of a sale such as shown by the present record are deemed to be principal. Sec. 3(2). The fact that neither irrevocable nor non-amendable trusts being administered at the time the statute became effective are expressly brought within its provisions, does not prevent the application of the same principle to such trusts, nor necessarily codify an existing rule governing them.

[10, 11] The parties agree that the intention of the testator, if it is ascertainable, is controlling. By his will, Traung provided that stock dividends and proceeds from the sale of stock rights "shall be credited to principal and added to the trust estate and be held as a part thereof." From this requirement, it may not be inferred that the testator intended either that the rule of apportionment should or should not be applied in the case of a sale of the shares. Certainly it cannot be said that the will, on its face, specifically declares the intention of the trustor as to whether the proceeds here in controversy are to be regarded as corpus or allocated between corpus and income.

[12] Moreover, the Pennsylvania rule would not aid Mrs. Traung, for the record shows conflicting evidence as to the amount of the net operating profits of the Mt. Tivy corporation for the period of the trust. Under these circumstances, even if she were entitled to the benefit of the apportionment formula, she has not sustained the burden of proof which it requires.

The order settling the third account of the trustees is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

30 Cal.2d 719

## TORAO TAKAHASHI v. FISH & GAME COMMISSION et al.

L. A. 19835.

Supreme Court of California, in Bank.
Oct. 17, 1947.

**1. Appeal and error 🔑439**

An appeal removes from jurisdiction of trial court subject matter of judgment or order appealed from, including all issues going to validity or correctness of such judgment or order, and trial court has no power thereafter, even by consent of parties to amend or correct judgment or order or to vacate it.

**2. Appeal and error 🔑82(2)**

Although amending of original judgment was void for lack of power of trial court to render it on ground that it was made after appeal was taken, appeal could be prosecuted from amended judgment as a "special order made after final judgment" under statute for purpose of having determination reviewed and reversed. Code Civ. Proc. § 963, subd. 2.

**3. Constitutional law 🔑210, 252**

The Fourteenth Amendment is not confined to the protection of citizens but applies to all persons within territorial jurisdiction, without regard to differences of race, creed, color or nationality. U.S.C.A.Const. Amend. 14.

**4. Constitutional law 🔑209**

"Equality" guaranteed by Fourteenth Amendment is equality under same conditions, and among persons similarly situated. U.S.C.A. Const.Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Equality".

**5. Constitutional law 🔑211**

Equal protection of laws as guaranteed by the Fourteenth Amendment does not prohibit legislature from making a reasonable classification of persons and businesses and from passing special legislation applying to certain classes, if classification is not arbitrary and is based upon some difference in the classes having substantial relation to legitimate object to be accomplished. U.S.C.A.Const.Amend. 14.

**6. Constitutional law 🔑48**

When a legislative enactment is attacked upon ground of discrimination, all the presumptions and intendments are in favor of reasonableness and fairness of legislative action and existence of fact supporting the legislative judgment is to be presumed and burden of overcoming presumption of constitutionality is cast upon the assailant unless legislation attempts to restrict fundamental liberties. Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

**7. Constitutional law 🔑48**

Decision of the legislature as to what is a sufficient distinction to warrant classification will not be overthrown by court unless it is palpably arbitrary. Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

**8. Fish 🔑3**

The state is owner of fish in coastal waters and may regulate the taking of them for private use.

**9. Fish 🔑8**

Subject only to constitutional limitations against discrimination, legislature, to conserve and protect fish, may pass such laws as to it seem wise, and question what measures are best adapted to that end is for its determination.

**10. Fish 🔑3**

Fish in coastal waters can become subject to private ownership only in such qualified way, to such limited extent, and subject to such conditions as legislature may impose.

**11. Game 🔑1, 3½**

The wild game within a state belongs to the people in their collective, sovereign capacity and is not subject to private ownership, except in so far as the people may elect to make it so, and they may, if they see fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good.

**12. Fish 🔑9**
**Game 🔑4**

State may confer exclusive rights of hunting and fishing within its borders upon its own citizens, and may constitutionally deny such privilege to citizens of other states, aliens and alien residents.

**13. Constitutional law 🔑230(2), 287**
**Fish 🔑9**

The statute prohibiting granting of commercial fishing licenses to aliens ineligible to United States citizenship does not violate due process clause of federal and state constitutions or equal protection clause of federal constitution as applied to an alien of Japanese descent where it was not established that legislature intended to discriminate against such aliens. Fish and Game Code, § 990; Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

**14. Fish 🔑9**
**Treaties 🔑6**

Contention that the statute prohibiting granting of commercial fishing licenses to aliens, ineligible to United States citizenship, was invalid as applied to an alien of Japanese descent on ground of violating treaty between United States and Japan was without merit in view that the treaty was abrogated on January 26, 1940. Fish and Game Code, § 990.

**15. Statutes 🔑217, 221**

Reports of a Senate fact-finding committee representing the opinion of only a few of the Senate could not be considered as expressing the intent of the legislature as a whole to inflict unwarranted discrimination against Japanese in enactment of the statute prohibiting the granting of commercial fishing licenses to aliens ineligible to United States citizenship, nor could articles in newspapers or other unofficial publications be considered as statements of legislative intent in that connection. Fish and Game Code, § 990.

**16. Evidence 🔑4**

Courts may take judicial notice of facts that are regarded as forming a part of common knowledge of every person of ordinary understanding and intelligence, but such common knowledge should be certain and undisputable and matter should be within court's jurisdiction.

**17. Evidence 🔑23(1)**

In considering the validity of the statute prohibiting the granting of commercial fishing licenses to aliens ineligible to United States citizenship, the court could not take judicial notice that it was commonly known to the legislators of 1945 in enacting the statute that the Japanese were the only aliens ineligible to citizenship and who engaged in commercial fishing in ocean waters bordering on California. Fish and Game Code, § 990.

**18. Commerce 🔑8(1)**

Rule that the state in exercise of its police power may regulate and control the taking, possession, and sale or transportation of fish and game is not violative of the federal government's interstate commerce power as applied to the regulation and control of the taking, possession and sale or transportation of fish caught upon the high seas beyond the three-mile limit and sought to be brought into or transported over portions of the state.

**19. Fish 🔑8**

Rule that the state in exercise of its police power may regulate and control the taking, possession and sale or transportation of fish is applicable to sea products caught upon high seas beyond the three-mile limit and sought to be brought into or transported over portions of state which have been subjected to statutory regulations affecting taking, possession and sale of fish and other marine products.

**20. Constitutional law 🔑70(3)**
**Fish 🔑9**

Any fish law having a reasonable relation to conservation of state's fisheries and its accomplishment and which is not unduly oppressive upon individuals is valid as a legitimate exercise of state's police power without inquiring into possible soundness of legislative judgment in the premises, and without consideration for possible individual hardships.

**21. Fish 🔑8**

The statute prohibiting the granting of commercial fishing licenses to aliens ineligible to United States citizenship as applied to bringing ashore of fish caught beyond coastal waters is within police power of the state, where statute was made for fish conservation purposes, notwithstanding that in application, it prevented Japanese aliens from engaging in commercial fishing. Fish and Game Code, § 990.

CARTER, J., GIBSON, C. J., and TRAYNOR, J., dissenting.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Mandamus by Torao Takahashi against Fish and Game Commission and others directing defendants to issue to petitioner, an alien, a commercial fishing license. From an adverse judgment, defendants appeal.

Reversed, with directions to enter judgment for defendants.

Robert W. Kenny, former Atty. Gen., Fred N. Howser, Atty. Gen., and Ralph W. Scott, Deputy Atty. Gen., for appellants.

A. L. Wirin John Maeno, Saburo Kido and Wirin, Kido & Okrand, all of Los Angeles, for respondent.

Arthur Garfield Hays, Richard Hawkins, and Frederick Sussman, all of New York City, Isaac Pacht, of Beverly Hills, Morris Cohn and Robert Morris, both of Los Angeles, Clore Warne, of Beverly Hills, Hugh Macbeth, Jr., Berkeley, and Herbert Ganahl, Daniel G. Marshall and William Strong, all of Los Angeles, as amici curiæ.

EDMONDS, Justice.

The superior court granted a peremptory writ of mandate directing the Fish and Game Commission to issue to the petitioner, Torao Takahashi, an alien ineligible to citizenship of the United States, a commercial fishing license. Upon its appeal from the judgment, the commission asserts that section 990 of the Fish and Game Code, which declares that a license shall not be granted to such an alien, is controlling. The constitutionality of that statute is the only question for decision.

In his amended petition, Takahashi alleges that since 1915, and until 1941, he was a duly licensed commercial fisherman, engaging in that occupation on the high seas. He was evacuated from California by military order in 1942. Upon his return to California in 1945, petitioner asserts, he qualified to obtain a fishing license within all of the requirements of the California Fish and Game Code "except only that he is a person of Japanese descent". The commission then refused to issue a license to him "solely because of his Japanese ancestry", and "solely because of the provisions of Section 990 of the Fish and Game Code". This provision is unconstitutional on its face and as applied to him, says Takahashi, because it was enacted for the purpose of discriminating against persons solely because of race, and is being administered in furtherance of that purpose. The bar of the statute, therefore, denies him due process of law as guaranteed by the state and federal constitutions, Const. Cal. art. 1, § 13, Const.U.S. Amend. 14, and the equal protection of the laws as guaranteed by the federal constitution. Const. U.S. Amend. 14. The remedy of mandamus is invoked, the petition concludes, because he has no adequate or any remedy at law or in any other proceeding. The relief sought is a peremptory writ requiring the commission to issue to him a commercial fishing license "to engage in commercial fishing on the high seas".

By its answer, the Fish and Game Commission denies that they refused Takahashi a license because of his Japanese ancestry. Upon information and belief, it asserts that he is ineligible to citizenship of the United States and, for that reason, it is not authorized or empowered under the applicable statute to issue a license to him. The remaining allegations of the petition are denied generally, specifically, or upon information and belief. As separate defenses, the commission alleges that the petition does not state facts sufficient to constitute a cause of action; that Takahashi is not qualified to receive or to have issued to him a commercial fishing license under the provisions of section 990 of the Fish and Game Code; and that he has no legal capacity to sue.

A demurrer to the petition was overruled. Petitioner then moved for a peremptory writ, the matter came on for hearing upon the pleadings, and judgment was rendered in his favor. By this judgment, the court found that Takahashi, although "a person ineligible to citizenship in the United

States, * * * is qualified to have issued to him a commercial fishing license, under the provisions of section 990 * * * authorizing him to bring ashore in California, for the purpose of selling the same in a fresh state, his catches of fish from the waters of the high seas beyond the State's territorial jurisdiction."

The commission perfected its appeal from this judgment and the transcript was filed within rule time. A few days later, the superior court, on application of Takahashi, entered an amended judgment directing that, by a peremptory writ of mandate, the commission be ordered to issue to him a commercial fishing license. Under the terms of the amended judgment and the amended peremptory writ of mandate, the commission is required to issue a license to Takahashi permitting him to fish commercially in territorial waters of the state as well as on the high seas.

In aid of appellate jurisdictions, the commission filed a notice of appeal from the amended judgment. By stipulation, the record on appeal was augmented to include the notice of appeal from the amended judgment, the affidavit of Takahashi and the original and amended order made under section 1110b of the Code of Civil Procedure, the amended judgment granting the peremptory writ of mandate, and the amended peremptory writ of mandate. The amended order made under section 1110b provides that the appeal taken from the judgment of the superior court granting the writ of mandate "shall not operate as a stay of execution of said judgment". Upon application of the commission, this court granted a writ of supersedeas staying proceedings upon both judgments until the determination of the appeal.

The commission, represented by the attorney general, does not question the validity of the amended judgment upon the ground that it was rendered after the appeal was perfected because the parties desire to have a decision upon the basis of its provisions. Also, the appellant does not now rely upon its separate defense that Takahashi has no legal capacity to sue.

Turning to the merits of the controversy, the commission contends that fish, like game, is the property of the state and held by it in its sovereign capacity as a trustee for all of its people; therefore, an individual cannot obtain an absolute property right in fish or game except upon such conditions, restrictions and limitations as the state may impose. It is well established, the argument continues, that the state, in the interest of conservation, may confer exclusive rights of fishing and hunting on its own citizens and, without violating constitutional inhibitions, expressly exclude aliens and nonresident citizens. The state may further classify aliens into two groups, those who are and those who are not eligible for citizenship, and such legislation is presumed to be constitutional. The reduction of the number of persons eligible to fish bears a reasonable relation to the object of conservation of fish and is within the purview of the state's police power; therefore, the classification is a reasonable one. And the inherent power of the state to regulate fish and game applies to fish brought into the state from the high seas by an ineligible alien.

Concerning the question as to whether the statute is being administered so as to discriminate against the Japanese, the commission relies upon the fact that no proof was offered by Takahashi in support of his allegation in that regard. For that reason, says the appellant, the allegations of the answer must be taken as true. The court may not take judicial notice that Japanese are the only ineligible aliens who engage in commercial fishing in ocean waters bordering California, and there is no basis for a conclusion that there was unconstitutional discrimination against Japanese aliens by description rather than name in the 1945 amendment to section 990. Nor may the court take judicial notice of alleged discrimination, as found in certain reports made by a committee of the California senate and other articles. In conclusion, the commission argues that section 990 of the Fish and Game Code does not divest Takahashi of rights under the treaty with Japan, because that treaty was abrogated in 1940.

Takahashi claims that section 990 of the Fish and Game Code is unconstitutional. Because it constitutes discriminatory race legislation, he argues, it violates due process as guaranteed by the California and United States constitutions, and denies equal protection of the laws in violation of the federal constitution. More specifically, he contends that the legislative history of section 990 discloses that this legislation was and is aimed exclusively against persons of the Japanese race. And even if fishing in territorial waters is a privilege granted by the state, rather than a right, the state may not unconstitutionally discriminate because of race, in the grant of that privilege. In support of this claim Takahashi contends that the court should take judicial notice of certain facts; namely, that it was known to the legislature in 1945 that Japanese were the only aliens ineligible to citizenship who engaged in commercial fishing in California waters and that certain articles and senate report show discrimination against this race. The alien also argues that the decisions construing the alien land law are not controlling in the present controversy because they do not concern the right to follow an occupation, and the statute concerning real estate has not been challenged as one aimed exclusively against any particular race.

[1, 2] An appeal removes from the jurisdiction of the trial court the subject matter of the judgment or order appealed from, including all issues going to the validity or correctness of such judgment or order. The trial court has no power thereafter to amend or correct its judgment or order, or to vacate or to set it aside. Such power cannot be reinvested in the trial court even by the consent of the parties. Linstead v. Superior Court, 17 Cal.App.2d 9, 61 P.2d 355; Kinard v. Jordan, 175 Cal. 13, 164 P. 894; Parkside Realty Co. v. MacDonald, 167 Cal. 342, 139 P. 805. The amended judgment is, therefore, void, but an appeal may be prosecuted from it as a "special order made after final judgment", for the purpose of having the determination reviewed and reversed. Code of Civ. Proc., sec. 963, subd. 2; Ivory v. Superior Court, 12 Cal.2d 455, 460, 85 P.2d 894; Luckenbach v. Krempel, 188 Cal. 175, 177, 204 P. 591; see 2 Cal.Jur., Appeal and Error, sec. 40.

Section 990 of the Fish and Game Code requires "every person who uses or operates or assists in using or operating any boat * * * to take fish * * * for profit", or who brings fish ashore "at any point in the State for the purpose of selling the same in a fresh state", to procure a commercial fishing license. Such a license "may be issued to any person other than a person ineligible to citizenship." This section was first codified in 1933. Stats.1933, ch. 73; based on Stats.1909, ch. 197, as amended. At the same session of the legislature, the section was amended (Stats.1933, ch. 696), and contained a restriction against persons who had not lived in the United States for one year. This restriction was held unconstitutional in Abe v. Fish and Game Commission, 9 Cal. App.2d 300, 49 P.2d 608. The hunting license section (427) of the Fish and Game Code, prior to 1945 and at the present time, classifies persons, for the purpose of imposing fees, as those under and over the age of 18 years, citizen residents of this state, nonresident citizens, resident declarant aliens, and those who have not declared their intention of becoming citizens. Section 428 of the same code, relating to sport fishing licenses, also classifies persons into groups of those over and under 18 years, residents and nonresident citizens of the United States, and aliens. In 1943 (Stats. 1943, ch. 1100) these sections were amended and "alien Japanese" were singled out by name as the only persons not qualified for a license to hunt, or fish for pleasure or profit. However, in 1945 (Stats.1945, ch. 181), each of these sections was amended so as to deny an alien "ineligible to [United States] citizenship" the privilege of obtaining either a hunting, sport fishing or a commercial fishing license.

[3-5] The Fourteenth Amendment to the federal constitution is not confined to the protection of citizens. It applies to all persons within the territorial jurisdiction, without regard to differences of race, creed, color or nationality. In re Kotta, 187 Cal. 27, 200 P. 957; Truax v. Raich, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131, L.R.A.1916D,

545, Ann.Cas.1917B, 283; Yick W. v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220; Wormsen v. Moss, 177 Misc. 19, 29 N.Y.S.2d 798. The equality guaranteed is equality under the same conditions, and among persons similarly situated. However, the legislature may make a reasonable classification of persons and businesses and pass special legislation applying to certain classes. The rule is that the classification must not be arbitrary, but must be based upon some difference in the classes having a substantial relation to a legitimate object to be accomplished. Watson v. Division of Motor Vehicles, 212 Cal. 279, 298 P. 481; Pacific Indemnity Co. v. Myers, 211 Cal. 635, 296 P. 1084; Superior etc. Corporation v. Superior Court, 203 Cal. 384, 264 P. 488; In re Kotta, supra; Gulf, C. & S. F. R. Co. v. Ellis, 165 U.S. 150, 17 S.Ct. 255, 41 L.Ed. 666.

As stated in Wormsen v. Moss, supra, "* * * the free right to labor is subject to the qualification that the right may be interfered with by the state, in the exercise of its general police power, in the interests of the health, morals, safety or welfare of the community. Such action of the state must, however, be reasonable, bear a just and reasonable relation to the promotion of the general welfare, and avoid arbitrary discrimination between persons. A statute enacted in the exercise of the police power must have been passed to prevent some manifest evil or to preserve public health, morals, safety or welfare. * * * If the calling is one that the State, in the exercise of its police power, may prohibit either absolutely or conditionally, by the exaction of a license, the fact of alienage may justify a denial of the privilege. But even then, there must be some relation between the exclusion of the alien and the protection of the public welfare." 29 N.Y.S.2d at pages 801, 803. Stated another way, the test of the constitutionality of legislation denying aliens the right to obtain a license to pursue a business is whether the classification has some reasonable basis in the welfare of the community. Miller v. City of Niagara Falls, 207 App. Div. 798, 202 N.Y.S. 549.

[6, 7] When a legislative enactment is attacked upon the ground of discrimination, all presumptions and intendments are in favor of the reasonableness and fairness of the legislative action. The existence of facts supporting the legislative judgment is to be presumed and the burden of overcoming the presumption of constitutionality it cast upon the assailant. The decision of the legislature as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary. People v. Globe Grain & Mill. Co., 211 Cal. 121, 127, 294 P. 3; People v. Monterey Fish Products Co., 195 Cal. 548, 556, 234 P. 398, 38 A.L.R. 1186; Alabama State Federation v. McAdory, 323 U.S. 450, 465, 65 S.Ct. 1384, 89 L.Ed. 1725; United States v. Carolene Products Co., 304 U.S. 144, 152, 58 S.Ct. 778, 82 L.Ed. 1234. The only possible limitation upon this rule is where the legislation attempts to restrict fundamental liberties. See, United States v. Carolene Products Co., supra, 304 U.S. at page 152, 58 S.Ct. 778, 82 L.Ed. 1234; Thornhill v. State of Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093.

[8-10] The statute now challenged regulates the bringing ashore in California of fish caught in territorial waters and on the high seas, and prohibits the issuance of commercial fishing licenses for either of these purposes to aliens ineligible to United States citizenship. It has long been held that the state is the owner of the fish in coastal waters and may regulate the taking of them for private use. "The Legislature may dispose thereof as to it may seem best, subject only to constitutional limitations against discrimination. Within those limitations the Legislature, for the purpose of conserving and protecting fish, may pass such laws as to it seem wise, and the question what measures are best adapted to that end is for its determination. [Citations.] Such fish can become the subject of private ownership only in such qualified way, to such limited extent, and subject to such conditions and limitations as the state through its Legislature may see fit to provide and impose." People v. Monterey Fish Products Co., supra, 195 Cal. at page 563, 234 P. at page 404, 38 A.L.R. 1186; see, In re Makings, 200 Cal. 474, 481, 253 P. 918; People v. Glenn-Co-

lusa Irr. Dist., 127 Cal.App. 30, 36, 15 P.2d 549; Rayside Fish Flour Co. v. Zellerbach, 124 Cal.App. 564, 566, 12 P.2d 961.

[11] It is well established that the legislature has the most extensive powers over the fish and game within its jurisdiction. In re Makings, supra, 200 Cal. at page 481, 253 P. 918. The broad powers of the state in this regard were early established in Ex parte Maier, 103 Cal. 476, 37 P. 402, 404, 42 Am.St.Rep. 129, where the court said, "The wild game within a state belongs to the people in their collective, sovereign capacity. It is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good." See, Lubetich v. Pollock, D.C., 6 F.2d 237, and cases cited therein.

[12] The right of the state to confer exclusive rights of hunting and fishing within its borders upon its own citizens is, therefor, beyond question. Also, citizens of other states, aliens, and alien residents may be constitutionally denied the privilege. Lacoste v. Dept. of Conservation, 263 U.S. 545, 44 S.Ct. 186, 68 L.Ed. 437; Patsone v. Commonwealth of Pennsylvania, 232 U.S. 138, 34 S.Ct. 281, 58 L.Ed. 539; Geer v. State of Connecticut, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793; McCready v. State of Virginia, 94 U.S. 391, 24 L.Ed. 248; Lubetich v. Pollock, supra; In re Eberle, C.C., 98 F. 295; Cummings v. People, 211 Ill. 392, 71 N.E. 1031; Commonwealth v. Hilton, 174 Mass. 29, 54 N.E. 362, 45 L.R.A. 475; State v. Kofines, 33 R.I. 211, 80 A. 432, Ann.Cas.1913C, 1120; People v. Setunsky, 161 Mich. 624, 126 N.W. 844; State v. Leavitt, 105 Me. 76, 72 A. 875, 26 L.R.A.,N.S., 799; People v. Brennan, 142 Misc. 225, 255 N.Y.S. 331; State v. Niles, 78 Vt. 266, 62 A. 795, 112 Am.St.Rep. 917; Alsos v. Kendall, 111 Or. 359, 227 P. 286; State v. Maybury, 136 Wash. 210, 239 P. 552. The broad powers of the state in this regard are set forth in Lubetich v. Pollock, supra, where the court stated: "In the light of the foregoing authorities it seems unescapable that the state owns the food fish in the waters over which it has jurisdiction, the same as any other proprietor owns property, and that aliens and nonresidents of the state may be constitutionally denied the right to take fish within its borders. The power to make such disposition of the fish arises out of and is incidental to the ownership of the property." D.C., 6 F.2d 240. Answering the contention that the Washington statute denied an alien the right to engage in a lawful occupation, the district court adopted with approval the following declaration by the Supreme Court of Oregon [111 O.S. 359, 227 P. 290]: "The rights of the state in the fish and in the waters from which the fish are to be taken are superior to plaintiff's right to choose fishing for salmon in those waters for an occupation. Such an occupation is not open to an alien against the legislative will of the state, since it involves the appropriation of property belonging to the state in its sovereign capacity. The state, in prohibiting aliens from engaging in the taking of salmon fish, is dealing with the common property of the people of the state; in prohibiting citizens of other states and unnaturalized foreign-born residents from fishing in the public waters of the state the state is, in fact, dealing with a property right of the state, and not with a mere privilege or immunity of a citizen of another state, nor does it amount to a denial to an alien within the state of the equal protection of its laws. Under the police power of the state the Legislature may prescribe any terms or conditions reasonably necessary for the preservation of the fish, but in the enactment of this law the Legislature was not legislating under its police powers, but under its reserved powers as the owner of the property which was the subject of the legislation, and which was to be affected thereby. As such owner it was authorized to prescribe any terms or conditions upon which the property of the state might be converted into private ownership. In legislating to that end it was dealing with its own property, and it had all of the rights and powers of an individual owner subject only to the duties which it owed to its own citizens." Under the broad powers resting in the state in regard to the regu-

lation of its fish and game as established by these authorities, it is clear that a state may withhold the privilege of hunting and fishing from aliens ineligible to United States citizenship.

This court recently held in People v. Oyama, 29 Cal.2d 164, 173 P.2d 794, 802, that the Alien Land Law (Alien Property Initiative Act of 1920, Stats.1921, p. lxxxiii, as amended; 1 Deering's Gen. Laws, Act 261) is constitutional. The broad powers of the state to regulate the ownership of real property within its boundaries were re-stated, and it was held that a state may prohibit, subject to a treaty to the contrary, the ownership of its lands by aliens ineligible to United States citizenship. The opinion points out that "Upon the subject of equal protection", the United States Supreme Court in Terrace v. Thompson, 263 U.S. 197, 44 S.Ct. 15, 20, 68 L.Ed. 255, "held that the classification was reasonable, saying that the rule established by Congress on the subject of naturalization 'in and of itself, furnishes a reasonable basis for classification in a state law withholding from aliens the privilege of land ownership as defined in the act.'" The basis of the classification regarding real estate is the same as the one upon which the statute here in controversy rests. By one statute, the state prohibits the ownership of land by ineligible aliens. In the other enactment the legislature has declared that such persons shall not take fish from its waters.

[13, 14] In many decisions the courts have upheld a classification of persons by which nonresidents and aliens were denied hunting and fishing privileges. In so far as conservation is concerned, it is just as reasonable to classify aliens upon the basis of eligibility to citizenship. Obviously, if the legislature determines that some reduction in the number of persons eligible to hunt and fish is desirable, it is logical and fair that aliens ineligible to citizenship shall be the first group to be denied the privilege of doing so. This is a logical, established, and reasonable method of classifying for conservation purposes, and the existence of facts supporting the legislative judgment is presumed. In view of the application of the presumption of constitutionality to legislation of this kind, and because of the broad powers of the legislature in regard to the ownership, regulation and protection of wildlife, it may not be said that the refusal of the state to allow aliens ineligible to citizenship in the United States to take, or assist in the taking of, fish for private use is so palpably arbitrary as to deny such aliens constitutional guarantees. The broad ground of attack that section 990 violates Takahashi's rights under the treaty between the United States and Japan is entirely without merit, for that treaty was abrogated on January 26, 1940. See, People v. Oyama, supra, 29 Cal.2d at page 175, 173 P.2d 794.

Takahashi contends, however, that section 990 is unconstitutional because it was enacted for the purpose and administered in a manner to discriminate against persons, including petitioner, solely because of his race. He points to the statute as it stood before the 1945 amendment and claims that the same group was singled out in different terms. Certain legislative reports and articles are referred to. But Takahashi has not established with any certainty that the legislature intended to discriminate against the Japanese by enacting the 1945 amendment to section 990. Certainly such discrimination does not appear upon the face of the amendment. All of the races ineligible to citizenship are included, and no one group in particular is singled out.

Prior to the 1945 amendment, section 990 expressly excluded alien Japanese, but this section was changed to exclude persons ineligible to citizenship. However, this does not conclusively show that the 1945 amendment was intended to be a continuance of the exclusive ban on alien Japanese by description rather than by name. Just as reasonably it may be said that the history of the 1943 and 1945 legislation shows a legislative desire to avoid the possibility of Japanese racial discrimination by extending the prohibition to all persons within a given class. And the fact that the legislature applied the phrase "ineligible to citizenship" to other subjects covered in the same chapter, including sport fishing and hunting, indicates that there was no intention to discriminate against alien Japanese commercial fishermen.

[15] Nor do the reports referred to in Takahashi's briefs point unerringly to unwarranted discrimination. The senate fact-finding committee reported merely that because the statute, as it read in 1943, might be declared unconstitutional, a change to the present form was desirable. By the amendment, if may be inferred, the legislature desired to extend conservation measures and did not rewrite the statute for the purpose of discriminating against alien Japanese. Furthermore, such reports on their face represent the opinion of only a few of the legislative body and cannot, with any certainty, be said to express the intention of the legislature as a whole. For much stronger reasons, articles in newspapers or other unofficial publications cannot be considered as statements of legislative intent.

[16] Takahashi contends, as justifying judicial notice, that "it was commonly known to the legislators of 1945 that Japanese were the only aliens ineligible to citizenship who engaged in commercial fishing in ocean waters bordering on California." Although the scope of judicial knowledge has been amplified by the courts in recent years, certain limitations remain. Courts may take judicial notice of facts that are regarded as forming a part of the common knowledge of every person of ordinary understanding and intelligence. However, such common knowledge should be certain and indisputable, and the matter should be within the court's jurisdiction. Varcoe v. Lee, 180 Cal. 338, 346, 181 P. 223; Civ.Proc., sec. 1875; People v. Sanchez, 21 Cal.2d 466, 132 P.2d 810; Livermore v. Beal, 18 Cal.App.2d 535, 64 P.2d 987; 31 C.J.S., Evidence, § 6 et seq.; 10 Cal.Jur. 693.

[17] Can it be said with certainty that Japanese were the only aliens ineligible to citizenship who engaged in commercial fishing in ocean waters bordering on California? And is the answer to this question a matter of common knowledge? The "Fish Bulletins", compiled by the Bureau of Marine Fisheries, Division of Fish and Game, Department of Natural Resources, do not include such information. And it was stipulated that the Statistician of the Bureau of Marine Fisheries does not know how many aliens ineligible to United States citizenship applied for commercial fishing licenses during the past fifteen years. At the time the 1945 amendment to section 990 was passed, the naturalization laws of the federal government prohibited Japanese, Hindus and Malayans from becoming citizens of the United States. The 16th Census of the United States, taken in 1940, shows that California was populated by aliens other than Japanese who were also ineligible to citizenship, and it is reasonable to assume that some of those persons were, or might desire to be, engaged in fishing as an occupation.

When the legislature acted in 1945, it did not change only the requirements in regard to commercial fishing. Sections 427 and 428, relating to hunting and sport fishing licenses, also were amended to prohibit the issuance of such licenses to ineligible aliens. If judicial knowledge is to be invoked, the intent of the legislature of 1945 in enacting the changes in chapter 181 should be gathered from the whole chapter and not alone from the section relating to commercial fishing. To follow logically the contention of Takahashi would require the further assumption of judicial knowledge that Japanese are the only ineligible aliens who hunt or fish for pleasure in California. This conclusion is again open to the objection of gross uncertainty. Under these circumstances, Takahashi has not sustained the burden of showing that the challenged statute is either unconstitutional on its face, or that it has been unconstitutionally applied to him.

This conclusion is not at variance with Macallen Co. v. Commonwealth of Massachusetts, 279 U.S. 620, 49 S.Ct. 432, 73 L.Ed. 874, 65 A.L.R. 866, which held that a statute imposing a tax on federal securities was void notwithstanding the designation given to the legislation. Counsel for Takahashi use the Macallen case as authority for their position that if the 1943 amendment to section 990 barring alien Japanese by name from fishing and hunting was unconstitutional, so is the present statute, because, since 1945, the same group is now singled out by a more general designation. But it is established by both federal and state authorities that the state may properly deny the privilege of hunting and fishing to all except its own citizens, and the record does not show that Japanese are the only ineligible aliens in this state who have hunted and fished.

Nor is In re Ah Chong, C.C., 2 F. 733, relied upon by Takahashi, controlling. In that case the court held unconstitutional an early California statute which prohibited aliens incapable of becoming electors of the state from fishing in inland state waters. This conclusion was placed upon the ground that the legislation was aimed solely at the Chinese. The statute was one of a series of constitutional provisions and legislative enactments, some of which singled out the Chinese by name, directed against a particular racial group. In those early days it was commonly known that the Chinese were the only aliens in California who could not become electors. It was thus evident from the extensive legislation and declared policy of the state, as embodied in its constitution, that Chinese were being singled out not only by name but by description. The Ah Chong case, therefore, is clearly distinguishable on its facts from the issues now before the court. Also, in striking down the statute, the court did not consider the important rules in regard to the presumption of constitutionality; nor, apparently, did the state strenuously urge, as here, that the statute was enacted for conservation purposes.

Other cases cited by Takahashi do not compel a determination in his favor. In Abe v. Fish and Game Commission, supra, the court considered only the constitutionality of section 990 in so far as it prohibited nonresidents from bringing ashore in California fish caught on the high seas. The decision does not construe the statute in so far as it prohibits the issuance of territorial commercial fishing licenses to ineligible aliens. Danskin v. San Diego Unified School District, 28 Cal.2d 536, 171 P.2d 885, concerned the constitutionality of section 19432 of the Civic Center Act, Education Code, which allows the governing boards of school districts to refuse the use of school buildings to "subversive elements". A majority of the court held the measure unconstitutional as an interference with freedom of speech and assembly upon the ground that, although a state may withhold the use of school property, it may not impose arbitrary and unconstitutional requirement as a condition for granting the privilege. The statute now under attack imposes no unconstitutional requirement as a condition for a privilege.

[18, 19] Considering the provisions of section 990 in regard to the bringing ashore of fish caught beyond coastal waters, it is well established that the state, in the exercise of its police power may regulate and control the taking, possession and sale, or transportation of fish and game. This principle is applicable to sea products caught upon the high seas beyond the three-mile limit of state jurisdiction and sought to be brought into or transported over portions of the state which have been subjected to statutory regulations affecting the taking, possession, and sale of fish and other marine products. Johnson v. Gentry, 220 Cal. 231, 30 P.2d 400, 92 A.L.R. 1264; Svenson v. Engelke, 211 Cal. 500, 296 P. 281; Ex parte Maier, supra; Silz v. Hesterberg, 211 U.S. 31, 40, 29 S.Ct. 10, 53 L.Ed. 75; Geer v. State of Connecticut, supra; Van Camp Sea Food Co. v. Dept. of Natural Resources, D.C., 30 F.2d 111; In re Deininger, C.C., 108 F. 623. This rule is not violative of the federal government's interstate commerce power. Ex parte Maier, supra, 103 Cal. at page 484, 37 P. 402, 42 Am.St.Rep. 129; Geer v. State of Connecticut, supra, 161 U.S. at page 534, 16 S.Ct. 600, 40 L.Ed. 793; Silz v. Hesterberg, supra, 211 U.S. at page 43, 29 S.Ct. 10, 53 L.Ed. 75; Van Camp Sea Food Co. v. Dept. of Natural Resources, supra, 30 F.2d at page 113. The reason for upholding such a regulation or prohibition was stated in Van Camp Sea Food Co. v. Department of Natural Resources, supra, where the court said: "We entertain no doubt as to the validity of such restriction on or qualification of the use to be made of the fish, because it tends to their protection and conservation as much as does a limita-

tion on the right to sell game or ship it to points without the state. * * * the state has the right to limit or qualify the use that may be made of fish of the same species brought into the state from the high seas, in order to make effective the restriction on the use of fish taken from its own waters."

[20] Section 1110 of the Fish and Game Code was considered in Santa Cruz Oil Corporation v. Milnor, 55 Cal.App.2d 56, 130 P.2d 256, and, in sustaining its requirements, the court adopted the following pertinent language from Mirkovich v. Milnor, D.C., 34 F.Supp. 409: "'That a state has the power to enact legislation for the conservation of its fisheries is, of course, not open to question. Any law having a reasonable relation to such object and its accomplishment, and which is not unduly oppressive upon individuals must be upheld as a legitimate exercise of the state's police power without inquiry into the possible soundness of legislative judgment in the premises, and without consideration for possible individual hardships. * * *

"'The insurmountable difficulties attendant upon policing the waters of the state from the coast to the imaginary three mile limit, wherever fishing operations occur; the impossibility of distinguishing fish taken in state waters from those taken from without, or between vessels fishing within from those fishing beyond the state's limits; the consequent ease with which fraud and deceit might be practiced by vessels delivering fish taken from the fisheries of the state to points outside the state on the pretext of operating solely beyond the three mile limit—these considerations alone justify the provisions of section 1110 of the Fish and Game Code as a proper exercise of the police power of the State of California, having reasonable relation to the object of their enactment, and reasonably calculated to render effective the state's power of control over the fish supply within its territorial waters.

"'In Bayside Fish Flour Co. v. Gentry, supra, [297 U.S. 422, 56 S.Ct. 513, 80 L.Ed. 772] the United States Supreme Court upheld the constitutionality of certain portions of the California Fish and Game Code regulating the processing within the state, for interstate commerce, of sardines taken either from the waters of the state or from beyond the state's territorial boundaries. State legislation prohibiting the possession of wild game out of season within its borders was held a valid exercise by the state of its police power for the protection of the state's own game supply, in its application to game imported from without the state. * * *

"'We have referred to but a few of the decisions upholding the constitutionality of state legislation calculated to effectuate the exercise by the state of its police power for the general welfare of its inhabitants. In each instance, the legislation was adjudged valid by application of the principle which governs the instant case, namely; that the state's power of control over its fish and wild game includes the right to adopt any measure, not unduly oppressive to private individuals, reasonably necessary to render that control effective.'" [55 Cal.App.2d 56, 130 P.2d 261.]

[21] Applying the rule of these cases to Takahashi's situation, as the state may prohibit the transportation of salmon caught on the high seas through certain districts during a closed season (Johnson v. Gentry, supra); prohibit possession of game during a closed season even if brought from without the state (Silz v. Hesterberg, supra); prohibit the sale of trout within the state although it was lawfully caught in another state and brought into this state for the purpose of sale (In re Deininger, supra); or regulate the output of a plant processing fish caught on the high seas (Van Camp Sea Food Co. v. Dept. of Natural Resources, supra), in furtherance of its declared public policy to prohibit ineligible aliens from taking its animals ferae naturae, the state also may refuse to issue a commercial fishing license to aliens ineligible to United States citizenship so as to permit them to bring ashore sea products at any point in the state for the purpose of selling the same in a fresh state. Section 990 of the Fish and Game Code as it stood at the time of the decision of Abe v. Fish and Game Commission, supra, required a license of every person who assisted in the bringing of fish caught

on the high seas into this state, for the purpose of selling the same in a fresh condition, and limited the issuance of such license to persons who had continuously resided in the United States for a period of one year. The statute in that form rested upon no reasonable basis for the prohibition. The present provision prohibits the bringing of fish ashore in California in the furtherance of an established and legitimate policy in regard to the distribution and conservation of the common property of the state.

The original and amended judgments are, and each of them is, reversed with directions to enter judgment for the commission and its members.

SHENK, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The problem involved in this case is whether the state may by statute exclude aliens who are residents of the state from fishing in the waters thereof when all other persons are permitted to do so. Specifically, in the instant case, the statute not only discriminates against aliens solely upon the basis of alienage but goes further and excludes only certain classes of aliens, namely, those who are ineligible to citizenship. From a broader view point, inasmuch as the fishing involved is commercial fishing, an age old means of livelihood, the issue is whether an alien resident may be excluded from engaging in a gainful occupation—from working—making a living.

A mere statement of the problem should compel an answer favorable to the alien if there is any security in our constitutional guarantees. We must assume that the alien is in this country properly. The federal government has chosen to permit his entry and residence here. That course having been adopted, settled principles of constitutional law, require that the alien be accorded the right to work, engage in commerce and otherwise become a useful member of the crew who pulls his oar in the ship of state. There are several settled principles that must be remembered. The right to work—to earn a living—is secured by the constitutions, both federal and state. James v. Marinship, 25 Cal.2d 721, 155 P.2d 329, 160 A.L.R. 900. The equal protection principle of the constitution shelters aliens as well as others. As said in Truax v. Raich, 239 U.S. 33, 39, 36 S.Ct. 7, 9, 60 L. Ed. 131, L.R.A.1916D, 545, Ann.Cas.1917B, 283: "The question, then, is whether the act assailed [a state statute requiring employers to employ a certain percentage of citizens in proportion to aliens] is repugnant to the 14th Amendment. Upon the allegations of the bill, it must be assumed that the complainant, a native of Austria [an alien], has been admitted to the United States under the Federal law. He was thus admitted with the privilege of entering and abiding in the United States, and hence of entering and *abiding in any State in the Union.* See Gegiow v. Uhl, Commissioner, 239 U.S. 3, 36 S.Ct. 2, 60 L.Ed. 114. *Being lawfully an inhabitant of Arizona, the complainant is entitled under the 14th Amendment to the equal protection of its laws.* The description, 'any person within its jurisdiction,' as it has frequently been held, includes aliens. 'These provisions,' said the Court in Yick Wo v. Hopkins, 118 U.S. 356, 369, 6 S.Ct. 1064, 30 L. Ed. 220 (referring to the due process and equal protection clauses of the Amendment), 'are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.' See also Wong Wing v. United States, 163 U.S. 228, 242, 16 S.Ct. 977, 41 L.Ed. 140, 145; United States v. Wong Kim Ark, 169 U.S. 649, 695, 18 S.Ct. 456, 42 L.Ed. 890, 907. * * *

"It is sought to justify this act as an exercise of the power of the State to make reasonable classifications in legislating to promote the health, safety, morals, and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, *does not go so far as to make it possible for the state to deny to lawful inhabitants, because of their race or nationality,* *the ordinary means of earning a livelihood.* It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 762, 4 S.Ct. 652, 28 L.Ed. 585, 588; Barbier v. Connolly, 113 U.S. 27, 31, 5 S.Ct. 357, 28 L.Ed. 923, 924; Yick Wo v. Hopkins, supra; Allgeyer v. Louisiana, 165 U.S. 578, 589, 590, 17 S.Ct. 427, 41 L.Ed. 832, 835, 838; Coppage v. State of Kansas, 236 U.S. 1, 14, 35 S.Ct. 240, 59 L.Ed. 441, L.R.A. 1915C, 960. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. It is no answer to say, as it is argued, that the act proceeds upon the assumption that 'the employment of aliens, unless restrained, was a peril to the public welfare.' The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself, and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor, is necessarily involved. It must also be said that reasonable classification implies action consistent with the legitimate interests of the state, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government. Fong Yue Ting v. United States, 149 U.S. 698, 713, 13 S.Ct. 1016, 37 L.Ed. 905, 913. The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality.

"It is insisted that the act should be supported because it is not 'a total deprivation of the right of the alien to labor'; that is, the restriction is limited to those businesses in which more than five workers are employed, and to the ratio fixed. It is emphasized that the employer in any line of business who employs more than five workers may employ aliens to the extent of 20 per cent of his employees. *But the fallacy of this argument at once appears. If the State is at liberty to treat the employment of aliens as in itself a peril, requiring restraint regardless of kind or class of work, it cannot be denied that the authority exists to make its measures to that end effective.* Otis v. Parker, 187 U.S. 606, 23 S.Ct. 168, 47 L.Ed. 323, Silz v. Hesterburg, 211 U.S. 31, 29 S.Ct. 10, 53 L.Ed. 75; Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192, 33 S.Ct. 44, 57 L.Ed. 184. If the restriction to 20 per cent now imposed is maintainable, the state undoubtedly has the power, if it sees fit, to make the percentage less. We have nothing before us to justify the limitation to 20 per cent save the judgment expressed in the enactment, and if that is sufficient, it is difficult to see why the apprehension and conviction thus evidenced would not be sufficient were the restriction extended so as to permit only 10 per cent of the employees to be aliens or even a less percentage; or were it made applicable to all businesses in which more than three workers were employed instead of applying to those employing more than five. We have frequently said that the legislature may recognize degrees of evil and adapt its legislation accordingly. ([St. Louis] Consol. Coal Co. v. People of State of Illinois, 185 U.S. 203, 207, 22 S.Ct. 616, 46 L.Ed. 872, 875; McLean v. State of Arkansas, 211 U.S. 539, 551, 29 S.Ct. 206, 53 L. Ed. 315, 321, Miller v. Wilson, 236 U.S. 373, 384, 35 S.Ct. 342, 59 L.Ed. 628, 632, L.R.A. 1915F, 829); but underlying the classification is the authority to deal with that at which the legislation is aimed. The restriction now sought to be sustained is such as to suggest no limit to the State's power of excluding aliens from employment if the principle underlying the prohibition of the act is conceded. No special public interest with respect to any particular business is shown that could possibly be deemed to support the enactment, for as we have said, it relates to every sort. *The discrimination is against aliens as such in competition with citizens in the described range of enterprises, and in our opinion it clearly falls under the condemnation of the fundamental law.*" [Emphasis added.] And the resident aliens are protected in their person and property. "* * * aliens residing in the United States for a shorter or longer time, *are entitled,* so long as they are permitted by the government of the United States to remain in the country, *to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property,* and to their civil and criminal responsibility." [Emphasis added.] Fong Yue Ting v. United States, 149 U.S. 698, 724, 13 S.Ct. 1016, 1026, 37 L.Ed. 905. See, also, Terrace v. Thompson, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255.

There is no reason why aliens ineligible to citizenship may be placed in a class by themselves, at least as long as they are residents of the state. The several states have no power to exclude aliens as such from their borders. 3 C.J.S., Aliens, § 33 (c); 2 Am.Jur.Aliens, secs. 70, 73; Rottschaefer on Const.Law, p. 375. Therefore, they cannot be excluded from residence here. Being required to accept them as inhabitants it must accord them the securities afforded others. The only basis for the classification suggested by the majority opinion is that, in furtherance of conservation of natural resources (fish and game), "[Where] the legislature determines that some reduction in the number of persons eligible to hunt and fish is desirable, *it is logical and fair that aliens ineligible to citizenship shall be the first group to be denied the privilege of doing so.* This is a logical, established, and reasonable method of classifying for conservation purposes, and the existence of facts supporting the legislative judgment is presumed." [Emphasis added.] I can see no logic in depriving resident aliens, even though they are not eligible to citizenship, of the means of making a livelihood, including the pursuit of commercial fishing. They are lawfully inhabitants and residents of the state. Even if it be assumed that nonresidents, both alien and citizens of the United States, may be excluded from game and fish on the theory that such resources belong to the people of the state, the fact remains that resident aliens are a part of the people—the inhabitants and residents of this state. Because some believe that aliens should be punished by such a penalty is no basis for a reasonable classification. There is no sound basis for the argument that because the fish and game belong to the people of the state, the taking of them may be prohibited to all, and that with such a broad power any group of people may be arbitrarily excluded from the right to take any portion thereof. On the basis of that reasoning the Legislature could validly prohibit persons ineligible to citizenship from using the highways. They belong to the state and the traffic hazards would be less if fewer people were using them. The same is true of the use of the parks, schools and other public buildings and places. It could be argued that they are overcrowded and the more people using them the greater the cost to the public, all to the diminishment of the resources of the state natural or otherwise. While the state may withhold a privilege if it elects not to grant it, it cannot arbitrarily prevent any member of the public from exercising it while granting such privilege to others. To conclude otherwise would deprive the equal protection principle of all meaning. If aliens are to be given equal protection, and they must, then to put them all in a class by themselves is to refute the very premise of the doctrine. Manifestly there is no rational basis for the classification. When the lack of a proper ground is patent on the face of legislation, proof of its lack of rationality is unnecessary. Suppose a statute declared that red headed persons could not engage in certain occupations. Plainly a red head could not prove there was no possible reason why the public welfare is more jeopardized by having red heads than others in those callings. He would simply say all that any one could say: "That such a classification is pure nonsense," and there is not a court in the land that would not agree with him.

The denial to resident aliens of equal protection of the laws guaranteed other residents of the state has been accomplished by piecemeal methods. They have been denied the right to engage in first one occupation and then another. It cannot be doubted that a sweeping provision prohibiting them from engaging in any occupation whatsoever would be held invalid. Truax v. Raich, supra. The onslaught by the "one at a time" method is fast achieving the same sweeping result. See, 17 N.Y.Univ. L.Q.Rev. 242; 18 Id. 483; 16 A.B.A.J. 113; 22 Minn.L.Rev 137; 39 Cal.L.Rev. 1207. One of the objectives of the Constitution of the United States, and particularly the amendments thereto, is to protect minorities. Section 1 of the Fourteenth Amendment to the Constitution of the United States provides that "No State shall * * * deny to *any person* within its jurisdiction the equal protection of the laws." The words, "any person," includes an alien. Truax v. Raich supra. Any rational application of this provision to statutes such as the one here involved must result inevitably in striking down such statutes as being in clear contravention of this provision. To permit such a statute to stand is destructive of the fundamental concept upon which that provision is based.

Even if we asume that aliens as such may be excluded from some vocations or pursuits yet *there is no conceivable basis for discrimination between different classes of aliens.* In the instant case *not all aliens* are shut out of commercial fishing. It embraces only those "ineligible to citizenship." Other aliens may follow that enterprise. Thus we have at least one complete answer to the proposition that because the fish are owned by the people of the state (people being used in the sense of a citizen of the state and aliens are not citizens) all non-citizens may be excluded from taking the fish. That reasoning requires the exclusion of *all* aliens. It furnishes no justification for excluding some aliens and not others. The majority opinion suggests no possible basis for such a classification and I do not believe there is any. Such a classification is based upon a mere ipse dixit and nothing more. The total absence of any rational foundation for such a classification is aptly illustrated by Dudley O. McGovney, Professor of Law, University of California, when he states:

> "Before stating with more precision the scope of rights denied to 'ineligible aliens' by these laws, let us look at their racial operation. Aliens of the brown or Malay race, except Filipinos of the same race, and aliens of the yellow or Mongolian race, except Chinese of the same race, are denied rights which aliens of the white or Caucasian race, aliens of the black or Negro race, and aliens of the red or American Indian race are permitted to enjoy without limitation. Thus eligibility of aliens to possess these particular rights follows a very queer pattern, or rather, is patternless, like a crazy quilt if they are Filipino aliens or Chinese aliens.
>
> "There may also be some patches whose race or color is dubious. These are aliens of races indigenous to British India, called Hindus in the popular parlance of Americans. When naturalization was confined to white and Negro aliens, the Supreme Court held that Hindus are neither, but surely they are not of the red, yellow, or brown races. Whatever their race, dark Hindu patches are included in the crazy quilt.
>
> "The patternless craziness does not end there. Even an alien whose blood is seven-sixteenths Japanese or Korean may [enjoy equal protection of the laws] * * * if the other nine-sixteenths is wholly of the red, black, or white race, or Hindu, or Chinese, or Filipino, or a combination of any or all of these. So may any alien who is seven-sixteenths Malay if the rest of his blood is wholly of a qualifying kind or a combination of qualifying kinds. The fraction of seven-sixteenths is taken as an example. The actual rule is that if eligible blood preponderates, however slightly, the alien is eligible to acquire real property in California. Here we have the possibility of patches of intermediate color. On the other hand if Mongolian blood other than Chinese preponderates in the veins and

arteries of an alien, or Malay blood other than Filipino predominates, that alien may not get into the quilt." 35 Cal.L.Rev. 7, 9.

In applying the equal protection provision of the Fourteenth Amendment to Aliens, the United States Supreme Court has drawn distinctions which, when applied to the instant statute, must render it invalid. Assuming the soundness of those distinctions for the sake of precedent alone, and applying them here, it appears that aliens may be shut out of the pool hall business (State of Ohio ex rel. Clarke v. Deckebach, 274 U.S. 392, 47 S.Ct. 630, 71 L.Ed. 1115), public employment (Heim v. McCall, 239 U.S. 175, 36 S.Ct. 78, 60 L.Ed. 206, Ann.Cas.1917B, 287), and the taking of game as a sportsman. Patsone v. Commonwealth of Pennsylvania, 232 U.S. 138, 34 S.Ct. 281, 58 L.Ed. 539. Those cases may be distinguished on various grounds: (1) In all of them the exclusion statutes under consideration included *all* aliens and not merely those ineligible to citizenship as is true of the statute here involved. (2) They did not concern the problem of a "common employment" from which the alien cannot be debarred. So says the United States Supreme Court in Truax v. Raich, supra. Commercial fishing with which we are dealing is a common pursuit with a long historical background. (3) The pool room business (dealt with in the Clarke case) has long been the subject of especially severe regulation, and it was on that basis the court held the prohibition as to aliens valid, stating, 274 U.S. at page 397, 47 S.Ct. at page 631, 71 L.Ed. 1115: "The *admitted* allegations of the answer set up the harmful and vicious tendencies of public billiard and pool rooms, of which this court took judicial notice in Murphy v. State of California, 225 U.S. 623, 32 S.Ct. 697, 56 L.Ed. 1229, 41 L.R.A.,N.S. 1530. The regulation or even prohibition of the business is not forbidden. (Citation.) The present regulation presupposes that aliens in Cincinnati are not as well qualified as citizens to engage in this business." [Emphasis added.] The court stressed the proposition that aliens cannot be discriminated against upon an "irrational" basis. Clearly, there is no rational basis for a distinction between aliens who are eligible and those who are ineligible to citizenship. Such aliens when engaged in commercial fishing are not in a business intrinsically harmful to the public. (4) The public employment present in the Heim case was based upon the theory that the state may hire whom it pleases as its employees. This is clearly distinguishable from a state law forbidding a certain class of aliens from seeking a livelihood in a common occupation.

The cases holding valid alien land laws (see, Terrace v. Thompson, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255; People v. Oyama, 29 Cal.2d 164, 173 P.2d 794) are expressly distinguished from the case at bar. In distinguishing Truax v. Raich, supra, the United States Supreme Court states in Terrace v. Thompson, supra, 263 U.S. at page 221, 44 S.Ct. at page 20, 68 L.Ed. 255: "In the opinion [Truax v. Raich] it was pointed out that the legislation there in question *did not relate to the devolution of real property,* but that the *discrimination was imposed upon the conduct of ordinary private enterprise* covering the entire field of industry with the exception of enterprises that were relatively very small. It was said that the right to work for a living in the common occupations of the community is a part of the freedom which it was the purpose of the Fourteenth Amendment to secure.

"In the case before us, the *thing forbidden is very different.* It is not an opportunity to earn a living in *common occupations of the community,* but it is the privilege of owning or controlling agricultural land within the state. The quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance and affect the safety and power of the state itself." [Emphasis added.] Assuming the soundness of that distinction and the alien land law cases, here we have a common occupation or calling, "commercial fishing," and hence the Truax case controls. "Fishing was one of man's earliest sources of food supply and it is still one of his most important means of livelihood." Encyclopaedia of the Social Sciences, Vol. III, p. 266.

Finally, highly persuasive arguments may be made that the law in the instant case is aimed solely at Japanese in an obvious discrimination against a particular race, in spite of the fact that that race is not mentioned by name in the statute, by reason of the historical background of alien legislation and court decisions. See, 35 Cal.L.Rev. 7, 51. It is settled that such legislation is invalid. See, Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L. Ed. 220; Yu Cong Eng v. Trinidad, 271 U.S. 500, 46 S.Ct. 619, 70 L.Ed. 1059.

In my opinion the learned trial judge was right in granting petitioner a peremptory writ of mandate and the judgment should therefore be affirmed.

GIBSON, C. J., and TRAYNOR, J., concur.

82 Cal.App.2d 166

## McCARTHY v. McCARTHY.

Civ. 13463, 13464.

District Court of Appeal, First District,
Division 2, California.
Oct. 31, 1947.
Hearing Denied Dec. 30, 1947.

**1. Appeal and error 🔑931(1)**

Appellate court must take as true the testimony most favorable to judgment.

**2. Deeds 🔑56(2)**

While valid delivery of a deed may be effected without manual transfer, effectiveness of delivery, regardless of whether there is a manual transfer, depends upon grantor's intention that deed should be presently operative.

**3. Deeds 🔑56(4)**

A deed which grantor executes with intention of having it take effect only after his death and which he retains in his possession or under his control is ineffectual to pass title for want of "delivery".

See Words and Phrases, Permanent Edition, for all other definitions of "Delivery".

**4. Husband and wife 🔑47(1)**

Evidence that grantor executed deed conveying realty to wife, who had advanced money to grantor, with intention that it should take effect only after grantor's death and placed it in metal box containing only grantor's papers and that wife without grantor's knowledge had deed recorded sustained finding that there was no delivery of deed, notwithstanding presumption of delivery arising from wife's possession of deed.

**5. Husband and wife 🔑47(1)**

Where grantor one week after learning that wife had recorded deed conveying realty to her which grantor had executed with intention that it should take effect only after his death filed action to quiet title with lis pendens and persistently demanded that wife reconvey property to him, trial court was not bound to find that grantor's conduct after learning of recording of deed amounted to a recognition of title in wife.

**6. Appeal and error 🔑1033(7)**

Any errror in finding that deed of gift of realty to grantor's wife was intended only to provide security for money advanced to grantor by wife while at the same time finding that deed was never delivered so that intention to provide security might well be ineffectual was in favor of wife and only grantor could complain thereof.

**7. Divorce 🔑286**

Provision in divorce decree awarding any community interest in realty to husband was not injurious to wife where full title to realty was quieted in husband in his action against wife to quiet title and wife in answer to such action denied existence of any community interest in the realty and the evidence showed none.

◆

Appeal from Superior Court, San Francisco County; Elmer E. Robinson, Judge.

Suit for divorce by Edna H. McCarthy against Joseph Francis McCarthy tried with action by Joseph Francis McCarthy against Edna H. McCarthy to quiet title to realty. From a judgment quieting title in husband subject to a lien in favor of wife and from that portion of divorce decree awarding to husband any community interest in the realty, Edna H. McCarthy appeals.

Judgments affirmed.

James W. Harvey, of San Francisco, for appellant.

Felix Lauricella, of San Francisco, for respondent.

DOOLING, Justice.

Separate appeals from two judgments are presented to us on two clerk's transcripts and a single reporter's transcript, since the two actions were tried in the superior court at the same time. The parties were husband and wife and the wife, appellant herein, sued the husband for divorce. The husband in turn brought an action against his wife to quiet title to a parcel of real property improved with a residence building consisting of two flats. In the quiet title action the court gave judgment for the plaintiff husband subject to a lien in favor of the defendant wife to secure the repayment to her of the sum of $1,655.

[1] The parties were married in 1942 and just prior to the marriage respondent had purchased the real property here involved making a down payment of $5,000. Before and shortly after their marriage appellant advanced sums of money to respondent aggregating $1,655. Respondent testified that appellant "was continually worrying about the $1,600" and that he determined to make a deed of the property to her so that she would be protected in case anything happened to him. The deed was prepared by a notary public and the respondent took the appellant to the notary's office in the family automobile. She remained outside in the automobile while he went into the notary's office and signed and acknowledged the deed. What happened thereafter we take from the respondent's testimony under the familiar rule that an appellate court must take as true the testimony most favorable to the judgment. Respondent took the deed to the car and showed it to his wife and "told her that I made the deed out that would protect her in case anything happened to me." He then put it in his pocket, the parties went home and he placed the deed in a metal box in which he kept papers of his own and in which nothing belonging to his wife was kept. About ten months later he learned that his wife had taken the deed from the box and had it recorded. He was angry and upset and demanded the retransfer of the property. About a week later he went to his attorney and commenced an action against his wife to quiet title to the property and caused a lis pendens to be filed. He continued to demand a reconveyance and his wife at one time promised to execute one. Marital troubles followed; there was a suit for separate maintenance filed and later dismissed. These actions were thereafter commenced and only at the time that the present quiet title action was filed was the original one dismissed.

On the question of his intent in making the deed the plaintiff gave the following testimony:

"Q. When you executed this deed of gift what was your intention as far as title to the property? A. I naturally—

"The Court: Not naturally.

"A. I wasn't getting married one month and giving a house away the next month; and while I was alive, the house was to be mine and it was to be hers after I died, if anything happened."

[2, 3] Even where there is a manual transfer of a deed a valid delivery depends upon whether the grantor intended that it should be presently operative (Huth v. Katz, 30 Cal.2d 605, 184 P.2d 521) and while a delivery may be effected without a manual transfer (9 Cal.Jur. 160) the vital question in every case is whether the grantor actually intended the deed to become presently operative (9 Cal.Jur. 153-155). "Accordingly, it is held that a deed executed by a grantor with the intention of having it take effect only after his death and which he retains in his possession or under his control will be ineffectual to pass

title for want of delivery. Fisher v. Oliver, 174 Cal. 781, 164 P. 800; Hayden v. Collins, 1 Cal.App. 259, 81 P. 1120." Azevedo v. Azevedo, 1 Cal.App.2d 504, 506, 36 P.2d 1078, 1079, and see Johns v. Scobie, 12 Cal. 2d 618, 623, 86 P.2d 820, 121 A.L.R. 1404; 9 Cal.Jur. 171.

[4] The finding of the trial court "that there was at no time any delivery of said deed of gift to defendant or any other person whatsoever" finds substantial support in the evidence and there our inquiry on this question must end.

We have no quarrel with the cases cited by appellant to the effect that manual delivery of a deed is not essential, that this rule is particularly applicable where the parties are husband and wife, and that the possession of the deed by the grantee raises a presumption of delivery. These rules of law would be important in support of a judgment for appellant if one had been rendered, but the evidence believed by the trial court overcomes the presumption of delivery arising from appellant's possession of the deed and on the vital question of intent supports the conclusion that there was in fact no delivery.

[5] Nor was the court bound to find that respondent's conduct after knowledge of the recording of the deed amounted to a recognition of title in appellant. We need only point to the almost immediate filing of a complaint to quiet title with lis pendens and the testimony of respondent that far from recognizing title in appellant he persistently demanded that she retransfer the property to him.

[6] Appellant cannot complain of the court's finding "that the execution of said deed of gift was not intended for the purpose of transferring said property or any part thereof from plaintiff to defendant, but was executed and intended to provide security to defendant for the sum of $1,655. * * *" The court as above recited found that there was in fact no delivery of the deed and in view of that finding the intention of the plaintiff to provide security may well have been ineffectual. But the error, if any, was one in favor of appellant of which only the respondent could complain.

[7] In the divorce action appellant was granted a decree of divorce. She complains on the appeal from that decree only of a provision in the decree "that any and all community interest of the parties hereto in and to" the same real property "be and the same is hereby awarded to the defendant." The full title was quieted in the other action and we cannot discover any injury to appellant in the provision complained of in view of the facts that she denied in her answer to respondent's cross-complaint that there was any community interest in this property and the evidence shows none.

Judgments affirmed.

NOURSE, P. J., and GOODELL, J., concur.

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82 Cal.App.2d 1

## LA BRANCH v. SCOTT.

Civ. 7355.

District Court of Appeal, Third District, California.

Oct. 21, 1947.

**1. Trial 🔑252(8)**

In action for injuries sustained when pedestrian was struck by automobile at highway intersection, pedestrian's requested instruction on question of right of way was properly refused as assuming, without requisite supporting evidence, that pedestrian was crossing within either a marked or unmarked crosswalk.

**2. Automobiles 🔑245(6)**

In the absence of evidence that there was a sidewalk on intersecting street, evidence was insufficient to establish as a matter of law that place where pedestrian crossed highway was within statutory definition of an unmarked crosswalk so as to give pedestrian right of way, and merely raised a question of fact as to existence of such crosswalk. Vehicle Code, §§ 560, 562, 563.

**3. Trial 🔑253(1)**

Formula instruction which failed to embrace all of the elements necessary to show legal liability of defendant and to warrant conclusion that plaintiff was entitled to a verdict was properly refused.

**4. Trial 🔑232(5)**

In pedestrian's action for injuries sustained when he was struck by automobile, instruction purporting to define what is meant by "right of way" and applying equally to pedestrian and motorist was not error.

**5. Appeal and error 🔑1064(2)**

In pedestrian's action for injuries sustained when struck by automobile while crossing a highway, giving of instruction on inference that when one looks in direction of an object clearly visible he sees it and that if there is evidence that he looked but did not see, either some part of evidence is untrue or person was negligently inattentive, which applied to both pedestrian and motorist, was not harmful to pedestrian as invading province of jury.

**6. Automobiles 🔑246(59)**

In pedestrian's action for injuries sustained when pedestrian was struck by automobile while crossing highway, evidence justified charge on duty of pedestrian crossing a highway to use ordinary care in looking for objects that may cause him injury and to see and to heed that which by such looking may have been visible to him in the exercise of the ordinary care and that to look heedlessly is contributory negligence.

**7. Automobiles 🔑246(4, 31)**

Where existence of crosswalk at point of pedestrian's injury was a question of fact, giving of instruction, which did not assume that there was no crosswalk, but merely described duty of pedestrian to yield right of way in event jury determined that there was no crosswalk and described corresponding duty of motorist to exercise care, was not error. Vehicle Code, § 562.

**8. Appeal and error 🔑1064(4)**

Where court was attempting to instruct in language of statute duty of pedestrian to yield right of way to vehicles when pedestrian was "crossing a roadway at any point other than a marked crosswalk or within an unmarked crosswalk", inadvertence of substituting the word "time" for the word "point" was not fatal. Vehicle Code, § 562.

**9. Appeal and error 🔑1064(1)**

In pedestrian's action against motorist for injuries sustained when pedestrian was struck while crossing highway, court's instruction, on its own volition, on right of one who is exercising ordinary care to rely on assumption that others will perform their duty under the law except when it is reasonably apparent that another is not going to perform his duty, was not prejudicial to pedestrian.

**10. Automobiles 🔑244(50)**

In pedestrian's action for injuries sustained when struck by motorist while crossing highway, evidence justified finding for motorist on ground of pedestrian's contributory negligence on looking heedlessly or carelessly. Vehicle Code, §§ 560, 562, 563.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Action by Harvey L. La Branch against Arthur Le Roy Scott to recover for injuries sustained by plaintiff when struck by defendant's automobile. Judgment for defendant, and plaintiff appeals.

Affirmed.

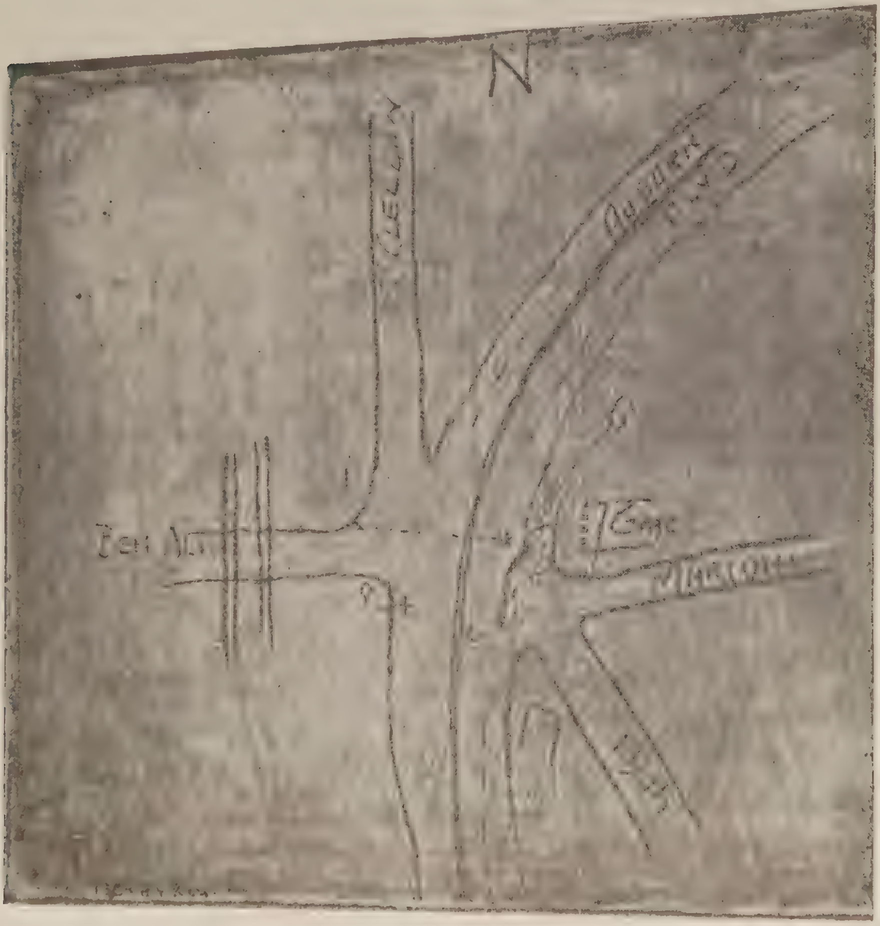
Thomas O'Hara, of Sacramento, for appellant.

Elliott, Atkinson, & Sitton, of Sacramento, for respondent.

ADAMS, Presiding Justice.

Plaintiff brought this action seeking damages for injuries alleged to have been sustained by him in an automobile accident when he was negligently struck by defendant's automobile while he was crossing a highway on foot. Defendant answered, denied negligence on his part, and alleged contributory negligence on the part of plaintiff. Trial of the cause by a jury resulted in a verdict for defendant, and plaintiff has appealed from the judgment which followed. The only grounds for reversal urged by appellant are that the court erred in refusing to give one certain instruction proposed by plaintiff, and in giving certain other instructions.

Discussion of these alleged errors calls for some consideration of the evidence. In the presentation of same the rough sketch of the scene of the accident, appearing below, was used by the parties:



The evidence shows that plaintiff, on the day of the accident, was visiting his son who lived on the north side of Ben Ali Avenue in Sacramento County, a short distance west of the Southern Pacific railroad tracks which cross Ben Ali Avenue between 40 and 45 feet west of Auburn Boulevard. Plaintiff left his son's home between 7:30 and 8:00 p. m., his destination being Gage's gasoline station which was located on the east side of Auburn Boulevard, and is marked "Gage" upon the sketch. His purpose was to secure some stove oil. He was accompanied by his eight year old grandson who walked ahead of him, and pulled a little wagon upon which rested a can to be filled with the oil. The night was dark, and plaintiff was attired in dark clothes and hat, and carried no light of any kind. The roadway was also dark in color. There was a street light at Marconi Avenue and Auburn Boulevard, but no other light except a little from the oil station. There was a blinker light over the highway which flashed red for Ben Ali-Marconi traffic, and yellow for highway traffic on Auburn Boulevard. There was a stop sign on the south side of Ben Ali Avenue, but no stop-and-go sign at any place.

After plaintiff crossed the railroad tracks he proceeded along the north side of Ben Ali Avenue to the highway, and then across the highway toward the oil station as indicated by the dotted line on the sketch, the boy being about 10 feet ahead of him. There is no evidence that between the railroad tracks and the highway there was any sidewalk on Ben Ali Avenue, and no crosswalk was marked on the street where plaintiff crossed. Plaintiff contends that there was a sidewalk on Ben Ali Avenue west of the tracks, but the evidence in this connection if any at all, is most meager.

Plaintiff testified that when he reached the westerly edge of the highway he stopped and watched for traffic but saw none, so proceeded across; that when he reached the double line in the center of Auburn Boulevard, he looked toward the south and saw the headlights of an approaching car, but thought he had plenty of time to get across, so proceeded toward the oil station, and that when over the middle line of Auburn Boulevard and close to the outer edge thereof, he was struck by defendant's car, rendered unconscious, and sustained the injuries for which he sought compensation.

Defendant testified that he was on his way to Roseville, and traveling in the extreme right lane of the four lanes of Auburn Boulevard, at a speed of about 35 or 40 miles per hour until he saw the blinker lights at the intersection, whereupon, when 200 or 300 yards south of the intersection, he reduced his speed to 30 miles per hour; that it was dark and the intersection area was not clearly discernible, and that he did not see plaintiff until he was about 30 feet from him; that plaintiff was then about two steps across the double line dividing the highway; that plaintiff there appeared to hesitate, then came on again; that defendant put on his brakes, turned sharply to the right, and brought his car to a stop in front of the service station, where it came to rest with but the left rear wheel on the edge of the highway; that plaintiff appeared to walk right into the side of his car, and hit it at the rear of the left front fender. Testimony of this witness and of a traffic officer who was called to the scene of the accident showed skid marks on the highway for a distance of about 30 feet. They are indicated on the sketch by the heavy line beginning about the south edge of Marconi Avenue and ending in front of the service station.

The instruction proposed by plaintiff and refused by the court, the refusal to give which is relied upon by appellant as reversible error, reads as follows:

"You are instructed that at the time of the happening of the matters here in suit the California Vehicle Code [§§ 477, 560, 563], provided as follows:

"'The driver of a vehicle shall yield the right of way to a pedestrian crossing the roadway within any marked cross-walk or within any unmarked cross-walk at an intersection, except that at intersections where traffic is controlled by traffic controlled signal devices or by police officers, pedestrians shall not cross the roadway against a red or stop signal. Whenever flash red or yellow signals are used and such signal is flashing yellow with rapid intermittent flashes, drivers of vehicles may proceed through the intersection or pass such intersection only with caution.'

"A violation of the vehicle code provisions herein referred to constitutes negligence as a matter of law.

"If you find that the plaintiff, Harvey LaBranch, was walking in the pedestrian cross walk crossing Auburn Boulevard in the Ben Ali-Marconi Avenue intersection across said boulevard before the defendant, Arthur LeRoy Scott, drove his vehicle into said intersection and you find that said defendant violated the Vehicle Code provision above set forth respecting failure to yield the right of way to the plaintiff pedestrian and you find that such violation was a proximate cause of plaintiff's injuries, then you should find for the plaintiff.

"If you find that the defendant failed to proceed through said intersection with caution and that such violation was a proximate cause of plaintiff's injuries, then you should also find for the plaintiff."

The court rejected the proposed instruction as not appropriate as there was not an unmarked crosswalk within the definition of the statute.

At plaintiff's request the court did give instructions in the language of sections 86, 83 and 85 of the Vehicle Code, defining "intersection," "roadway" and "crosswalk," the definition of crosswalk being:

"(a) That portion of a roadway ordinarily included within the prolongation or connection of the boundary lines of sidewalks at intersections where the intersecting roadways meet at approximately right angles, except the prolongation of any such lines from an alley across a street.

"(b) Any portion of a roadway distinctly indicated for pedestrian crossing by lines or other markings on the surface."

[1] We think that the trial court did not err in refusing to give the rejected instruction if for no other reason than that it assumed that plaintiff was crossing the street within either a marked crosswalk or an unmarked crosswalk at an intersection, since the evidence fails to show that such was the case. It was stipulated that there was no marked pedestrian lane or crosswalk, and plaintiff's testimony which is relied upon as showing that there was an unmarked crosswalk was as follows:

"Q. Now, about how far away from this intersection with Auburn Boulevard was the residence that you were staying at—3128 Ben Ali Avenue? A. About how far away was it?

"Q. Yes. A. Oh, I imagine two blocks.

"Q. About two blocks away? A. I imagine.

"Q. And you would walk down the sidewalk or path? A. Yes.

"Q. On which side of the street? A. On the north side of the street, facing traffic.

"Q. You were walking east? A. I was going east.

"Q. And you were on the north side of the street? A. North side of the street.

"Q. That is the same side of the street as the house you were stopping at was located on? A. Yes, yes.

* * * * * *

"Q. Now, as you come to the railroad tracks, there is no sidewalk or pathway, is there? A. No.

"Q. And did you cross over those tracks? A. Yes."

On cross-examination he testified:

"Now, as you came easterly on Ben Ali Avenue, I understand that you were traveling on the northerly side walking along the northerly edge? A. I was.

"Q. So that the traffic which was going westerly on Ben Ali was coming on your side of the road? A. Yes.

"Q. And you were walking in the gravel area? A. Yes."

There was no evidence of the existence of a sidewalk on either side of Marconi Avenue.

[2] Appellant relies upon Blanton v. Curry, 20 Cal.2d 793, 802, 129 P.2d 1, and cases there cited, as authority for his contention that he was crossing the highway on a crosswalk. But the factual situations presented in those cases are not comparable. The evidence in this case cannot be said to establish, as matter of law, that the place where plaintiff crossed the highway was the "portion of a roadway ordinarily included within the prolongation or connection of the boundary lines of sidewalks at intersections." There is no evidence that there was a sidewalk on Ben Ali Avenue east of the railroad track which was or could be prolonged across the highway—or, if so prolonged, it was prolonged on the course pursued by plaintiff—or that there was any sidewalk along either side of Auburn Boulevard, or along Marconi Avenue. Appellant argues that the meager testimony set forth above shows the existence of a "sidewalk or path" on the north side of Ben Ali Avenue west of the railroad tracks, and not only justifies a conclusion that a sidewalk there existed, but that it was prolonged along the north side of that street east of the tracks and thence across the highway. The most that could be said of plaintiff's argument in this behalf would be that the evidence presented a question of fact for the jury. The existence of such a crosswalk across Auburn Boulevard could not properly be assumed as was done in the proposed instruction.

[3] The said instruction is faulty in other respects. For instance, it is therein recited that violation of the provisions of the code sections set forth constitutes negligence as matter of law. It then recites that if the jury found that plaintiff was walking in the pedestrian crosswalk, cross-

ing Auburn Boulevard, before defendant drove his vehicle into said intersection, and if they found that defendant violated the foregoing provisions of the Vehicle Code respecting failure to yield the right of way to plaintiff, and they found that such violation was a proximate cause of plaintiff's injuries, they should find for plaintiff. And while it set forth the provisions of section 477 of the Vehicle Code which provides that whenever flashing red or yellow signals are used and a yellow lens is illuminated with rapid intermittent flashes, drivers of vehicles may proceed through the intersection or past such signal only with caution, there is no qualification of the foregoing statement by instructing that the jury must also find that defendant did not proceed through the intersection with caution. That is put into the last paragraph of the instruction as another and apparently additional ground for finding for plaintiff. Also, the instruction fails to include the necessity of finding that plaintiff was not guilty of contributory negligence. It was, in effect, a formula instruction, which failed to embrace all of the elements necessary to show legal liability on the part of defendant and to warrant the conclusion that plaintiff was entitled to a verdict. There was no error in refusing to give such instruction. 24 Cal.Jur., 833, sec. 96; Starr v. Los Angeles Ry. Corporation, 187 Cal. 270, 278, 201 P. 599; Kofoid v. Beckner, 70 Cal.App. 624, 629, 630, 234 P. 113.

The next error alleged is that the court erred in giving an instruction reading:

> "When the law says that one person has a right of way over another, its purpose simply is to establish a practical basis for necessary courtesy on the highway, and its meaning is that when at any given moment of time, two persons, neither of whom then occupies the space in question, desires to proceed into the same place on the highway, one of them shall yield. The other has the privilege of the immediate use of the space in question. That privilege is his right of way.
>
> "Failure to yield to one to whom the law has given the right of way is negligence."

[4] This instruction is a quotation of California Jury Instructions (Civil), No. 150, and only purports to define what is meant by right of way. It applies equally to a plaintiff or a defendant and we cannot see that plaintiff suffered by the giving of same. That a pedestrian as well as the driver of a car is required to yield the right of way under certain circumstances is indicated by section 562 of the Vehicle Code, and it cannot be assumed that in the instant case the said instruction was aimed at plaintiff any more than at defendant. Appellant cites and relies upon Shipway v. Monise, 59 Cal.App.2d 565, 571, 139 P.2d 60; but the instruction here given was not the same as any there criticised. The ones there given were held to be erroneous in that they made direct reference to plaintiff's obligation to yield the right of way, omitting the corresponding obligation upon the defendant.

Appellant's third error alleged is that the trial court erred in instructing the jury that

> "General human experience justifies the inference that when one looks in the direction of an object clearly visible, he sees it. When there is evidence to the effect that one did look, but did not see that which was in plain sight, it follows, that either some part of such evidence is untrue or the person was negligently inattentive."

[5] This instruction as worded was no more applicable to appellant than to defendant, and we fail to see how the giving of same can be said to have injured appellant. He first states that it applies only where the facts are in conflict, citing Bischell v. State of California, 68 Cal.App.2d 557, 157 P.2d 41. We find nothing in that opinion so holding. The only discussion about conflict of evidence therein contained grew out of the use in the instruction of the words "irreconcilable conflict" which were not used in the case here. Appellant further urges that such instruction was erroneous in the use of the words "it follows that either some part of the evidence is untrue or the person was negligently inattentive," and that this invaded the province of the jury. We are unable to agree. It was left to the jury to decide whether either party was telling the truth *or* was negligently inattentive, or to draw no inference of any kind. The giving of a

similar instruction having been held not to constitute error in the Bischell case, we are not disposed to find it injurious to appellant in this case. The form of the instruction given in that case is found in the Book of Approved Jury Instructions (sometimes referred to as "B.A.J.I."), at page 169. The same or a similar instruction was given in Collier v. Los Angeles R. Co., 60 Cal.App.2d 169, 175, 140 P.2d 206; Lasater v. Oakland Scavenger Co., 71 Cal.App.2d 217, 222, 162 P.2d 486. This instruction was redrafted subsequently into the form in which it was given in this case to "make it more understandable to a jury." (See "B.A.J.I.", 1946 Supp., p. 43.)

[6] Appellant next urges reversal because of the giving of an instruction reading:

"I charge you that it is the duty of a pedestrian crossing a highway to use ordinary care in looking for objects that may cause him injury, and to see and heed that which, by such looking, may have been visible to him, in the exercise of ordinary care and caution. He has no right not to look or to look carelessly. To look heedlessly is as negligent as not to look at all, and if you find from the evidence that plaintiff LaBranch failed in this respect and thereby proximately contributed to the accident, your verdict must be in favor of the defendant."

He says there is no evidence that appellant looked heedlessly; that he saw defendant's car and believed it was sufficiently distant to permit his safe crossing. But this is not all of the evidence, for appellant testified also that when he had reached the middle line of Auburn Boulevard, he saw defendant's car coming; that about that time the boy, who was about ten feet ahead of him, started to run; that plaintiff did not look around to see what caused the boy to run, but that he looked over his shoulder and looked behind, then looked in the southerly direction and saw defendant's automobile which "looked like a long ways off"; that he then took four or five steps; that his first intimation that he was in a position to danger was when he heard defendant's brakes squeal. The transcript shows:

"Mr. Sitton: Q. Let's go back over it again. When you arrived at the point I am going to point to there—marks the intersection of your path with the double white line at the middle of Auburn Boulevard, you turned your head and looked back down Auburn Avenue, is that correct? A. Yes.

"Q. And you glanced to the south and saw this automobile an indeterminate distance away from you, is that correct? A. Yes.

"Q. And you kept right on walking on this line towards Gage's service station? You think you may have gone four or five steps, is that right? A. Yes.

"Q. How fast were you walking now? A. Twenty miles an hour.

* * * * * *

"Q. So you walked right along, did you? A. Same pace.

"Q. To the point where you got hit with the automobile is that correct? A. I guess it was.

* * * * * *

"Q. Let me go back and tie this up. From the time you left this point X, marked number one, at the edge of the highway, until the time you arrived at the point X where you think is about the point of the collision, you didn't hesitate or stop at any time, did you? A. To look back over my shoulder.

"Q. You didn't stop, though? A. No.

"Q. You kept right on walking, and as you got to the center of the line and you got in this other lane, you turned your head and looked back into Ben Ali Avenue, didn't you? A. Yes.

* * * * * *

"Q. Now, as you were walking along there, going toward that station there, did you keep your eyes on the station where you were going? A. Yes.

* * * * * *

"Q. And how far was the defendant from you at that time when you heard the screech of the brakes? A. He wasn't very far.

"Q. Did you look up to see him? A. I seen him, yes.

"Q. What is that? A. Yes.

"Q. And did you keep your eyes on him from that time forward? A. Not very long because he was swinging into me.

"Q. You saw the lights of his car turn sharply to the right, didn't you? A. To the right?

"Q. Away from you, toward Gage's service station? A. He was coming towards me when I seen it.

"Q. Did you continue to watch him, or what did you do in respect to that? A. I didn't do anything.

"Q. You didn't have time to do anything more than just get hit? A. That's all."

Upon the basis of the testimony set forth above we think that the giving of this instruction was justified, especially since plaintiff himself testified that though he saw the lights of defendant's approaching automobile, he did not stop but kept right on walking, and when he got to the center line of Auburn Boulevard, he looked back over his shoulder into Ben Ali Avenue. The instruction left to the jury the question whether, in view of this testimony, plaintiff exercised ordinary care and caution, and whether he looked heedlessly or carelessly.

[7, 8] It is further contended by appellant that giving an instruction in the language of section 562 of the Vehicle Code was error. That section provides:

"(a) [Yielding of right of way to vehicles.] Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway.

"(b) [Duty of driver to exercise care.] The provisions of this section shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of any pedestrian upon a roadway."

In the instruction the word "time" was substituted for the word "point" in the phrase "crossing a roadway at any point other than", etc. This inadvertence cannot be said to be fatal to the instruction. Nor can it be said that the giving of same constituted error. The instruction does not assume that there was not a crosswalk, either marked or unmarked; but merely instructed the jury as to the duty of the pedestrian in the event they concluded there was no such crosswalk.

[9] Appellant's final contention is that there was reversible error in the court's giving, of its own volition, of the following instruction:

"A person, who, himself, is exercising ordinary care has a right to assume that others, too, will perform their duty under the law, and he has a further right to rely and act on that assumption. Thus it is not negligence for such a person to fail to anticipate injury which can come to him only from a violation of law or duty by another. However, an exception should be noted; the rights just defined do not exist when it is reasonably apparent to one, or in the exercise of ordinary care would be apparent to him, that another is not going to perform his duty."

This instruction was applicable alike to plaintiff and defendant and the giving of same cannot be said to have caused injury to plaintiff, especially in view of other instructions given.

[10] The evidence adduced was ample to justify the jury in finding for the defendant, and as we find no errors in the instructions which justify a reversal, the judgment is affirmed.

THOMPSON, and PEEK, JJ., concur.

## PEOPLE v. LOPEZ.

Cr. 4127.

District Court of Appeal, Second District, Division 1, California.

Nov. 5, 1947.

Rehearing Denied Nov. 17, 1947.

Hearing Granted Dec. 4, 1947.

**1. Assault and battery ⚷92**

Evidence sustained conviction for assault with a deadly weapon.

**2. Criminal law ⚷636(7)**

The instructing of a jury in a criminal action in the absence of the defendant, either directly or indirectly, is improper.

**3. Criminal law ⚷858(3), 1186(4)**

Fact that jurors, in prosecution for assault with a deadly weapon, had and used a pamphlet relating to general instructions concerning the duties and responsibility of trial jurors in the criminal department of the superior court, which had been distributed among jurors in another department of the court some time before, was improper, but was not so prejudicial as to require reversal. Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Antonio Lopez was convicted of assault with a deadly weapon, and from the conviction and from an order denying a motion for new trial, the defendant appeals.

Judgment and order affirmed.

William J. Currer, Jr., of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Defendant was adjudged guilty by a jury of the crime of assault with a deadly weapon. The record reveals that the offense followed a quarrel; the defendant went to his home a short distance away, obtained a revolver, returned to the scene and shot the victim in the knee. It is defendant's testimony, "I think I am going to look for my glasses," and my wife said, "They will beat you up again; you better not go", and I said, "I am going because I need those glasses; otherwise I cannot drive." The victim Fernandes testified:

"Q. What did the defendant do or say after he came back? A. He said he was going to shoot me.

* * * * * *

"A. I told him why was he going to shoot me, I did not do anything to him.

"Q. What did he say to that? A. He said, 'Anyway, I am going to shoot.'"

The defendant was intoxicated at the time.

[1] It is appellant's contention on appeal that "the evidence does not support the verdict and judgment." The defense was "self defense". An examination of the record reveals the evidence to be sufficient.

It is also urged on appeal that the court erred in its charge to the jury on the law of self defense. In this connection it is argued that the instructions were not sufficiently comprehensive to include "defendant's theory of the case". It is also argued with regard to the instructions that, "only the negative is stated, and stated in such a way as to minimize the right of a man to defend himself, and particularly the defendant in this case." An examination of the instructions given and refused reveals no prejudicial error. More detailed instructions were unnecessary in the circumstances.

Appellant also contends that the "court erred by instructing the jury in the absence of appellant". On the motion for a new trial it developed that several of the jurors had a pamphlet entitled, "General Instructions Concerning the Duties and Responsibility of Trial Jurors in the Criminal Department of the Superior Court of Los Angeles County, California", which had been distributed among them in another department of the court some time before. Appellant argues in this connection that, "We believe that the pamphlet, and the instructions contained therein, were highly prejudicial to the defendant's case, and covered matters which not only were not in issue in the trial, but also the tone and language of the entire pamphlet apparently seeks to cast a doubt upon honesty of persons who defend in criminal cases and their counsel."

[2, 3] Although instructing a jury in a criminal action in the absence of the defendant either directly or, indirectly by the use of such pamphlets or otherwise is contrary to law and a violation of the substantial rights of a defendant, it does not appear that sufficient prejudice resulted to overcome the mandate of section 4½ of Article VI of the Constitution.

There being no prejudicial errors in the record, the judgment and order are affirmed.

YORK, P. J., and WHITE, J., concur.

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82 Cal.App.2d 120

## K. C. WORKING CHEMICAL CO. v. EUREKA-SECURITY FIRE & MARINE INS. CO. OF CINCINNATI, OHIO.

Civ. 15829.

District Court of Appeal, Second District, Division 3, California.

Oct. 29, 1947.

1. **Insurance** 🔑132

A "cover note", sometimes referred to as a "binder", is a writing given to the insured to bind the company in case a loss occurs pending action upon the application and the actual issuance of a policy.

See Words and Phrases, Permanent Edition, for all other definitions of "Binder" and "Cover Note".

2. **Appeal and error** 🔑931(1)

On appeal all evidence tending in any degree to support findings would be accepted as true.

3. **Insurance** 🔑665(1)

In action to recover on fire policies, evidence did not sustain finding that policies had been cancelled prior to loss.

4. **Insurance** 🔑238(2)

A broker appointed by an assured to procure insurance does not ordinarily have authority to cancel existing policies.

5. **Insurance** 🔑238(2)

Authority to cancel existing policies may be shown to have been conferred upon the broker appointed by an assured to procure insurance.

6. **Insurance** 🔑238(2)

Authority to keep property insured is not authority to consent to a cancellation of insurance which would leave the property wholly without insurance.

7. **Insurance** 🔑238(2)

Possession by broker of fire policies did not make broker the ostensible agent of insured for purpose of having the policies canceled.

8. **Insurance** 🔑131(1)

A parol contract of fire insurance is valid.

9. **Insurance** 🔑646(1)

Insurer to establish cancellation of fire policy must show either that conditions upon which insurer was allowed to cancel policy were strictly complied with or that insured, knowing all the facts, waived such compliance.

10. **Insurance** 🔑646(1)

In action on fire policies, insurer had burden of proving alleged cancellation of policies before loss.

11. **Insurance** 🔑646(1)

Where a parol contract of fire insurance is made, both parties will be presumed to have entered into the contract with reference to the statutory form.

12. **Insurance** 🔑131(1)

To constitute a verbal contract of fire insurance the minds of the parties must have met upon all the essentials of the contract.

13. **Insurance** 🔑131(1)

To establish a parol contract of fire insurance the testimony must make clear the subject matter of insurance, the amount and elements of the risk, including its duration in point of time and extent in point of hazard assumed, the rate of premium, and generally all circumstances which are peculiar to the contract and distinguish it from every other so that nothing remains to be done but to fill up the policy and deliver it, and pay the premium.

**14. Insurance ⟹124**

To constitute a valid contract of insurance the minds of the parties must have met on the identity of the person with whom they are dealing.

**15. Insurance ⟹124**

A contract of insurance is not effected by a transaction which does not supply the element of mutuality of agreement and mutuality of obligation.

**16. Insurance ⟹130(2)**

No contractual relation exists between an applicant for insurance and an insurance company until an application for insurance is accepted.

**17. Insurance ⟹130(1)**

An insurance company is not bound to accept an application or proposal for insurance but may reject it for any reason or arbitrarily.

**18. Insurance ⟹130(3)**

A mere intention or mental determination on the part of the insurer to accept the application for insurance is not of itself sufficient to effect a binding contract.

**19. Insurance ⟹124**

A contract of insurance must be assented to by both parties either in person or by their agents.

**20. Insurance ⟹124**

There can be no enforceable contract of insurance if the insured and an agent who represents several insurance companies fails to designate one of the companies before a loss occurs.

**21. Insurance ⟹137(1)**

Payment of the premium is a condition which must be fulfilled if temporary insurance is to be considered as affording protection to the applicant.

**22. Insurance ⟹130(4)**

Mere delay by insurer in acting on an application for insurance does not create a contract of insurance.

**23. Insurance ⟹665(2)**

To establish a parol contract of insurance, the proof must be clear and convincing to the effect that contract was actually entered into, that each party understood it in the same light and in regard to the same subject matter.

**24. Contracts ⟹1, 15**

A "contract" is an agreement to do or not to do a particular thing and the agreement must be by consent which is free, mutual, and communicated by each to the other, and consent is not mutual, unless parties all agree upon same thing in same sense.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract".

**25. Insurance ⟹240, 246**

Under provision of fire policies that policies could be canceled at any time at request of insured or that insurer could cancel by giving five days' written notice, return of policies to insurer's general agent by broker who had no authority to cancel policies did not effect a cancellation at request of insured or by mutual consent. Insurance Code, § 2071.

**26. Insurance ⟹665(1)**

Where broker in possession of existing policies of fire insurance was authorized to cancel policies only if new policies were entered into, evidence did not establish that a parol contract of fire insurance was entered into authorizing cancellation of existing policies.

◆

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by K. C. Working Chemical Company, a corporation, against the Eureka-Security Fire and Marine Insurance Company of Cincinnati, Ohio, a corporation, to recover on two fire insurance policies. From a judgment for defendant, plaintiff appeals.

Judgment reversed.

G. R. Dexter and Walter H. Robinson, both of Beverly Hills, for appellant.

McBain & Morgan, of Los Angeles, for respondent.

VALLEE, Justice pro tem.

Plaintiff appeals from a judgment for defendant in an action upon two fire insurance policies. All facts necessary to a recovery, if the policies were in force, were proven by plaintiff or stipulated to. The defense was that the policies were canceled before a fire occurred.

The trial court found that about February 20, 1945, respondent, in consideration of the premium charged therefor, by its agent, issued and delivered to appellant two policies of fire insurance; that the policies were California standard form; that by the policies respondent insured appellant, subject to the provisions of the policies, against loss or damage by fire to the property covered therein, in one policy in a sum not exceeding $5,000, and in the other in a sum not exceeding $3,500, for the term commencing February 20, 1945 and ending February 20, 1946, payable at Los Angeles; that the term provided by the policies was subject to the right of either party to cancel as provided by its terms and of the parties to cancel by mutual agreement; that the property insured consisted of soap and materials for soap making, and machinery, equipment and materials, all owned by appellant; that on April 7, 1945, the insured property was totally destroyed by fire without the act or fault of appellant; that by the destruction of the property appellant suffered a loss of $11,440.73 as to the property described in one policy, and $6,525.50 as to the property described in the other policy; that no part of the loss has been paid by respondent; that notice of loss and proof of loss were given in writing within the time prescribed by the policies; that in all respects appellant has performed and complied with all of the conditions of the policies on its part to be performed had the policies been in force and effect; that respondent has repudiated the existence of the policies and has refused to recognize them as in existence since March 31, 1945; that on March 31, 1945, and prior to the fire, the policies, and each of them, were by mutual agreement between appellant and respondent, through their agents and servants acting within the scope of their authority as such, and for a valuable consideration, canceled, and the policies and each thereof were, upon said date, surrendered and delivered to the possession of respondent by appellant; that on March 31, 1945, and prior to the fire, appellant did cancel the policies and each of them and did notify respondent of such cancellation and did surrender the possession of said policies to respondent, and did replace said policies of insurance with insurance bound in other insurance companies; that respondent did join in, approve and agree to said cancellation of the policies on March 31, 1945, and by reason of said cancellation, the terms of insurance expired on March 31, 1945. [These findings are inconsistent. If the policies were canceled by mutual agreement they were not canceled by appellant alone. If they were canceled by appellant alone they were not canceled by mutual agreement.]

Appellant contends (1) that the trial court erred in its rulings on the admission of evidence, and (2) that there is no evidence to support the findings of cancellation. It will not be necessary to consider appellant's contentions with respect to rulings upon the admission of evidence as, under the view we take of the case, there is no evidence to support the findings that the policies were canceled either by mutual agreement or by appellant.

The evidence upon the issue of cancellation is meager. No written notice of cancellation was given by respondent to appellant. One Legman, a licensed insurance broker, acted as such for appellant in placing the insurance represented by the policies in suit. The policies were delivered to Legman about February 23, 1945. About three weeks thereafter, respondent's general agent telephoned Mrs. Legman (employed in Legman's office), told her that the company was dissatisfied with the risk and asked that the policies be returned for cancellation. About that time Legman became ill and one Elwood, an employee of Legman, without an agent's or broker's license at the time, on March 28, 1945, telephoned Working, President of appellant, and told him that he had the policies and that respondent had requested the return of the two policies because on inspection the risk did not meet their underwriting approval and most probably that he [Elwood] would have to place that coverage "board." Working handled all of appellant's insurance matters. Working told Elwood that he [Working] thought he was paying too much for his coverage as it was, because the chemicals that he had on the premises were not conducive to the cause of a fire; that in fact they would put fire out. Elwood told Working that he would relay this information in his attempt to place the coverage, and place it "non-board", if possible, but it did seem like a "board" risk. Working said to Elwood, "Under the circumstances, all right, go ahead and do the best you can for me." Elwood testified that that was all of the conversation as he remembered it; that "attempts were made by others than myself prior to the request for me to try to obtain coverage." Working testified that he told Elwood, in the conversation just referred to, that he [Elwood] had no authority to cancel; that he told him to see if he could obtain other insurance; that he told him not to cancel the policies; that Legman was agent of appellant only for the purpose of securing insurance. Working's testimony that he told Elwood not to cancel was not directly contradicted by Elwood. Working testified that he did not hear anything further from either Elwood or Legman prior to the fire. After Elwood talked to Working on the telephone, and on March 28, 1945, Elwood telephoned to a Mrs. McDermott, an employee in the office of one Lovinger, an insurance broker. Legman and Lovinger "got together occasionally on difficult policies to place." Elwood asked Mrs. McDermott to try and place the coverage and relayed to her the information which had been given him by Working regarding the chemicals he had on hand and his claim that he was being overrated and for Lovinger to try and place the coverage "non-board" if they couldn't place it "board" (sic) as Working had requested. Elwood further testified that on March 29, 1945, Mrs. McDermott called him and stated that the coverage had been placed "board"; that she did not say what company. At that time, Mrs. McDermott was employed by two insurance brokers, Lovinger and Donin. She did not have a broker's license. Mrs. McDermott testified that she received a telephone call from Elwood regarding appellant's insurance in the latter part of March, 1945; that Elwood said that he had a line to place and whether we could take care of it and then he gave the name of the company and its location; that he told her it was on stock and, she thought, on fixtures; that she was not real positive as to the amount; that she told Elwood that she would take it downstairs to the Old Line Agencies [insurance brokers] and try to place it; that following the conversation she wrote up the order and on the same day took it down to Mrs. Fine, an insurance broker employed by Old Line Agencies; that she gave Mrs. Fine the order and asked her [Mrs. Fine] whether it could be placed "non-board"; that Mrs. Fine said they couldn't place it "non-board" and would have to place it "board"; that Mrs. McDermott said, "you keep it bound until I call on it to Mr. Elwood and give him the rate and see whether it will be satisfactory"; that she did not know what Mrs. Fine said when she told her to keep it bound; that "I guess she said—well, she stamped it up and put it with her orders for policies"; that she didn't know that she particularly "guessed", that that was the usual procedure and that many times they would put an order on Mrs. Fine's desk and "nothing said"; that she then looked up the "board" rate and called up Elwood and gave him the "board" rate; that Elwood said that he would call up Working and see whether the "board" rate would be all right [Elwood did not testify that he talked to Working to see if the "board" rate was all right. Working's testimony was to the effect that he did not.]; that she did not tell Elwood anything about whether the risk was bound or not; that to the best of her memory the next day Elwood called up and said the rate would be all right and to write up the policy; that she said "all right"; that she then went downstairs and told Mrs. Fine to write up the policies; that the "board" rate was satisfactory; that she did not remember Mrs. Fine's conversation "because we have so many policies. Maybe she did not say anything for all I know"; that she did not recall whether she talked to Elwood after he said the "board" rate was allright; that when she called Elwood up about the "board" rate she told him, "We have bound the risk pending the approval of the board rate" by Mr. Working; that about four or five days after the order was placed she heard of the fire; after that she went to see Mrs. Fine and said to her, "What do you know, that soap place has had a fire"; that Mrs. Fine pulled the order out from her stack of orders and told her assistant, "We will write the policies before we report the loss"; that while she was talking to Mrs. Fine, Mr. Kleiner (apparently President of Old Line Agencies), came in the office and she said the same thing, that they had a fire; that in the course of the conversation Legman's name was spoken and Kleiner wanted to know if Legman placed the order, and she [Mrs. McDermott] said "yes"; that then Kleiner denied liability; that Kleiner did not say anything denying liability in substance or effect before Legman's name was mentioned; that she placed orders in a similar manner before; that she never saw any policy written up covering the order she had placed with Mrs. Fine; that no policies were written; that when she testified that she did not tell Elwood that the risk was bound and later testified that she did tell him, she meant that after Elwood said that the board rate would be acceptable she went down and told Mrs. Fine to write up the policies and when Elwood said the rate would be acceptable she (Mrs. McDermott) said to Elwood, "all right, it is bound"; that the reason she told Elwood it was bound was that "when we give an order to the underwriter it is assumed at once that it is bound; that that is the usual custom of handling our business"; that she made the statement to Elwood that it was bound on the assumption that it was bound; that she thought it was bound; that she never saw any paper or writing showing or approving or confirming the bind; that the order she filled out was an Old Line Agencies' form.

[1] Mrs. Fine testified that in March, 1945, she was chief underwriter for Old Line Agencies on fire insurance; that about ninety per cent of orders that came in over the phone or in person from brokers for fire insurance coverage came to her; that Old Line Agencies had the agency for several fire insurance companies; that one of them was Home Fire & Marine Insurance Company; that in 1945 Old Line received orders for fire insurance; that she countersigned the policies of Old Line Agencies; that upon receipt of telephone orders she quite often bound them verbally over the telephone; that Old Line frequently bound the coverage when insurance brokers came into the office in person and requested coverage; that that happened frequently; that when she bound insurance on such a request she would issue policies or written cover notes [A cover note is a writing given to the insured to bind the company in case a loss occurs pending action upon the application and the actual issuance of a policy. It is sometimes referred to as a "binder". Insurance Code, sec. 382; Duncan v. John Hancock Mut. Life Ins. Co., 137 Ohio St. 441, 31 N.E.2d 88, 90; State Distributing Corporation v. Travelers Indemnity Co., 224 N.C. 370, 30 S.E.2d 377, 379]; that if a cover note was issued, the original cover note, or if a policy was issued, the policy, was sent to the company, a copy to the agent, and Old Line kept a copy; that for several years prior to April 1, 1945, and since, she had been issuing binders and cover notes or policies for Home Fire & Marine Insurance Company; that Home Fire & Marine accepted those coverages; that occasionally Home did not agree with Old Line and asked it to return a policy to cancel it; that she had authority to do those things for Home Fire & Marine Insurance Company; that prior to April 1, 1945, Old Line had bound risks at the request of Lovinger or Mrs. McDermott. Mrs. Fine did not testify that she bound appellant's risks or that she issued a cover note or a binder or a policy.

Between March 10 and March 31, 1945, respondent's general agent made repeated demands upon Elwood and Legman's wife, for return of the policies. Elwood told respondent's general agent about March 29th or 30th, 1945, that he had been successful in placing the insurance "board"; that it had been necessary to place the insurance with another broker who had placed it with the Old Line Underwriters. Respondent received the policies from Elwood on March 31, 1945, and stamped them "Cancelled Flat—No Charge." Thereafter, and before April 7, 1945, Elwood told respondent's general agent that he did not have a cover note or a policy on the risk; that he did not have a written cover note in his possession; that he just had a telephone confirmation. Respondent's general agent testified that at the time of this last conversation in April he was in doubt as to whether or not respondent was released by the action he had taken on these policies "because Elwood would not release those policies to me. He had them in his possession all the time, of course, and he told me he would not release those policies to me until he was sure Mr. Working was insured elsewhere and he had received his permission to return the policies to us." Legman testified that over a period of three or four years prior to March, 1945, he had placed more than ten policies through the Lovinger office; that Lovinger, in turn, placed for him through "board" companies; that Lovinger placed several of the policies in the Loyalty Group, some in National Automobile, and quite a number in Home Fire & Marine Insurance Company where "most of the policies were placed through the Lovinger office for our office"; that "the majority of the policies were placed in the Home Fire & Marine; all board policies, I would say, were placed in the Home Fire & Marine"; that they were placed through Old Line Agency; that about the middle of March, 1945, respondent's general agent talked to him and requested that the policies be returned for cancellation; that he told the agent to give him a little time so that he could replace the policies elsewhere before he returned them for cancellation. From February 23, 1945 to March 28th or 29th, 1945, the policies were in Legman's office. They were mailed by someone in Legman's office to respondent's general agent. The date of mailing is not fixed definitely. Elwood never received from any company a cover note in writing providing for the new insurance. He never learned what company, if any, it was that the new insurance was "placed in" or "taken by". Elwood never received any written communication from respondent in which a desire on its part was expressed for cancellation of either one or both of the policies. Legman never learned in any way, either in writing or verbally, what company it was that the claimed binder was made with. He was never informed. He never received from anyone a written confirmation of the binder. He assumed it was the Home Company because he had placed orders through Lovinger's office on a "board" company time and again in the past and the policies always came through in the Home, so he had no reason to question the name of the company. That is all the information he had on the matter. He never received any policies covering the property covered by the policies in suit from any company other than those he received from respondent and sued upon herein.

Each of the policies sued upon contained the following provision: "This policy shall be canceled at any time at the request of the insured, in which case the company shall, upon surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be canceled at any time, without tender of unearned portion of premium, by the company by giving five (5) days' written notice of cancellation to the insured and to any mortgagee or other party to whom, with the written consent of the company, this policy is made payable, in which case the company shall, upon surrender of the policy or relinquishment of liability thereunder, refund the excess of paid premium above the pro rata premium for the expired time." Insurance Code, sec. 2071.

[2-7] Accepting, as we must, all of the evidence tending in any degree to support the findings with respect to cancellation as true and drawing all reasonable inferences that may be drawn from the evidence, we are of the opinion that there is no evidence to support the findings as to cancellation. The evidence is without conflict that Elwood's authority to cancel was conditioned upon his procuring new insurance. He had

no authority to cancel until he had secured the new insurance. If new insurance was not procured Elwood had no authority to cancel. His returning the policies to respondent was ineffective to cancel and the policies were in force on the date of the fire. Respondent concedes that it is the general rule that a broker appointed by an assured to procure insurance does not ordinarily have authority to cancel existing policies. Counsel argues that authority to cancel may be shown to have been conferred upon the broker, citing Stevenson v. Sun Insurance Office, 17 Cal.App. 280, 286, 119 P. 529. We do not question this rule of law, but here the authority to cancel was conditioned upon new insurance first being procured. An agent authorized to procure insurance is not thereby made the agent of the assured to cancel a policy. Quong Tue Sing v. Anglo-Nevada Assurance Corporation, 86 Cal. 566, 571, 25 P. 58, 10 L.R.A. 144; Lauman v. Springfield Fire, etc., Ins. Co., 184 Cal. 650, 652, 195 P. 50; Cronenwett v. Iowa Underwriters, etc., 44 Cal.App. 571, 575, 186 P. 824. Authority to keep property insured is not authority to consent to a cancellation of insurance which would leave the property wholly without insurance. Lauman v. Springfield Fire, etc., Ins. Co., supra. Elwood's possession of the policies did not make him the ostensible agent of appellant for the purpose of having the policies canceled. Hooker v. American Indemnity Co., 12 Cal.App.2d 116, 120, 54 P.2d 1128. There is no question of ostensible agency in the case. Elwood's authority was actual and express. Respondent knew that Elwood's authority to cancel was conditioned upon his procuring new insurance.

[8-22] The new insurance, if it was procured, must have consisted of a contract between appellant and some fire insurance company. A parol contract is valid and enforceable. Harlow v. American Equitable Assur. Co., 87 Cal.App. 28, 31, 261 P. 499; Kleiber Motor Truck Co. v. International Indemnity Co., 106 Cal.App. 709, 719, 289 P. 865. In order to establish cancellation of a policy of insurance it must be shown either that the conditions upon which the company was allowed to cancel the policy were strictly complied with, or that the insured, knowing all the facts, waived such compliance. Quong Tue Sing v. Anglo-Nevada Assurance Corporation, supra, 86 Cal. 566, 571, 25 P. 58, 10 L.R.A. 144. The burden of proving cancellation is upon respondent. Rossini v. Saint Paul Fire, etc., Ins. Co., 182 Cal. 415, 420, 188 P. 564; Bebbington v. California Western, etc., Ins. Co., 30 Cal.2d 157, 180 P.2d 673. It is true, as respondent suggests, that where a parol contract of insurance is made, both parties will be presumed to have entered into the contract with reference to the statutory form. However, there must be a contract. There is not a scintilla of evidence in the record that any contract for new insurance was ever made. " 'To constitute a verbal contract of insurance the minds of the parties must have met upon all the essentials of the contract. The testimony must make clear the subject-matter of insurance, the amount and elements of the risk, including its duration in point of time and extent in point of hazard assumed, the rate of premium, and generally all the circumstances which are peculiar to the contract and distinguish it from every other so that nothing remains to be done but to fill up the policy and deliver it, on the one hand, and pay the premium on the other.' Benner v. Fire Ass'n of Philadelphia, 229 Pa. 75, 78 A. 44, 46, 140 Am.St.Rep. 706." Dutton Dredge Co. v. United States Fidelity & Guaranty Co., 136 Cal.App. 574, 576, 29 P.2d 316, 317. Oral contracts of insurance must be definite and certain. The parties must agree on all of the essential terms. Bridges v. St. Paul Fire & Marine Ins. Co., 102 Neb. 316, 167 N.W. 64, L.R.A. 1918D, 1199; State ex rel. Fishback v. Universal Service Agency, 87 Wash. 413, 151 P. 768, Ann.Cas.1916C, 1017; Whitman v. Milwaukee Fire Ins. Co., 128 Wis. 124, 107 N.W. 291, 5 L.R.A.,N.S., 407, 116 Am.St.Rep. 25; Note 15 A.L.R. 999. To constitute a valid contract of insurance the minds of the parties must have met on the identity of the person with whom they are dealing. Ludwinska v. John Hancock Mut. Life Ins. Co., 317 Pa. 577, 178 A. 28, 98 A.L.R. 705, 707. A contract of insurance is not effected by a transaction which does not supply the element of mutuality of agreement and mutuality of obligation.

Mutual Life Ins. Co. of New York v. Young's Adm'r, 23 Wall. 85, 23 L.Ed. 152; Employers' Liability Assur. Corporation v. Frost, 48 Ariz. 402, 62 P.2d 320, 107 A. L.R. 1413, 1416; Goddard v. Monitor Mutual Fire Ins. Co., 108 Mass. 56, 11 Am. Rep. 307; Carleton v. Patrons' Androscoggin Mutual Fire Ins. Co., 109 Me. 79, 82 A. 649, 39 L.R.A., N.S., 951; Bridges v. St. Paul Fire & Marine Ins. Co., supra, 102 Neb. 316, 167 N.W. 64, L.R.A.1918D, 1199; Dorman v. Connecticut Fire Ins. Co., 41 Okl. 509, 139 P. 262, 51 L.R.A.,N.S., 873; Whitman v. Milwaukee Fire Ins. Co., supra, 128 Wis. 124, 107 N.W. 291, 5 L.R.A., N.S., 407, 116 Am.St.Rep. 25; American Surety Co. of New York v. Commonwealth, 180 Va. 97, 21 S.E.2d 748. Until an application for insurance is accepted, no contractual relation exists between an applicant for insurance and an insurance company. Linnastruth v. Mutual Benefit, etc., Ass'n, 22 Cal.2d 216, 219, 137 P.2d 833; Carleton v. Patrons' Andorscoggin Mutual Fire Ins. Co., supra; Bridges v. St. Paul F. & M. Ins. Co., supra; Shawnee Mut. Fire Ins. Co. v. McClure, 39 Okl. 535, 135 P. 1150, 49 L.R.A.,N.S., 1054; Dorman v. Connecticut Fire Ins. Co., supra; Prudential Fire Ins. Co. v. Stanley, 191 Okl. 506, 131 P.2d 88; Wheelock v. Clark, 21 Wyo. 300, 131 P. 35, Ann.Cas.1916A, 956; Notes, 107 A.L.R. 1421; 9 Ann.Cas. 221; 21 Ann. Cas. 796; Ann.Cas.1916B, 677. An insurance company is not bound to accept an application or proposal for insurance but may reject it for any reason or arbitrarily. Mutual Life Ins. Co. of New York v. Young's Adm'r, supra, 23 Wall. 85, 23 L.Ed. 152; Cauman v. American Credit Indemnity Co. of New York, 229 Mass. 278, 118 N.E. 259, Ann.Cas.1918E, 841; Note: 107 A.L.R. 1421. A mere intention or mental determination on the part of the insurer to accept the application is not of itself sufficient to effect a binding contract. New v. Germania Fire Ins. Co., 171 Ind. 33, 85 N.E. 703, 131 Am. St.Rep. 245; Hopkins v. Phoenix Fire Ins. Co., 200 Ky. 365, 254 S.W. 1041; Simmons v. State Farm Mut. Automobile Ins. Co., La.App., 11 So.2d 703. A contract of insurance must be assented to by both parties either in person or by their agents. Alliance Marine Assur. Co. v. Louisiana State Ins. Co., 8 La. 1, 28 Am.Dec. 117. There can be no enforceable contract of insurance if the insured and an agent who represents several companies fail to designate one of the companies before a loss occurs. Hartford Fire Ins. Co. v. Trimble, 117 Ky. 583, 78 S.W. 462; Hopkins v. Phoenix Fire Ins. Co., supra, 200 Ky. 365, 254 S.W. 1041, 1043; Kleis v. Niagara Fire Ins. Co., 117 Mich. 469, 76 N.W. 155, 156; Springfield Fire & Marine Ins. Co. v. Hubbs-Johnson Motor Co., Tex.Com.App., 42 S.W.2d 248, 251; Ogle Lake Shingle Co. v. National Lumber Ins. Co., 68 Wash. 185, 122 P. 990, 991; Hamp v. Havens, 169 Wash. 332, 13 P.2d 75; Sholund v. Detroit Fire & Marine Ins. Co., 172 Wash. 111, 19 P.2d 395. It is held in a number of cases that payment of the premium is a condition which must be fulfilled if temporary insurance is to be considered as affording protection to the applicant. Union Cent. Life Ins. Co. v. Robinson, 5 Cir., 148 F. 358, 8 L.R.A.,N.S., 883; Note, 81 A.L.R. 340. Mere delay in acting on an application does not create a contract of insurance. Linnastruth v. Mutual Benefit, etc., Ass'n, supra, 22 Cal.2d 216, 220, 137 P.2d 833; Lucas v. Metropolitan Life Ins. Co., 14 Cal.App.2d 676, 680, 158 P.2d 934.

[23-25] In Law v. Northern Assurance Co., 165 Cal. 394, 399, 132 P. 590, 593, the oral statements were much stronger than in the instant case. In the Law case, Sturtevant was the broker of the insured having secured a "cover note" from Northern which expired April 18, 1906, at noon. H. C. Ahpel was the city agent of Northern. On March 19, 1906, Sturtevant and Ahpel met and Sturtevant said to Ahpel, " 'Henry, I have just got a line on the Fairmont that I can give you.' After some conversation, in which Mr. Ahpel learned that the building would be completed in October or November, he agreed to take $25,000 of the insurance. He asked Mr. Sturtevant if he (Ahpel) would 'get the renewal,' and the reply was, 'Sure, Henry.' " The Supreme Court held that the foregoing did not create an oral contract of insurance and said (at page 400 of 165 Cal., at page 593 of 132 P.): "* * * while a parol contract of insurance may be made, proof of such an agreement must be clear and convincing, be-

cause, ordinarily, insurance is obtained by the issuance of elaborate written policies. American Can Co. v. Agricultural Ins. Co., 12 Cal.App. [133], 135, 106 P. 720." The facts in American Can Co. v. Agricultural Ins. Co., supra, 12 Cal.App. 133, 106 P. 720, 722, square almost to a "T" with those here. Roy was the broker for the insured plaintiff. Fred Brown was the clerk of Edward Brown & Sons, agents of Agricultural Insurance Company, with authority to accept business and issue cover notes but not to make out or sign policies. The policy was to expire on April 18, 1906, at noon. On April 17, 1906, Roy prepared slips for the renewal of the policy which was to expire the following day. Late the afternoon of April 17th, Roy took the slips to the office of Edward Brown & Sons and in his language, which was not contradicted, said: "'So I stepped in behind the counter, as in fact I was accustomed to do, and Mr. Brown here (pointing to a person in the courtroom) was at his desk putting his things away, that is, Mr. Fred Brown; he had charge of the city department; so I said; "Here, Fred, are some renewals for you," and Fred says; "All right." As I turned around and went out I think he put them in a drawer of his desk. This was about all that was said about it.'" The court held that the evidence was insufficient to prove an oral contract and reversed a judgment for the plaintiff. It said that the answer of Brown, "All right", did not mean anything more than that he would take the matter up in due course. The court further stated (at page 135 of 12 Cal.App., at page 721 of 106 P.): "A parol contract of insurance may be made and is enforceable; but as such contracts are rarely made, and are not made in the usual and ordinary course of business, the proof of such oral contract must be clear and convincing. In fact it is the universal custom of insurance companies to issue written policies, with full and minute specifications as to their liability and the exceptions that would make the policy void. The preliminaries, as in contracts for the sale of real estate, are usually only negotiations which are afterward merged into the written contract. Hence it is at once apparent, even to the laymen, that in the somewhat unusual claim that an oral contract of insurance was entered into, the only safe and sound rule is to require the proof to be clear and convincing to the effect that the contract was actually entered into, that each party understood it in the same light, and in regard to the same subject-matter. Kerr on Insurance, 52, § 33; Eng. & Am. Ency. of Law, vol. 13, p. 221; Cleveland Oil & Paint Mfg. Co. v. Norwich Union Fire Ins. Co., 34 Or. 228, 55 P. 435. * * * A contract is an agreement to do or not to do a particular thing. It must be by consent, which is free, mutual, and communicated by each to the other. The consent is not mutual unless the parties all agree upon the same thing in the same sense and unless they do so agree there is no contract." To the same effect, upon analogous facts, see Taylor v. Phoenix Ins. Co., 47 Wis. 365, 2 N.W. 559, 3 N.W. 584; Idaho Forwarding Co. v. Fireman's Fund Ins. Co., 8 Utah 41, 29 P. 826, 17 L.R.A. 586; Consumers' Match Co. v. German Ins. Co., 70 N.J.L. 226, 57 A. 440; Whitman v. Milwaukee Fire Ins. Co., supra, 128 Wis. 124, 107 N.W. 291, 5 L.R.A., N.S., 407, 116 Am.St.Rep. 25; Cleveland Oil & Paint Mfg. Co. v. Norwich Union Fire Ins. Soc., 34 Or. 228, 55 P. 435; Dinning v. Phoenix Ins. Co., 68 Ill. 414; May v. Standard Fire Ins. Co., 220 Mich. 455, 190 N.W. 240; Continental Ins. Co. of New York v. Baker, 238 Ky. 265, 37 S.W.2d 62; Note, 15 A.L.R. 1004. The return of the policies to the company's general agent did not effect a cancellation at the request of the insured or by mutual consent. Emery v. Pacific Employers Ins. Co., 8 Cal.2d 663, 670, 67 P.2d 1046; Hooker v. American Indemnity Co., 12 Cal.App.2d 116, 54 P.2d 1128.

The real test of whether new insurance had been procured is whether appellant could have recovered for the loss from some company other than respondent. That appellant could not have recovered against some other company is clear from Law v. Northern Assurance Co., supra, 165 Cal. 394, 132 P. 590; American Can Co. v. Agricultural Ins. Co., supra, 12 Cal. App. 133, 106 P. 720; Toth v. Metropolitan Life Ins. Co., 123 Cal.App. 185, 11 P.2d 94; and Walters v. West American Ins. Co., 4 Cal.App.2d 581, 41 P.2d 355, 43 P.2d

306. Cases cited by respondent are of no assistance. In all of them that have any bearing at all upon the question, the substituted or new insurance was in fact obtained and in force before cancellation of the prior policy. An illustration is Home Ins. Co. v. Campbell Mfg. Co., 4 Cir., 79 F.2d 588.

The evidence is entirely too vague, indefinite and uncertain to establish a contract for the new insurance. The evidence of conversations between Elwood and Mrs. McDermott, who was merely an agent of appellant with respect to the procuring of the new insurance, and statements by Mrs. McDermott when she delivered the order to Mrs. Fine, with no money passing and no definite promise, is insufficient to establish a parol contract of insurance. There is a lack of agreement as to several essential elements of a contract. There was no meeting of the mind of appellant with any fire insurance company as to any of the essential terms or elements of a contract. What company was to carry the new insurance? That it was Home Fire & Marine Insurance Company, as respondent asserts, is supposition and surmise, nothing more. Old Line Agencies had the agency for a number of fire insurance companies. With which one was Mrs. Fine going to place appellant's order? The evidence does not reveal. There could be no contract until Old Line designated with certainty the company to be bound. It is evident that the trial judge was at a loss to determine the company in which the new insurance was placed. He did not find that it was placed in a particular company. His finding was that the policies with respondent were replaced "with insurance bound in other companies." Was there to be one or two policies? If one, was the amount to be $5,000 or $8,500? If two, what was to be the amount of each? What was the duration of the insurance? What was the amount of the premium to be paid? Were any limiting or burdening clauses to be attached to the policy to be issued? Insurance Code, sec. 2080. The evidence is silent as to all of these matters. They are not prescribed by the Standard form. Insurance Code, sec. 2071. No premium was paid. No cover note or binder or memorandum of any kind was issued. Appellant's application was never accepted by any company. Mrs. Fine's intention or mental determination, if there was such, to accept the application on behalf of some company was not sufficient to effect a binding contract. Her delay in acting upon the application did not create a contract. There was neither mutuality of agreement nor mutuality of obligation. The fact that the Legman office mailed the policies to respondent's general agent about a week before the fire occurred and that the general agent stamped "Cancelled" on the policies did not effect a cancellation. In the absence of authority in the Legman office to cancel, or of a mutual agreement between appellant and respondent to cancel the policies, they could only be canceled in the manner provided in the policies, i. e. at the request of the insured, or by the company upon giving five days' written notice of cancellation to the insured. There was no request of the insured to cancel and there was no written notice given by the company. All there is in the evidence is a delivery of an order for insurance to Mrs. Fine, a statement by Mrs. Fine that they would have to place it "board", a request to Mrs. Fine to keep it "board" without any response by Mrs. Fine. There was not even the response, "All right", which was held insufficient to create a contract in American Can Co. v. Agricultural Ins. Co., supra, 12 Cal.App. 133, 106 P. 720.

[26] The evidence is wholly lacking in details essential to prove a contract. There is no evidence that a contract was effective in praesenti. No contract for new insurance was entered into. Without that contract Elwood was without authority to cancel the policies with respondent. The policies were not canceled. They were in full force on the date of the fire.

Judgment reversed.

SHINN, Acting P. J., and WOOD, J., concur

82 Cal.App.2d 196

## PEOPLE v. WALKER.

Cr. 2003.

District Court of Appeal, Third District, California.

Oct. 31, 1947.

**1. Indictment and Information 🔑161(8)**

Order directing district attorney during trial to amend information charging defendant with assault with intent to commit murder so as to charge assault with a deadly weapon with intent to commit murder, for purpose of having information conform to proof, was proper, where evidence relative to defendant's use of gun in shooting victim first appeared at preliminary hearing. Pen.Code, § 1008.

**2. Indictment and Information 🔑161(8)**

An information, unlike an indictment, may be amended under statute so as to charge an additional or different offense supported by evidence adduced at preliminary examination. Pen.Code, § 1008.

**3. Criminal law 🔑814(20)**

Refusal of defendant's requested instruction on simple assault was not error, where record was uncontradicted that deadly weapon was used, and that party was actually shot by weapon so used, so that if defendant was guilty at all, he was guilty of assault with deadly weapon.

**4. Criminal law 🔑1177**
**Infants 🔑69**

In determining request of defendant, who was 17 years of age at time of commission of crimes, and 18 years of age at time of sentencing, for referral to Youth Authority, proper criteria should have been whether defendant was a proper subject for rehabilitation, and where trial court failed to apply proper criteria, judgment sentencing defendant to state prison was reversed and cause remanded in order that trial court might reconsider defendant's request. Welfare and Institutions Code, §§ 1700, 1731.5, 1732.

**5. Infants 🔑69**

Final determination as to whether a youthful offender is proper subject for commitment to Youth Authority will lie with that body, and not with trial court finding offender guilty of offenses charged. Welfare and Institutions Code, §§ 1700, 1731.5, 1732.

Appeal from Superior Court, Solano County; Joseph M. Raines, Judge.

Earl Walker, also known as Albert Earl Westbrook, was convicted of assault with deadly weapon with intent to commit murder, and of grand theft, and he appeals.

Affirmed in part, and in part reversed and remanded.

Melvin M. Belli, Edwin T. Wilson, Berry D. Brown and John Shortridge, all of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and Chas. W. Johnson, of San Francisco, for respondent.

PEEK, Justice.

By an information defendant originally was charged (1) with the crime of assault with intent to commit murder, and (2) with the crime of robbery. To each count he pleaded not guilty and subsequently moved to change his plea to not guilty and not guilty by reason of insanity. At the conclusion of the trial and prior to submission of the case to the jury, the court, on its own motion, ordered the district attorney to file an amended information as to count one so as to charge the defendant with assault with a deadly weapon with intent to commit murder. The jury found him guilty of assault as charged in count one as amended and guilty of grand theft under the charge of robbery as set forth in count two. Thereafter defendant withdrew his plea of not guilty by reason of insanity and the court sentenced him on each count as provided by law, the sentences to run concurrently.

Defendant by his statement to police officers and his testimony at the time of the trial admitted obtaining a ride in a car operated by one William Wise apparently on the pretext that defendant's wife was at a hospital expecting the birth of a child; that during the course of the ride and at defendant's request and upon his statement that he had lost his bearings the car was stopped; that after alighting from the car defendant drew a gun, shot Wise and thereafter drove off in the victim's car. Defendant further stated he could give no reason for his acts other than that he had been drinking heavily during the afternoon and evening of the crime nor could he account for having told Wise that his wife was about to have a baby as he was not married. Further more he could not understand why he had shot the victim as Wise appeared to him to be a good person and he had no intent to kill him. The only reason he gave for taking the car was that he became frightened after he realized he had shot and injured Wise.

[1, 2] In support of his first contention that the trial court abused its discretion in ordering the information amended, appellant argues that said amendment was in excess of the scope and purpose of section 1008 of the Penal Code in that under the first count of the first amended information, which merely charged an assault with intent to commit murder, the jury guided by proper instructions could have found him guilty of simple assault but by the second amended information, which charged assault with a deadly weapon with intent to commit murder, and the instructions actually given, the jury was given no alternative but to find him guilty of assault with a deadly weapon.

Nowhere in the record is there a denial that a deadly weapon was used. In fact defendant himself identified the gun and testified as to its ownership, possession and use. He does not contend, nor could he, that the evidence was insufficient to support the conviction of assault with a deadly weapon. It is readily apparent in the light of the evidence so produced, including the admissions and testimony of the defendant himself, that the crime of simple assault was not involved. If he was guilty at all he was guilty of the crime of assault with a deadly weapon. People v. McCoy, 25 Cal. 2d 177, 187, 194, 153 P.2d 315; People v. Lopez, 135 Cal. 23, 25, 66 P. 965. Therefore the amendment to the information ordered by the trial judge merely conformed to the proof. From the wording of said section 1008 of the Penal Code this would seem to be one of the clear purposes thereof, if such an amendment can be accomplished without prejudice to the substantial rights of the defendant. People v. Clawson, 82 Cal.App. 422, 255 P. 552. Here the evidence relative to the use of a gun in the shooting of the victim first appeared at the preliminary hearing and was both admissible and admitted under the first amended information. The situation so presented is quite comparable to that in the case of People v. Foster, 198 Cal. 112, 243 P. 667. There, as here, the amendment was made after the introduction of evidence and over the objection of the defendant. On appeal the Supreme court held that as the amended information did not charge an offense different from that shown by the evidence taken at the preliminary examination and because such amendment did not prejudice the substantial rights of the defendant it was not error for the trial court to amend the information. Unlike an indictment, and information may be amended under Penal Code section 1008 so as to charge an additional or different offense supported by evidence adduced at the preliminary examination. People v. Tallman, 27 Cal.2d 209, 163 P.2d 857; People v. Foster, supra; People v. Shutler, 15 Cal.App.2d 704, 59 P.2d 1050.

[3] Appellant's second contention, that the trial court erred in failing to give the instruction on simple assault offered by him, is likewise without merit. As previously stated the record is clear and uncontradicted that a deadly weapon was used and that the party assailed was actually shot by the weapon so used. Under such circumstances it is self evident that if the defendant was guilty at all he was guilty of the higher offense as alleged in the amended information. Here the court permitted appellant to offer additional instructions to the jury covering the charge of assault with a deadly weapon, and such instructions were given. Since there could be no justification for expecting a verdict of simple assault under the evidence it cannot be said that the court erred in re-

fusing to give the proffered instruction. People v. McCoy, supra; People v. Lopez, supra; People v. Galloway, 104 Cal.App. 422, 429, 286 P. 476.

The appellant's third contention is that the court exceeded the spirit and purpose of the Youth Authority Act in sentencing him to imprisonment in the state penitentiary in that at the time of the commission of the crimes he was seventeen years of age and at the time of sentencing was only eighteen.

The pertinent provisions of the Youth Authority Act relative to referral as they existed at the time of sentencing of the defendant, are found in section 1731.5 of the Welfare and Institutions Code, which provided:

"After certification to the Governor as provided in this article and until January 1, 1948, a court *may* refer to the Authority any person convicted of a public offense who comes within all of the following description:

"(a) Is found to be less than 21 years of age at the time of apprehension;

"(b) Is not sentenced to death, imprisonment for life, imprisonment for 90 days or less, or the payment of a fine, or after having been directed to pay a fine, defaults in the payment thereof, and is subject to imprisonment for more than 90 days under the judgment;

"(c) Is not granted probation.

"If the Authority believes that any person referred to it as provided in this section can be materially benefited by the procedure and discipline of the Authority, and that proper and adequate facilities exist for the care of such person, it shall so certify to the court. The court shall thereupon commit said person to the Authority." [Italics ours.]

And Section 1732 of the same code, which provided that:

"Except as otherwise provided in this chapter the court *shall* commit to the Authority every person convicted of a public offense after January 1, 1948, who

"(a) Is found to be less than 21 years of age at the time of apprehension, and

"(b) Is not sentenced to death, imprisonment for life, imprisonment for 90 days or less, or the payment of a fine or who, after having been directed to pay a fine, defaults in the payment thereof, and is subject to imprisonment for more than 90 days under the judgment, and

"(c) Is not granted probation." [Italics ours.]

It is apparent from the history of the act and from the amendments which, from time to time, have been passed, that it was the intent of the legislature that ultimately all persons coming within the provisions thereof should be referred to the authority.

At the outset of its enactment (Statutes 1941, Ch. 937, p. 2526) after the Authority had certified to the Governor that it had the proper facilities and personnel for the discharge of its duties thereunder and until January 1, 1944, commitments to the Authority of all persons under the age of 23 years was mandatory under both section 1731.5 and 1732. Thereafter by the Statutes of 1943, Ch. 236, p. 1147, the date of January 1, 1944, was extended to January 1, 1946, the substantive provisions remaining the same. By Chapter 2, sections 5 and 6, page 22 of the Statutes of the Third Extra Session of 1944, the age of the persons included within said sections 1731.5 and 1732 was reduced from 23 years to 21 years; otherwise the sections remained the same. This was followed by the Statutes of 1945, Chapter 779, sections 1 and 2, which changed the mandatory provision of said section 1731.5 to permissive. Section 1732 was not amended except to advance the date to January 1, 1948. In other words, until January 1, 1948 referrals to the Authority were to be within the discretion of the trial court, but after said date commitments would become mandatory with respect to all persons coming within the classification therein set forth. In its last session [1947] the legislature re-enacted the same provisions in both sections but extended the mandatory provisions of Section 1732 to January 1, 1950.

Thus it appears that originally it was, and from the sequence of amendments thereto still is, the intent of the legislature that ultimately all youthful offenders except as otherwise provided in said section should be referred to the Youth Authority. This general policy is in accord with the expressed intent of the legislature as set forth in the statement of purpose in Section 1700 of the act as originally adopted, as follows:

"The purpose of this chapter is to protect society more effectively by substituting for retributive punishment methods of training and treatment directed toward the correction and rehabilitation of young persons found guilty of public offenses. To this end it is the intent of the Legislature that the chapter be liberally interpreted in conformity with its declared purpose."

Although it would seem that defendant should have been referred to the Authority the record does not support his contention that the trial court overlooked the purpose and intent of said act. To the contrary it appears from the comment of the trial judge at the time sentence was pronounced, that he was particularly cognizant of the purpose of the act but by reason of a misunderstanding of the provisions thereof was convinced that he was compelled to sentence defendant to a state prison.

The record in this regard shows that at the time of sentence the court stated that "upon the testimony of these two * * * [psychiatrists] on the subject of insanity, that their opinion that the defendant is legally sane and has been at all times, should govern the court. * * * The question of his being influenced or governed in what he did on the day in question by liquor cannot govern this court, and accordingly it will be necessary for the Court in the interest of justice and on the duty of the court to sentence this defendant to State Prison as provided by law, and not to commit him to the Youth Authority." The court further observed that in addition to the testimony of the two doctors it had in mind "the law of the State of California, which is plain, positive and controlling on this Court, that intoxication can be no excuse for the commission of crime; that the only reason that evidence of intoxication may be received by a jury is upon the question of intent, * * *."

In summary the court stated that because of the psychiatrists' "conclusion of his [the defendant's] legal sanity and on the question of intoxication as influencing his judgment more or less, the Court, I say, must now deny its own inclination to send this defendant of tender years to the Youth Authority, but to send him to State Prison."

It therefore appears that although the trial judge felt, and properly so, that the defendant definitely came within the provisions of the act, nevertheless because of the reasons stated and in particular the defendant's sanity, he believed that under the circumstances he had no discretion but to send the defendant to a state prison.

[4, 5] The issues as to defendant's sanity and the effect of his intoxication at the time of the commission of the acts relate only to the question of his guilt or innocence of the crimes with which he was charged. Obviously the mere question of whether or not the defendant is sane, or the question of his guilt can have no bearing upon whether or not he is a proper subject for rehabilitation. It thus appears that the trial court in passing upon the defendant's request for referral to the Youth Authority failed to apply proper criteria in the attempted exercise of his discretion. For this reason the cause should be remanded to the trial court in order that such discretion may be exercised on the basis of the defendant's youth and his ability to profit by a commitment to the Authority. In any event the final determination as to whether or not the defendant is a proper subject for commitment to the Youth Authority will lie with that body and not with the trial court. For this reason a trial court should not be too hesitant in referring a youthful offender to the Authority in accordance with the stated purpose of the act; particularly is this true where, as here, there is any possibility that he may be found to be a proper subject for commitment thereto.

For the foregoing reasons the judgment in so far as the conviction of the crimes charged is concerned is affirmed; however, that portion of the judgment sentencing the defendant to the state prison is reversed and the cause is remanded to the trial court in order that it may reconsider the defendant's request for referral to the Youth Authority and exercise its discretion in accordance with the views herein expressed.

ADAMS, P. J., and THOMPSON, J., concur.

82 Cal.App.2d 192

## SELLMAN v. SELLMAN et al.

Civ. 15735.

District Court of Appeal, Second District, Division 3, California.

Oct. 31, 1947.

As Modified Nov. 14, 1947.

**1. Husband and wife ⚷4, 19(2)**

A husband assumes responsibility for the support of his family, and, on his failure to provide such support, his wife is authorized to purchase on his credit whatever is necessary for her maintenance. Civ. Code, § 167.

**2. Husband and wife ⚷268(1), 270(11)**

Unless secured by a pledge or mortgage thereof, executed by husband, property of the community, other than wife's earnings, is not liable for contracts of wife made after marriage, and a judgment against wife, based on such a contract, cannot be satisfied out of property of community but only out of wife's separate estate. Civ. Code, § 167.

**3. Divorce ⚷321½**

Where husband and wife took title to dwelling as joint tenants, and wife was forced to borrow and give note for $150 when husband failed to furnish necessaries, and husband promised to pay note and subsequently wife obtained a divorce decree which required husband to keep up payments on incumbrances on the house, judgment was obtained against wife on her note, and judgment creditor purchased her interest in dwelling at sheriff's sale and assigned certificate of purchase to husband, husband became an involuntary trustee for benefit of wife and was estopped to take advantage of his acts as against wife. Civ. Code, § 2224.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by William A. Sellman against Bessie I. Sellman and another to quiet title and to recover possession of certain improved realty. From an adverse judgment, the plaintiff appeals.

Judgment vacated with directions.

Wm. R. Law, of Los Angeles, for appellant.

Bessie I. Sellman, George N. Foster and Saul S. Klein, both of Los Angeles, for respondent.

KINCAID, Justice pro tem.

Plaintiff appeals from a judgment denying him relief in this action wherein he seeks to quiet title to and recover possession of certain improved real property.

The evidence discloses that plaintiff and defendant were formerly husband and wife and there is one minor child the issue of such marriage. While living together, the parties purchased with community funds the lot and dwelling which is the subject matter of this action for $10,500, taking title thereto in both their names as joint tenants. At the time of the filing of the subsequent divorce proceedings the full purchase price of such property had been paid, excepting $4,500; the rental value of the property was $50 per month. On or about June 21, 1932, before the separation of the parties, and plaintiff having failed to furnish money for the support of his wife and child, defendant borrowed the sum of $150, giving a promissory note as evidence of the indebtedness. Defendant thereupon told plaintiff that she had borrowed this money and that he would have to pay off the loan to the lender. Plaintiff told defendant, "Don't you worry about that. I will take care of that. That is my problem."

Several months after the execution of the promissory note by defendant, plaintiff brought an action for divorce against her. She thereupon filed her answer and cross-complaint thereto and was granted an interlocutory judgment of divorce against plaintiff. Defendant was awarded the custody of the minor child, the possession of and right to live in the community real property and plaintiff was ordered to pay defendant $85 per month for the support of herself and child, keep up reasonable repairs on the house, and payments on the encumbrances, assessments and taxes thereon, title to the property to remain in joint tenancy.

Suit was subsequently brought against defendant on the above-described promissory note and on September 30, 1933, a judgment was rendered against her for $179.67. A writ of execution issued and the judgment creditor undertook to purchase at sheriff's sale her interest in the real property in satisfaction of the judgment in the sum of $214.67. On August 26, 1937, the judgment creditor assigned the certificate of purchase of defendant's interest in such property to plaintiff herein. Some eight years later he filed this suit against defendant to quiet title to all her right, title and interest in said property and for possession.

Following trial, the court made its findings to the effect that the loan of $150 was made by defendant while she and plaintiff were husband and wife, that the proceeds thereof were used for the necessaries of their home, and that plaintiff had agreed to pay back the loan; that by taking an assignment from the judgment creditor of the certificate of purchase secured on execution sale, and by procuring a sheriff's deed in his own name, plaintiff became a constructive trustee for the defendant; that the judgment of divorce theretofore entered between the parties required plaintiff to keep the property in question in joint tenancy and that such order remains in full force and effect; that plaintiff is estopped to take advantage of the defendant under the circumstances here found to exist, and that defendant continues in full ownership of her undivided one-half interest in such real property as a joint tenant with plaintiff. The sole question presented for decision on this appeal is whether the foregoing evidence is sufficient to sustain the findings and judgment of the trial court.

Plaintiff did not testify at the trial. He offered no evidence to contradict the foregoing facts. Even though title to the property was taken in the names of the parties as joint tenants, it is conceded to have been purchased and held as community property. That the money represented by the loan was borrowed and used for the necessaries of life by defendant, while the parties were still living together, and that plaintiff promised to repay it, is undisputed. Instead of paying it he permitted the obligation to be reduced to a judgment and, some four years later, bought the certificate of purchase purporting to represent ownership of defendant's undivided joint tenancy share in the property. He now relies on a sheriff's deed therefor to oust defendant, quiet title in him as to her one-half interest, worth at least $3,000 under the evidence, in exchange for paying off an obligation of several hundred dollars which was primarily his in the beginning.

[1, 2] "The husband assumes responsibility for the support of his family and upon his failure to provide such support his wife is authorized to purchase on his credit whatever is necessary for her maintenance. Civil Code, § 174; Title Insurance & Trust Co. v. Ingersoll, 158 Cal. 474, 492, 111 P. 360." Mergenthaler v. Mergenthaler, 69 Cal.App.2d 525, 527, 160 P.2d 121, 123. Unless secured by a pledge or mortgage thereof, executed by the husband, the property of the community, other than the earnings of the wife, is not liable for the contracts of the wife made after marriage. Civ.Code, sec. 167. A judgment against the wife based on such a contract cannot be satisfied out of property of the community but only out of her separate estate. Bogart v. Woodruff, 96 Cal. 609, 31 P. 618.

[3] We are here concerned with ascertaining the rights and property interests of the parties hereto only, and not those existing between defendant and the judgment creditor prior to the payment of the judgment by plaintiff. Whatever they may have been as a result of the execution sale, all the facts and circumstances of the entire transaction were known to plaintiff. He was fully aware also of his continuing obligation, by judgment of the court, to support the defendant, his former wife, and their minor child, both monetarily and by

maintaining the joint tenancy property as such and as a place in which they could reside. His acts are patently an attempt to circumvent this obligation and constitute a fraud on the defendant, their child and the court. Under such conditions he becomes an involuntary trustee for the benefit of defendant of whatever he may have gained by his fraudulent acts. Civ.Code, sec. 2224; Forman v. Goldberg, 42 Cal.App.2d 308, 315, 108 P.2d 983; Johnson v. Clark, 7 Cal. 2d 529, 533, 61 P.2d 767. The evidence fully supports the findings of the court, including those that plaintiff is estopped to take advantage of his fraudulent acts as against defendant, that he is a constructive trustee for her and that, so far as plaintiff is concerned, her ownership in an undivided one-half interest in such property as a joint tenant with him remains unimpaired.

The court is directed to vacate the judgment and to enter a new judgment reading as follows: "It is ordered, adjudged and decreed that plaintiff and defendant are the owners as joint tenants of the real property described in the complaint and that defendant recover her costs of suit."

Respondent shall recover costs on appeal.

SHINN, Acting P. J., and WOOD, J., concur.

82 Cal.App.2d 188

## OAKLEY v. OAKLEY.

Civ. 15727.

District Court of Appeal, Second District, Division 3, California.

Oct. 31, 1947.

**1. Appeal and error 🔑1011(1)**

A finding of trial court upon conflicting evidence will not be disturbed if there is evidence of substantial character which reasonably supports the judgment.

**2. Marriage 🔑60(7)**

In divorce suit wherein defendant cross-complained for annulment of marriage, evidence sustained finding that when parties were purportedly married plaintiff knew of an existing marriage of defendant, and defendant was entitled to an annulment of purported marriage.

**3. Marriage 🔑63**

Where one or both parties to an invalid marriage have in good faith believed such marriage to be valid, upon an annulment or declaration of invalidity, courts will recognize right of de facto wife in property acquired by parties through their joint efforts, and which would have been community property had marriage been valid, and will make an equitable division of such property.

**4. Marriage 🔑63**

Where an invalid marriage has been procured by fraud of de facto husband, who is aware of invalidity of marriage, and wife has acted in good faith, wife may recover reasonable value of her services above value of support furnished her supposed husband.

**5. Marriage 🔑63**

Where plaintiff lived with defendant as defendant's wife but with no genuine belief that she was legally married to defendant, plaintiff was not entitled as a putative wife to a money judgment for services rendered to defendant during period parties lived together, and in absence of agreement for division of defendant's earnings or for payment by defendant to plaintiff of a stated sum or for reasonable value of plaintiff's service to defendant above value of support maintenance, trial court properly rendered judgment annulling marriage but otherwise refusing further relief leaving parties in position in which they had placed themselves.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Suit for divorce by Florence A. Oakley against Gordon C. Oakley wherein defendant cross-complained for annulment of purported marriage. From decree denying plaintiff's prayer for divorce and granting cross-complainant a decree of annulment, plaintiff appeals.

Judgment affirmed.

Arnold L. Leader and Leonard Wilson, both of Los Angeles, for appellant.

Lyons & Lyons, Harry Lyons and David Lyons, all of Los Angeles, for respondent.

KINCAID, Justice pro tem.

Plaintiff appeals herein from a judgment denying her prayer for a divorce, and granting defendant and cross-complainant a decree of annulment of their purported marriage.

The record discloses that defendant and one Laura Miller Oakley were legally married at a date prior to July 25, 1939. On this date she filed an action for divorce against defendant, in the State of California, an interlocutory judgment of divorce was granted to her on September 5, 1939, and a final judgment of divorce was duly entered in said action on September 13, 1940.

On October 2, 1939, plaintiff herein, Florence A. Oakley, and defendant, went to Tia Juana, Mexico, where a marriage ceremony was performed purportedly joining them as husband and wife. They thereupon returned to California where they continued to live together as husband and wife until May 29, 1944. On January 8, 1945, plaintiff filed an action for divorce against defendant and by her amended complaint alleged that at the time of her marriage to defendant she did not know that he was married to another woman and did not learn of that fact until May 29, 1944, whereupon she separated from him. She further alleged that she has performed services for defendant, believing herself to be legitimately married to him, for the period of four years, eight months and twenty-seven days, the reasonable value of such services being the sum of $5,000, for which judgment is demanded. By his answer to the amended complaint defendant denies plaintiff's allegations of lack of knowledge and affirmatively alleges she was informed by him of the fact that he had a living wife, his marriage to whom had never been legally terminated, and that any marriage between plaintiff and defendant would be invalid and void; that notwithstanding plaintiff's knowledge of such facts the parties proceeded to Mexico and entered into the marriage ceremony at that place. By way of cross-complaint defendant prayed for an annulment on the basis of the foregoing facts. Following trial, the court made its findings substantially in accordance with the denials and allegations contained in defendant's answer and cross-complaint, specifically finding that at the time the parties hereto engaged in the marriage ceremony at Tia Juana, Mexico, on October 2, 1939, both knew that said marriage would not be valid in the State of California by reason of being contracted within one year of the time of the entry of the interlocutory judgment of divorce obtained by Laura Miller Oakley against defendant herein, and that such purported marriage between the parties hereto was void and of no force or effect whatever. The court further found that no property exists, nor have any assets accumulated by or between the parties hereto during the period the parties resided together, and that she has performed no services for defendant while believing she was his legitimate wife; that their purported marriage was illegal, void from the beginning and should be annulled.

Plaintiff's primary point on appeal is that there is insufficient evidence to support the court's finding that plaintiff knew of the then existing marriage between defendant and Laura Miller Oakley at the time she entered into the purported marriage with him of October 2, 1939 in Mexico. Although conceding that defendant testified specifically that he told plaintiff that he had not been divorced from his former wife and that the evidence on this subject is directly conflicting she advances the novel theory that this constitutes an "equilibrium of evidence between the parties," thus requiring the trial court to find in her favor. She cites no supporting authority.

[1, 2] The law is well established in this state that a finding of the trial court upon conflicting evidence will not be disturbed on appeal if there is evidence of a substantial character which reasonably supports the judgment. (Fewel & Dawes, Inc., v. Pratt, 17 Cal.2d 85, 89, 109 P.2d 650; Sears v. Schwartz, 61 Cal.App.2d 125, 142 P.2d 334.) The foregoing evidence, being directly conflicting, it was the responsibility of the trial judge to weigh

and determine the testimony of the witnesses in the light of all the evidence and of the circumstances surrounding the case. The testimony of defendant, when considered with all the surrounding facts and circumstances of the marriage, was evidence, substantial in character, which the trial court was entitled to believe and which amply supports its finding as to this point.

Plaintiff next contends that she is a putative wife of defendant and as such is entitled to a money judgment for services rendered to him during the period they lived together and that the court should decree a lien on the separate property of the husband to enforce the same.

**[3, 4]** "Where a 'putative' marriage has existed, that is, where one or both parties to an invalid marriage have in good faith believed such marriage to be valid, upon an annulment or declaration of invalidity the courts will recognize the right of the de facto wife in property acquired by the parties through their joint efforts, and which would have been community property had the marriage been valid, and will make an equitable division of such property. * * * Where an invalid marriage has been procured by fraud of the de facto husband, who is aware of the invalidity of the marriage, the right of the wife who has acted in good faith to recover the reasonable value of her services over and above the value of the support and maintenance furnished her by her supposed husband, has been sustained in a number of jurisdictions, including this state." (Sanguinetti v. Sanguinetti, 9 Cal.2d 95, 99, 100, 69 P.2d 845, 111 A.L.R. 342; see also, Taylor v. Taylor, 66 Cal.App.2d 390, 398, 152 P.2d 480.

In the instant case, however, no putative marriage ever existed, as neither party to the marriage ceremony ever believed it to be valid. A somewhat similar situation to that before us was present in the case of Vallera v. Vallera, 21 Cal.2d 681, at pages 684, 685, 134 P.2d 761, 762, wherein our Supreme Court said: "The essential basis of a putative marriage, however, is a belief in the existence of a valid marriage. * * * Although it is clear from the trial court's findings that the parties in the present case did not comply with the requisites of a legal marriage, plaintiff contends that the presumption that a person is innocent of crime or wrong (Code Civ.Proc. § 1963, subd. 1), and the fact that the parties lived together as man and wife at a time when both were free to enter into a valid marriage with one another, establishes that plaintiff believed in good faith that she was the lawful wife of defendant. The findings of the trial court, however, amply supported by the evidence, do not substantiate the existence of good faith. * * * The controversy is thus reduced to the question whether a woman living with a man as his wife but with no genuine belief that she is legally married to him acquires by reason of cohabitation alone the rights of a co-tenant in his earnings and accumulations during the period of their relationship. It has already been answered in the negative. Flanagan v. Capital Nat. Bank, 213 Cal. 664, 3 P.2d 307. Equitable considerations arising from the reasonable expectation of the continuation of benefits attending the status of marriage entered into in good faith are not present in such a case."

**[5]** In the absence of an agreement between plaintiff and defendant for the division of his earnings or for the payment by him to her of a stated sum or for the reasonable value of her services to him over and above the value of the support and maintenance which he furnished her, she is not entitled to a judgment therefor. There is no evidence of any such agreement between them. Where, as here, both parties knowingly participated in the fraudulent marriage the trial court properly rendered judgment annulling the marriage but otherwise, as a court of equity, refused further relief, leaving them in the position in which they had placed themselves.

The judgment is affirmed.

SHINN, Acting P. J., and WOOD, J., concur.

82 Cal.App.2d 176

## AGNEW v. LARSON.

Civ. 15639.

District Court of Appeal, Second District,
Division 3, California.
Oct. 31, 1947.

**1. Limitation of actions ⇨31**

An action by a patient against physician for injuries sustained by patient by reason of alleged negligent or unskilled treatment of patient is an "action sounding in tort" and not an "action on a contract" and is barred one year after date of injury. Code Civ.Proc. § 340, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Action in Tort" and "Action on Contract".

**2. Physicians and surgeons ⇨14(4)**

A physician is chargeable with knowledge and foresight to the degree of learning and skill possessed by physicians of good standing practicing in the same locality of both the nature and effect upon patient of foreign substance or matter introduced into body of patient by physician.

**3. Limitation of actions ⇨95(2)**

Where patient ultimately allegedly developed a cancerous condition as result of physician's allegedly negligently prescribing stilbestrol to be taken by patient over a prolonged period of time and patient relied upon physician for information as to patient's condition as well as for information as to results reasonably to be anticipated from the medicine the one year statute of limitations did not commence to run against patient's action for alleged malpractice until patient knew or in the exercise of ordinary care should have discovered the cancerous condition. Code Civ.Proc. § 340, subd. 3.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Frances Agnew against Edwin Larson for damages for medical malpractice. From judgment dismissing complaint, plaintiff appeals.

Judgment reversed with directions.

Cuthbert J. Scott, of Los Angeles, for appellant.

Harold B. Pool, of Los Angeles, for respondent.

KINCAID, Justice pro tem.

Plaintiff appeals from a judgment of dismissal following her declination to amend her first amended complaint to which the demurrer of defendant Larson had been sustained with leave to amend.

Plaintiff's cause of action is one for damages for medical malpractice which she claims to have suffered as a patient while under the care and as a proximate result of the negligence of Larson, hereinafter referred to as defendant, and another defendant physician, John C. Wilson. A general demurrer by the latter was overruled, his answer filed, but trial on the issues thus joined has not yet been had.

Larson's demurrer, while predicated on the two grounds of insufficiency of the complaint to state a cause of action against him and the bar of subdivision 3 of section 340, Code of Civil Procedure, was sustained on the second ground and he concedes on this appeal that, excepting for the bar of the statute of limitations, the complaint states a cause of action against him.

The first amended complaint alleges, in effect, that on January 27, 1942, defendant Larson was employed by the plaintiff as her physician for the purpose of examining her physical condition and prescribing medical treatment or medication therefor; that on numerous occasions to and including June 1, 1943, defendant treated plaintiff by prescribing, and directing her to take, a substantial quantity of medicine consisting of stilbestrol in tablet form; that throughout such period plaintiff took the prescribed tablets at the times and in the number as directed by defendant; that on June 1, 1943, defendant prescribed and directed plaintiff to obtain an additional 100 tablets of stilbestrol to be taken by her at the rate of one tablet daily.

The pleading further alleges that about July 17, 1944, plaintiff employed defendant Wilson as a physician to examine and treat her and that he accepted such employment; he thereupon prescribed for plaintiff and directed her to take tablets of stilbestrol and to continue taking them under a new prescription following the completion of the taking of the quantity of tablets then on hand pursuant to the Larson prescription of June 1, 1943; that plaintiff thereupon did take, in accordance with the prescription, the tablets prescribed by Larson, thereafter commencing to take and taking for some 26 successive nights the stilbestrol tablets as prescribed by Wilson.

It is further alleged that although the defendants held themselves out as being doctors of medicine, possessing that degree of skill and learning ordinarily possessed by other reasonably skillful and prudent physicians practicing in the community, they nevertheless, in prescribing stilbestrol for her, prescribed a drug which is a synthetic estrogen containing cancerous properties which may produce or cause cancer of a woman's breast, particularly of women with a family history of breast cancer and which should not be administered to women with such a family history, nor for prolonged periods of time; that when its administration is indicated it should be prescribed only after a physical examination of the patient has been made; that defendant Larson actually knew that plaintiff had such a family history in that plaintiff's mother had had a breast cancer and had died therefrom; that plaintiff did not know that the said drug so prescribed for and taken by her contained the aforementioned properties or might cause her to sustain cancer of her breast, nor could she, by the use of ordinary care and diligence, have discovered such facts.

It is further alleged that on or about January 15, 1945, and while plaintiff was under the care and treatment of both defendants, a lump developed in plaintiff's right breast which laboratory tests on February 8, 1945, disclosed to be cancer; that on February 10, 1945, plaintiff was required to and did submit to the removal by surgery of her right breast in order to prevent the cancer from growing and spreading to other parts of her body; that the taking by her of such medicine over the prolonged period heretofore described, when considered in conjunction with her physical condition and her family history of breast cancer caused her cancerous condition and that in prescribing and directing plaintiff to take such medicine over the long period of time alleged and with knowledge that plaintiff had a family history of breast cancer defendants failed to possess or exercise that degree of skill and learning ordinarily possessed and exercised by other skillful physicians practicing in Los Angeles County; as a proximate result of which she suffered general and special damages.

[1] The original complaint was filed herein by plaintiff on January 15, 1946. "It is the settled law in this state that an action by a patient against a physician and surgeon for injuries sustained by the former, by reason of the negligent or unskilled treatment of the latter, is an action sounding in tort and not upon a contract. Such an action is therefore barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure one year after the date of the injury." Huysman v. Kirsch, 6 Cal.2d 302, 306, 57 P.2d 908, 910.

The date of injury which starts the running of the statute of limitations, however, is not necessarily the same date as that when the negligent act or omission of the physician took place. As pointed out in Huysman v. Kirsch, supra, 6 Cal.2d at page 312, 57 P.2d at page 913, the leading case of Marsh v. Industrial Acc. Comm., 217 Cal. 338, 18 P.2d 933, 86 A.L.R. 563, where several employees were injured in the course of their employment by inhaling dust laden atmosphere resulting in serious impairment of health, is authority for the principle that "the date of the injury was not the date of the exposure, nor even the date of the last exposure to the dust laden atmosphere, but rather the time when the employees became aware that their injuries were due to such exposure, or when by the exercise of reasonable care and diligence they might have ascertained that fact. In other words, * * * that the statute of limitations did not run against these employees until they knew the causes of their injury, or by reasonable care and diligence should have known the cause of their injury."

In applying this rule to cases of malpractice, our Supreme Court in Huysman v. Kirsch, had facts before it for consideration showing, according to the allegations of the complaint, that a defendant physician performed an abdominal operation upon the plaintiff, at which time, on closing the wound, he inserted a tube in her body to drain the wound and negligently left it therein, without her knowledge, until the tube was removed by defendant 20 months later, during which time he continued to treat the patient; that as a consequence of such negligent act painful and infected sores were created to her damage. The court said (6 Cal.2d at pages 312, 313, 57 P.2d at page 913): "If we apply this principle to the facts in the present action, the same results will follow as the appellants in this action had no knowledge of the presence of the drainage tube in the body of Mrs. Huysman until it was removed therefrom by the respondent on September 26, 1932. During all this time she was under the exclusive care of the respondent, a reputable and skillful physician and surgeon, and both Mrs. Huysman and her husband relied solely upon him for information as to her physical condition and as to her failure to regain her health. It cannot be said, therefore, that they had any knowledge whatever of the cause of her failure to recover from the operation, or that they could have gained that knowledge by the exercise of due care and diligence prior to September 26, 1932. Before that date they were as completely in the dark as to the cause of Mrs. Huysman's injury as were Marsh and his fellow workers while they were inhaling the dust laden air in their employer's factory until the disease resulting therefrom had reached such a stage as to indicate its cause. We can see no good reason why, if the statute of limitations did not begin to run in one case, that it should run in the other. There is one very material element present in the case before us which was lacking in the Marsh Case. In that case the ignorance of the employees was due to the nature of the business in which they were employed and not to any improper or negligent act of their employer. In the present case, the ignorance of the appellants as to Mrs. Huysman's condition was due solely to the negligent act of the respondent. This fact in our opinion makes the present action even stronger than the Marsh Case in respect to the running of the statute."

The same rule was applied in the case of Faith v. Erhart, 52 Cal.App.2d 228, 126 P.2d 151, the complaint charging that the defendant dentist, in the course of his professional services to plaintiff, so negligently pulled some of her teeth as to cause roots or portions thereof to break off and remain imbedded in her jaw; that although he had full knowledge of these facts he represented to plaintiff that the extractions were complete and no further dental care or treatment was necessary therefor; that relying on defendant's representations she sought no further dental or medical care thereon until a time some 10½ years later when x-ray films revealed to her, for the first time, the presence of the said broken roots, all in an infected state; that her health was seriously damaged thereby. The defendant dentist's plea in bar of the statute of limitations was rejected. (To the same effect see Pellett v. Sonotone Corporation, 55 Cal.App.2d 158, 130 P.2d 181; Petrucci v. Heidenreich, 43 Cal.App.2d 561, 111 P.2d 421; Alford v. Industrial Accident Comm., 28 Cal.2d 198, 202, 169 P.2d 641; see Note, 144 A.L.R. 214.

Defendant, while conceding the applicability of the foregoing rule to cases arising out of surgery, in which the patient subsequently discovers foreign substances such as sponges, clamps, tubes, pieces of broken bones and other objects to have been left in his body, contends that it does not apply to the administration or introduction into the patient's body of a drug or medicine. We fail to find any basis of differentiation, however, in the respective situations.

Quite a similar factual background as that before us confronted the Maryland Court of Appeals in the case of Hahn v.

Claybrook, 130 Md. 179, 100 A. 83, L.R.A. 1917C, 1169. There the plaintiff's complaint alleged that, between the years 1902 and 1910, the defendant physician negligently prescribed for the use of plaintiff a drug called argentum oxide, and which was taken in such quantities by her as the patient of defendant, under his direction and treatment, as to cause a silver poisoning manifesting itself by a chronic discoloration of the skin. Defendant raised the plea of the bar of a 3 year statute of limitations. The evidence disclosed the discoloration of the skin became sufficiently apparent to have put her upon notice and inquiry about 6 years after plaintiff had first begun taking the prescribed drug. The court held that, inasmuch as by the exercise of ordinary care and diligence she could then have discovered the cause of her injury, that was the date when her cause of action accrued and the statute of limitations commenced running.

[2] The nature or character of the foreign substance or matter introduced into the body of the patient by the physician is immaterial. The physician is chargeable with knowledge and foresight, to the degree of learning and skill possessed by physicians of good standing practicing in the same locality (McCurdy v. Hatfield, 30 Cal.2d 492, 183 P.2d 269), of both the nature and effect of such foreign substance or matter upon the patient and, where injury proximately results from the negligent act of the physician and the patient has relied upon him for information as to his physical condition as well as for the results that may reasonably be anticipated from the introduction into his body of the foreign substance or matter, including drugs and medicines, the statute of limitations does not commence to run until the patient knows, or in the exercise of ordinary care should have known, the cause of his injury.

[3] Plaintiff's amended complaint alleges facts showing that plaintiff first discovered the bodily injury, accruing to her as a proximate result of the negligent acts or omissions of defendants, on February 8, 1945. Her complaint was filed within the one year period following such discovery and therefore the defense, by way of demurrer, of the statute of limitations is unavailable to defendant Larson. A cause of action having been stated by plaintiff's amended complaint, it was error to sustain the demurrer thereto.

The judgment of dismissal is reversed with directions to the court to overrule the demurrer of the defendant Larson.

SHINN, Acting P. J., and WOOD, J., concur.

82 Cal.App.2d 170

## In re SCHNELL'S ESTATE.

## CATLIN et al. v. BLYNIENE et al.

Civ. 15788.

District Court of Appeal, Second District, Division 1, California.

Oct. 31, 1947.

Hearing Denied Dec. 30, 1947.

**1. Evidence** 🔑23(1)

It is common knowledge that public officials continually employ special counsel whenever exigencies of the case demand and no express statutory enactment prohibits such action.

**2. Executors and administrators** 🔑216(2)

Attorneys' fees could be awarded to attorneys who were engaged by public administrator, as administrator of estate of deceased, and who successfully prosecuted action to determine whether securities claimed by executor of estate of deceased's husband belonged to estate of deceased, notwithstanding that county counsel was charged with duty of acting as attorney for public administrator in probate matters.

**3. Executors and administrators** 🔑216(2)

The award of $10,000 to attorneys who were employed on contingent fee basis by public administrator to recover property for estate, and who recovered sum of $44,756.27 for estate, was not excessive.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Proceeding in the matter of the estate of Anna Schnell, deceased, wherein public administrator Ben H. Brown, administrator, employed Frank D. Catlin and Henry W. Catlin, attorneys, to establish title to property claimed by Security First National Bank of Los Angeles, as executor of the estate of August Schnell, deceased. Elmira Blyniene, heir at law, was the contestant. The attorneys petition for allowance of fees for extraordinary services. Objections to the petition were filed. From a judgment fixing fees, the attorneys appeal.

Affirmed.

Catlin & Catlin, Frank D. Catlin, Henry W. Catlin, and Haas & Home, all of Los Angeles, for appellants.

Hanna & Morton, of Los Angeles, and Riccardi, Webster & Donahue, of Pasadena, for respondents.

YORK, Presiding Justice.

This is an appeal by petitioners from a judgment fixing a fee of $10,000 for extraordinary legal services rendered by them in connection with the above named estate.

On March 2 and June 13, 1943, orders were made in said estate authorizing the Public Administrator Ben H. Brown, as administrator, to retain appellants, attorneys at law, for the purpose of endeavoring to recover and establish title to property claimed by the executor of the Estate of August Schnell, Deceased, the order of June 13, 1943, specifically decreeing that said administrator "be and he is hereby authorized and directed to agree to pay to said firm of attorneys for their services a contingent fee based upon the value of the property recovered for said estate, the amount of such fee to be fixed by the above entitled court after the recovery of said property."

Beginning on March 2, 1943, and continuing for the ensuing three years, appellants by various actions and proceedings in both the superior court and this court, succeeded in recovering for said estate property of the value of $45,219.02. Based upon such recovery, appellants petitioned the court on April 24, 1946, to fix and allow extraordinary fees for such services, alleging $18,000 to be a reasonable fee therefor. Objections to said petition were filed, and the matter came on for hearing on July 15, 1946, after which the court found:

"III. That this court's orders of March 2nd, 1943, and June 13, 1943, authorizing the employment of Catlin & Catlin on a contingent basis and the employment thereunder by Ben H. Brown, as administrator of said estate, were and are void.

"IV. That Henry W. Catlin and Frank D. Catlin as attorneys did render services in connection with the quiet title action for and on behalf of Ben H. Brown, as administrator of the estate of Anna Schnell, deceased, vs. Security-First National Bank of Los Angeles, as executor, which services did not bring any property of any kind into the estate of Anna Schnell, deceased, and that said attorneys are not entitled to any fees therefor.

"V. That petitioners Frank D. Catlin and Henry W. Catlin did perform extraordinary services as attorneys at the special instance and request of Ben H. Brown, as administrator of the estate of Anna Schnell, deceased, and through their services, and as a result thereof, property of approximately $45,000 was brought into said estate, which moneys and property have been received and become a part of said estate of Anna Schnell, deceased.

"VI. That Frank D. Catlin and Henry W. Catlin are entitled to extraordinary fees for services rendered in proceedings to determine interests in the estate of August Schnell, deceased, which proceedings brought approximately $45,000 in property into the estate of Anna Schnell, deceased, and that a reasonable fee therefor is $10,000."

Appellants urge (1) that the contract of employment was valid and should have been considered in measuring the amount of fees to be allowed; (2) that appellants "are entitled to have their fee fixed taking into consideration the contingent element of their employment"; and (3) that the court abused its discretion in fixing attorneys' fees at $10,000 when the estate benefited to the extent of $45,000 solely through the efforts of appellants.

Respondents make the point that the judgment herein is void since it unlawfully and contrary to public policy awards attorneys fees to persons other than the County Counsel of Los Angeles County who is charged with the duty of acting as attorney for the public administrator in probate matters.

[1] While section 21, article VI, Los Angeles County Charter, provides that the county counsel shall act as attorney for the public administrator in the administration of estates of decedents and collect the fees therefor on behalf of the county, it is a matter of common knowledge that public officials continually employ special counsel whenever the exigencies of the case demand, and no express statutory enactment prohibits such action. See, State Compensation Insurance Fund v. Riley, 9 Cal.2d 126, 131, 69 P.2d 985, 111 A.L.R. 1503, where it is stated: "The law is well settled that a public agency may employ special counsel to protect its rights unless specifically prohibited from so doing by statutory or charter provision * * * This problem has been frequently presented in reference to the employment by municipal corporations of special counsel to assist the regularly appointed or elected city attorney in special litigation. * * *. In the early case of Hornblower v. Duden, 35 Cal. 664, it was held that the board of supervisors without specific statutory authority, could employ special counsel to assist the district attorney, not only in cases in which the county is a party, but in any cause in which the county is interested. At page 670, of 35 Cal., it is stated: '* * * There is no reason why public as well as private interests should not be subserved by the employment of several counsel, when the exigencies of the case are such as to demand it, in the judgment of prudent men; and we are satisfied that the Legislature has not been so unwise as to render such a course impossible.' See, also Lassen County v. Shinn, 88 Cal. 510, 26 P. 365." Also, Evans v. Superior Court, 14 Cal.2d 563, 575, 96 P.2d 107.

In the instant case, the public administrator's petition to the court for an order authorizing him to employ appellants alleged that he had information that August Schnell during his lifetime had made a gift to his wife, Anna Schnell, of certain securities of a value in excess of $50,000; that the Estate of Anna Schnell, deceased, "outside of her interest in the foregoing securities, consists only of a dwelling which had been owned in joint tenancy by Anna Schnell and August Schnell; that since the death of Anna Schnell the said securities have been delivered into the custody of the Security National Bank of Pasadena * * * which institution refuses to recognize your petitioner's demand for possession of such property and has asserted that they are the property of the estate of August Schnell, deceased.

"That the outcome of such litigation is uncertain; that your petitioner does not wish to put the estate of Anna Schnell to the expense of employing counsel at a fixed fee, *or to use the services of the County Counsel* in the prosecution of an action to determine title to the securities which would also involve the estate in the necessity of paying large attorney's fees for the services of counsel regardless of the outcome; that your petitioner has discussed the issues involved with the law firm of Messrs. Catlin & Catlin, practicing attorneys in Los Angeles, who have signified their willingness to accept employment by petitioner for the purpose of proving title in the above entitled estate to such securities upon a contingent fee, to be paid only from the proceeds of the sale of said shares of stock, in an amount to be fixed by the above entitled court after the successful termination of an action for such purpose, and they have agreed that if petitioner retains them and advances all costs and expenses of the action they will make no charge against the estate if the action should prove to be unsuccessful."

[2] In the circumstances presented, the public administrator used sound judgment and practical common sense when he engaged the services of appellants, who, through persistent effort over a period of three years, succeeded in recovering for the

within estate the sum of $44,756.27 in cash from the Estate of August Schnell, deceased.

Adverting to appellants' first point, to-wit, that the contract of employment was valid, said contract provided for a contingent fee dependent upon the success of the attorneys in collecting assets of the estate, such fee to be fixed by the court after recovery of property and to be based upon the value thereof.

In Re Estate of Rowe, 66 Cal.App.2d 594, 603, 152 P.2d 765, 770, it was held that an order allowing or establishing extraordinary fees of attorneys for an executrix on a percentage basis, rather than fixing such fees in a definite amount of money, is void. However, it was there stated by way of dictum that: "Our opinion is not to be construed as holding that an executor or administrator may not, with the approval of the court, make a contract upon a contingent fee basis for legal services to be rendered in the future. That question is not involved in the present appeal."

In Re Estate of McDonald, 37 Cal.App.2d 521, 525, 99 P.2d 1115, 1117, it was stated: "There is no doubt that the Probate Court has authority to make an order authorizing an administrator to employ counsel and provide that the attorneys' fees shall be fixed at a future time upon the completion of the services. Ludwig v. Superior Court, 217 Cal. 499, 501, 19 P.2d 984."

The orders here in question did nothing more than authorize the making of a contract upon a contingent fee basis for legal services to be rendered in the future. In re Estate of Rowe, supra. However, for the purposes of this decision, it is not necessary to decide the question of the validity of the orders and the employment thereunder because it is clear that appellants rendered valuable services and are entitled to payment therefor.

The findings of fact, hereinbefore recited, disclose that the court, when it fixed the fees herein, had in mind and considered both the value of the property recovered and the contingent element of appellants' employment. And, as stated in Biaggi v. Sawyer, 75 Cal.App.2d 105, 115, 170 P.2d 678, 684, quoting from 3 Cal.Jur. 718: "Where the trial court has fixed the compensation of an attorney upon the consideration of the evidence and its own judgment, the appellate court will not interfere unless a plain and palpable abuse of its discretion has occurred."

In Berry v. Chaplin, 74 Cal.App.2d 669, 678, 169 P.2d 453, 460, where, as here, the question was "whether the amount fixed by the judgment is so small that this court can say that the trial court abused its discretion in making the allowance," the court stated: "Among the factors to be considered in determining what constitutes a reasonable compensation for an attorney who has rendered services in connection with a legal proceeding are the nature of the litigation, its difficulty, the amount involved, the skill required and the skill employed in handling the litigation, the attention given, the success of the attorney's efforts, his learning, his age, and his experience in the particular type of work demanded (City of Los Angeles v. Los Angeles-Invo Farms Co., 134 Cal.App. 268, 276, 25 P.2d 224); the intricacies and importance of the litigation, the labor and the necessity for skilled legal training and ability in trying the cause, and the time consumed. Palm Springs etc. Co. v. Kieberk Corporation, 46 Cal.App.2d 234, 241, 115 P.2d 548; Collins v. Welsh, 2 Cal.App.2d 103, 110, 37 P.2d 505."

[3] In the instant cause, both appellants testified in great detail with respect to the services they rendered during the period in question. An examination of such evidence discloses that the court's award based thereon, while not excessive, was a reasonable fee and that there was no abuse of discretion on the part of the court in making such award.

While appellant Henry W. Catlin and Mr. Dave F. Smith, both veterans before the bar, testified as experts and gave the opinion that $22,500 would be a reasonable fee for the services rendered, the court was not bound thereby, for the reason that the "value of an attorney's services is a matter with which a judge must necessarily be familiar. When the court is informed of the extent and nature of such services, its own experience furnishes it with every element necessary to fix their value." 3 Cal.Jur. 714.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

Hearing denied; EDMONDS, J., dissenting.

82 Cal.App.2d 156

**In re REINHERTZ' ESTATE.**
**LEVE v. REINHERTZ.**
**Civ. 13386.**

District Court of Appeal, First District, Division 2, California.
Oct. 31, 1947.
Rehearing Denied Nov. 25, 1947.
See 186 P.2d 755.

**1. Wills** 🔑**848**

A petition by devisee of apartment house, sold at probate sale, to determine her interest in testatrix' estate, was governed by Probate Code section requiring legatees to contribute amounts determined by distribution decree to legatee whose legacy is sold for payment of debts or expenses, not by general sections respecting determination of heirship. Probate Code, §§ 753, 1080–1082.

**2. Executors and administrators** 🔑**501**

Conflicting testimony of executor and devisee's witnesses as to whether cost to testatrix' estate of nontechnical services personally performed by executor in operation and upkeep of apartment houses, constituting almost entire estate, would have been greater or less than amount allowed him therefor on settlement of his accounts had he employed others to do same work, presented fact question for probate court, which was not bound to accept testimony of devisee's witnesses.

**3. Executors and administrators** 🔑**501**

The probate judge may fix value of nontechnical services performed by executor personally, as in operation and upkeep of apartment houses constituting almost entire estate of testatrix, from description of such services and judge's own general knowledge in determining amount to be allowed executor therefor on settlement of his accounts, and is not necessarily bound by express evidence of value of such services.

**4. Executors and administrators** 🔑**494**

The probate court had power to make allowance to executor for nontechnical services, performed by him personally in operation of apartment houses, constituting almost entire estate of testatrix, without first securing probate court order authorizing him to continue operation of apartment houses. Probate Code, § 572.

**5. Executors and administrators** 🔑**510(4)**

A devisee voluntarily appearing in proceeding for settlement of executor's accounts, filing objections thereto, having full hearing before probate court, and making no claim therein that required notices were not given, was foreclosed from urging that court's failure to find that notice of settlement was given, as required by statute, invalidated settlement order. Probate Code, § 1200.

**6. Executors and administrators** 🔑**216(2), 496(1)**

An executor's and his attorney's fees for services in probate sale of one of testatrix' two apartment houses, covered by blanket mortgage securing payment of testatrix' note to mortgagee, were properly calculated on full sale price, not on net amount paid estate after deducting from such price amount paid mortgagee on account of note and mortgage.

**7. Executors and administrators** 🔑**216(2), 496(2)**

The balance of testatrix' debt, secured by blanket mortgage on her two apartment houses, after payment to mortgagee of portion of price for which one of houses was sold at probate sale, on account of mortgage and note secured thereby, should not be deducted from value of remaining apartment house in calculating executor's and his attorney's statutory commissions.

**8. Executors and administrators** 🔑**216(2), 496(1)**

An executor and his attorney's statutory fees should not have been calculated on gross receipts from testator's apartment houses, operated by executor, without deducting expenses of operation; net, not gross, income being proper basis for calculating such fees.

**9. Executors and administrators 🔑216(2), 496(2)**

The amount of testatrix' estate accounted for is base for reckoning executor's and his attorney's commissions on settlement of executor's accounts.

**10. Executors and administrators 🔑477**

In operation of testatrix' business, executor is bound to account to her estate only for net income or profits.

**11. Executors and administrators 🔑502**

A detailed statement of continued operation of testatrix' business by executor should not be set out in his account, with items of gain or loss reported as credits or charges, but they should be reported, if at all, in separate paper, such as exhibit attached to account; estate not being interested in account of such operations, but concerned only with profits made.

**12. Wills 🔑684(9)**

Testatrix' incompetent daughter, for whom half of one of testatrix' two apartment houses was devised to testatrix' son in trust, was not entitled to half of net income from such house after probate sale of other house, devised to another daughter of testatrix, but only to income from half of portion of unsold house not distributed to such other daughter in lieu of her specific devise. Probate Code, § 753.

**13. Wills 🔑684(5)**

The share of incompetent beneficiary of testamentary trust in half of realty of testatrix must be reduced by her pro rata part of administration expenses properly apportioned. Probate Code, § 750.

**14. Wills 🔑684(2)**

An order for payment of half of net income from one of testatrix' two apartment houses to beneficiary of testamentary trust in half of such house after probate sale of other apartment house, devised to another, cannot be supported on ground that money may be paid such beneficiary from principal of trust estate for her support, if necessary, in absence of evidence or recital in order of any such necessity and express provision therein that such payment should be charged against trust property.

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

In the matter of the estate of Lotta Reinhertz, deceased. From an order settling the second and third accounts of Nathaniel Reinhertz, as executor of deceased's will, an order authorizing him, as testamentary trustee for, and guardian of the person and estate of, Jennie Gaba, an incompetent person, to pay her a specified sum, and an order denying a petition by Lillian Leve to determine her interest in the estate, petitioner appeals.

Orders settling the accounts and authorizing payment to the incompetent reversed, and order denying petition to determine appellant's interest in the estate affirmed.

A. Don Duncan, of San Francisco, for appellant.

Gus C. Ringole, of San Francisco, for respondent.

DOOLING, Justice.

Lotta Reinhertz died testate on December 9, 1937. By her will she appointed her son Nathaniel Reinhertz executor. She left two apartment houses which we shall hereinafter designate as the O'Farrell Street property and the Steiner Street property, some jewelry and a small amount of cash. The O'Farrell Street property was devised to her daughter Lillian Leve, appellant herein. The Steiner Street property was devised one-half to Nathaniel Reinhertz for his own use and the other one-half to Nathaniel Reinhertz in trust for another daughter, Jennie Gaba, the income to be paid to her for her support, with remainder to appellant's daughter. By a codicil her jewelry was left to Jennie Gaba and her other personal property (a small amount of cash) to Nathaniel Reinhertz.

The O'Farrell Street property was sold at probate sale, the order confirming sale reciting "that all devisees and legatees must contribute according to their respective interests to the devisee or legatee whose devise or legacy has been sold, and the Court, when distribution is made, must settle the amount of the several liabilities and decree the amount each person shall contribute, and reserve the same from his distributive share for the purpose of such contribution."

No appeal was taken from this order and it has become final. Thereafter the executor filed his second account and the appellant, Lillian Leve, filed a petition for an order determining her interest in the estate, and also objections to the second account. Counsel for the executor objected to the hearing of the petition to determine interest on the ground that it was actually a petition for contribution by a devisee whose devise had been sold in course of administration and could properly be considered only at the time of final distribution. Prob. Code, sec. 753. Thereupon the court directed the executor to file a final account and petition for distribution and continued the hearing until that could be done. An account, designated third and final account, and a petition for distribution were thereafter filed. To the third account appellant filed objections and the hearing was resumed. The probate court settled the second and third accounts as presented but determined that the estate was not ready for distribution. The petition to determine interest was denied on the ground that it was a petition for contribution "to be determined at the time of final distribution of said estate as provided in Section 753 Probate Code."

[1] Appellant contends that her petition to determine interest comes under sections 1080–1082, Probate Code. It was the probate court's conclusion that the petition was governed by Prob. Code, sec. 753. We agree with the probate judge. Appellant's only right is that given her by the latter section which reads:

"When property given by will to persons other than the residuary devisees and legatees is sold for the payment of debts or expenses or family allowance, all the devisees and legatees must contribute according to their respective interests to the devisee or legatee whose devise or legacy has been sold, and the court, when distribution is made, must settle the amount of the several liabilities and decree the amount each person shall contribute, and reserve the same from his distributive share for the purpose of such contribution."

The section which gives the right also fixes the time for the court to make its determination, i. e. "when distribution is made." Sections 1080 et seq. are general sections and must yield to the particular section which both creates the right and provides the remedy and its time and manner of exercise. Brill v. County of Los Angeles, 16 Cal.2d 726, 732, 733, 108 P.2d 443; Neuwald v. Brock, 12 Cal.2d 662, 669, 86 P.2d 1047. Furthermore it seems clear that the "amount of the several liabilities" and "the amount each person shall contribute" can only be determined when the estate is ready for distribution for only then can the probate court know the amount and character of property which it has to distribute.

[2, 3] The order settling the second and third accounts is attacked because of the allowances made to the executor at the rates charged in his accounts for services personally performed by him in and about the apartment houses. The executor testified upon the hearing that this work consisted of papering, painting, repair and carpenter work, plumbing repairs, electrical repairs, hanging fixtures, plastering, hanging clothes line and other odd jobs. For this work he charged one dollar per hour during the earlier period and later seventy-five cents per hour. He testified that he had done similar work about the apartment houses for his mother during her life time, from which his knowledge of the value of such services may be inferred, and that if he had employed other persons to do the same work the cost to the estate would have been much greater. Three witnesses for the appellant testified that during the period covered by the accounts the same work could have been performed by a handy man at fifty cents per hour. The case presents no more than the usual conflict of evidence which the probate court has resolved. The probate court was not bound to accept the testimony of appellant's witnesses. In the case

of services of a non-technical nature, such as here involved, the judge may fix the value from a description of the services performed bringing to bear his own general knowledge and is not necessarily bound by express evidence of the value of the services performed. Nylund v. Madsen, 94 Cal.App. 441, 445 et seq., 271 P. 374; Seib v. Mitchell, 10 Cal.App.2d 91, 95, 52 P.2d 281; Lumdberg v. Katz, 44 Cal.App.2d 38, 46, 111 P.2d 917; Geisenhoff v. Mabrey, 58 Cal.App.2d 481, 488, 137 P.2d 36; Caminetti v. Prudence, etc., Ins. Ass'n, 62 Cal.App.2d 945, 953, 146 P.2d 15; Collier v. Landram, 67 Cal.App.2d 752, 759, 155 P.2d 652; Trumbo v. Bank of Berkeley, 77 Cal.App.2d 704, 176 P.2d 376.

[4] The point that no allowance could be made for these services because the executor did not secure an order from the probate court authorizing him to continue the operation of the apartment houses under Probate Code section 572 is foreclosed by In re Estate of Scherer, 58 Cal.App.2d 133, 136 P.2d 103. The court in that case said in answer to a similar objection to an allowance of extra compensation for continuing a business of the decedent without prior authorization (58 Cal.App.2d at page 144, 136 P.2d at page 110):

> "It must be conceded that the probate court was clothed with power to authorize the executor to conduct testator's business. Therefore the court possessed the power to ratify such action on the part of the executor, done without a previous court order. [In re] Estate of Maddalena, 42 Cal. App.2d 12, 19, 108 P.2d 17. Especially is this true where the carrying on of the business was a necessary means to preserve the estate."

It would have been an act of extreme improvidence, of which the appellant could have justly complained, if the executor had not continued the operation and upkeep of the apartment houses which constituted almost the entire estate of his testatrix.

[5] Appellant is in no position to argue that the failure of the court to find that notice of the settling of the accounts was given as required by Probate Code section 1200 invalidates the order settling the accounts. She appeared, filed objections to the accounts and had a full hearing before the court. The record shows no claim before the probate court that the required notices were not given. Having voluntarily appeared and contested the accounts she is foreclosed from urging the want of statutory notice. In re Estate of Palm, 68 Cal.App.2d 204, and citations on page 214, 156 P.2d 62; 34 C.J.S., Executors and Administrators, § 846.

[6] Complaint is also made of the basis of computation of the ordinary executor's and attorney's fees in the two accounts as settled. The O'Farrell Street property was sold at probate sale for $4750. The O'Farrell Street property and the Steiner Street property were subject to a blanket mortgage to Wells Fargo Bank and Union Trust Company to secure the payment of a note executed by the testatrix in favor of the mortgagee. The mortgagee presented a creditor's claim based on this note and mortgage which was approved in the sum of $12,653.23. At the time of the sale of the O'Farrell Street property the bank insisted on the payment to it of $4273.50 of the purchase price on account of its note and mortgage. The purchase price was paid in escrow to a title company and the escrow holder paid $4273.50 directly to the bank and the balance only to the executor. Executor's and attorney's fees were calculated on the full sale price of $4750. Appellant claims, citing In re Estate of Lampman, 15 Cal.2d 212, 100 P.2d 488, and In re Estate of Rowe, 66 Cal.App.2d 594, 152 P.2d 765, that the fees should have been calculated only on the net to the estate after deducting from the sale price the $4273.50 paid by the escrow holder to the bank.

A careful reading of In re Estate of Lampman, supra, which was followed in Re Estate of Rowe, supra, satisfies us that it is not controlling in the case before us. There the property sold was subject to a deed of trust to secure the payment of a debt. The debt was not that of the decedent but of a prior owner and no claim based thereon was filed in the probate proceedings. The property was sold subject to the deed of trust which the purchaser assumed.

Under the special facts the court held that only the decedent's equity was sold and only the net amount actually received on the sale by the executrix should be used in calculating the ordinary fees of the executrix and her attorney. The court said (15 Cal.2d at page 215, 100 P.2d at page 490) that "'the amount of the estate accounted for' is the base for reckoning commissions" and pointed out that in the case before it the executrix was only chargeable with the amount actually received by her (15 Cal.2d at page 219, 100 P.2d at page 491). The court quoted with approval In re Estate of Pease, 149 Cal. 167, 85 P. 149, but distinguished it on the ground that in the Pease case the mortgage secured a debt of the decedent, a claim for which had been presented to the estate, saying (15 Cal.2d at page 218, 100 P.2d at page 491):

> "Likewise, in Estate of Pease, supra, the debt was a debt of the decedent, and a claim therefor had been presented to the estate. The court in allowing to the executor a commission based upon the total sale price of the property held that the payment of the mortgage was done by the real estate broker as an agent of the executor, and based its holdings upon the fact that 'the executor is bound to account to the court for the entire proceeds of sales made under its orders.'"

In the case before us, as in Re Estate of Pease, supra, 149 Cal. 167, 85 P. 149, the mortgage debt was a debt of the estate which the executor was bound to pay from the mortgaged assets of the estate. He was bound to account to the probate court for the full sale price, to pay therefrom the $4273.50 in reduction of the mortgage claim against the estate and to take credit for such payment. As in the Pease case the payment by the escrow holder to the mortgagee was done as agent of the executor. The case before us is governed by In re Estate of Pease, supra, rather than In re Estate of Lampman, supra. The probate court correctly calculated commissions on the full sale price of the O'Farrell Street property.

[7] What has been said on this point sufficiently disposes of the claim that the balance of the mortgage debt should be deducted from the value of the Steiner Street property in calculating statutory commissions of the executor and his attorney.

[8-11] In the accounts the executor's and attorney's statutory fees were calculated on the gross receipts from the two apartment houses without deducting the expenses of operation. The statutory fees should not have been calculated on this basis. The operation of an apartment house is not in the same class as the ordinary rental of real property and partakes more of the nature of the operation of a business. The test of the property upon which the statutory commissions should be calculated is laid down in Re Estate of Lampman, supra, 15 Cal.2d 212, 215, 100 P.2d 488, 490, as follows: "It is apparent that 'the amount of the estate accounted for' is the base for reckoning commissions, and that once this figure is established the matter of determining the correct statutory fees is merely a matter of computation." In the operation of a business the executor is bound to, and should, only account to the estate for the net income or profits. In re Rose's Estate, 80 Cal. 166, 22 P. 86; In re Estate of De Rome, 175 Cal. 399, 165 P. 919; cf. In re Estate of Allen, 42 Cal.App.2d 346, 108 P.2d 973. The rule of these cases is thus stated in 11 b Cal.Jur. 545:

> "The detailed statement of business operations continued by the representative should not be set out in his account with the item of gain or loss reported as a credit or charge; if reported at all they should be in a separate paper, perhaps as an exhibit attached to the account. In such an account of business operations the estate is not interested, being concerned only with profits made."

It seems clear that in this case the net and not the gross income is the proper basis for calculating the statutory fees. The case is unlike In re Estate of Ricaud, 70 Cal. 69, 11 P. 471 where ordinary rental received from real property not operated as a business was involved. In Re Estate of Lampman, supra, 15 Cal.2d 212, 100 P.2d 488, while the fees were apparently calculated on the gross income from an apartment house the propriety of this method was not one of the points presented to or decided by the court on appeal and on that question the case has not the force of an authority.

[12] Pending the other appeals the executor petitioned the probate court for an order authorizing the payment to Jennie Gaba of $1732.25, the petition reciting that "one-half of the net income of the said property devised in trust to petitioner for himself and Jennie Gaba amounts to the sum of $1732.25." After a hearing in which appellant opposed the petition an order was made authorizing the executor to pay to Jennie Gaba $1959.75 "from time to time as the said sum becomes available in cash in his hands." From this order a separate appeal has been prosecuted.

This order cannot stand. We have already held that upon final distribution appellant is entitled to have a portion of the remaining estate distributed to her in lieu of the property specifically devised to her which has been sold. It is clear that under the circumstances, since the Steiner Street property and its income are the sole remaining assets of the estate, the contribution to appellant in lieu of her specific devise must come from this source. Under the circumstances Jennie Gaba is not entitled to one-half the net income from the Steiner Street property but only to the income from one-half of the portion of the Steiner Street property which is not distributed to appellant in lieu of her specific devise. We do not hold that no payment to Jennie Gaba would be authorized before final distribution but we do hold that in making any order for such payment the order must be framed in such fashion as to protect appellant from the possible impairment of her as yet undetermined distributive share. The only basis for the order here made is the testimony of the executor, unsupported by any account, that: "There is now due to her the sum of $1900 which is one-half net income from property devised to her in trust. I am asking for an order for the payment of that sum to her when it is in the estate. I do not believe there is that much on hand now."

[13] It is clear not only that Jennie Gaba is not entitled to a full one-half of the net income from the Steiner Street property but that her share must further be reduced by her pro rata of the expenses of administration properly apportioned. Prob. Code, sec. 750. Under the circumstances the order for the payment of $1959.75 to Jennie Gaba is excessive and not supported by the evidence.

[14] Some attempt is made to support this order on the ground that under the will money for her support may be paid to Jennie Gaba from the principal of the estate held for her in trust if necessary. No evidence of any such necessity was introduced and the petition and order for payment are not based on that theory. Any order based on the theory that it was necessary to make a payment for support out of principal should so recite and should make express provision that the payment so made should be a charge against the property devised in trust for Jennie Gaba.

We need not consider the propriety of respondent's request in the probate court for compensation for extraordinary services in opposing appellant's petition to determine interest since no order for such compensation was made.

This small estate has been in probate for something like ten years and it is to be hoped that it may soon be finally distributed.

The order settling the second and third accounts and the order for payment to Jennie Gaba are reversed. The order denying appellant's petition to determine her interest in the estate is affirmed. It is further ordered that each side bear its own costs on the appeals from the order settling accounts and denying appellant's petition to determine interest which were presented in one transcript and that appellant recover costs on her appeal from the order for payment to Jennie Gaba.

NOURSE, P. J., and GOODELL, J., concur.

## McEVOY v. AMERICAN POOL CORPORATION et al.*

Civ. 15782.

District Court of Appeal, Second District, Division 1, California.

Oct. 28, 1947.

Rehearing Denied Nov. 17, 1947.

Hearing Granted Dec. 24, 1947.

**Automobiles ⚷201(1)**
**Negligence ⚷56(1)**

Where corporation engaged in business of cleaning swimming pools furnished necessary chemicals to service man who provided his own automobile and service man's automobile guest was injured in collision when bottles containing chemicals broke and poured over her and she inhaled fumes, proximate cause of injury was the collision rather than alleged negligence of corporation in furnishing inherently dangerous substance without adequately instructing service man or furnishing proper containers, and corporation was not liable for injuries.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Personal injury action by Mary McEvoy against the American Pool Corporation and another. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Richard K. Gandy and Robert G. Cockins, both of Santa Monica (Mark E. O'Leary, of Los Angeles, of counsel), for appellant.

Reginald I. Bauder, of Los Angeles (Robert E. Ford, of Los Angeles, of counsel), for respondents.

DORAN, Justice.

In this action for damages for personal injuries, "after the jury had been selected and opening statements of counsel for plaintiff and defendants had been made, the trial court, upon motion for a non-suit by defendants based upon stipulation as to evidence to be introduced by plaintiff, gave judgment of non-suit." Plaintiff appeals from the judgment.

It is contended on appeal that the "Facts show negligence on the part of defendants sufficient to make a case for jury"; that the "Facts show negligence of defendants in failing to exercise the care required in furnishing dangerous substances for the use of their employees"; and that the "Facts show defendants were liable because of the conduct of their employee".

The record reveals that defendants are engaged in the business of "cleaning swimming pools"; that 8 or 9 service men and a service manager are employed for this work; that "a service man's equipment consists of a vacuum cleaner, garden hose, a skimmer for taking the leaves out of the pools, and certain chemicals consisting of copper sulphate, ammonia pea chrystal alum, aqua-ammonia, Purex and sodium hypochlorite. The aqua-ammonia and the sodium hypochlorite are issued to them in glass gallon jugs. To transport this equipment each service man is required to provide his own vehicle, which in most every case is a private car, such as a sedan, roadster, or coupe, and the corporation compensates him for the use of his car. It is necessary for them to carry 16 to 18 gallons of the sodium hypochlorite and 3 or 4 gallons of the aqua-ammonia. The sodium hypochlorite had an available content of chlorine of 17%. Sodium hypochlorite is made by dissolving chlorine gas in a solution of caustic soda. This solution is highly unstable and emits chlorine gas and breaks down while in solution into hydrochloric and hydrochlorous acid. No racks or equipment of any kind were furnished to the service men for their use in transporting these chemicals." "On the 20th day of April, 1946, at approximately 1:30 a.m. * * * plaintiff was riding as a guest in a vehicle operated by Jack McEvoy, her son, who was a service man of the defendants at the time.

"In McEvoy's car was a load of these chemicals. The plaintiff was unaware of the nature of the load. She had often ridden with Jack McEvoy when the vehicle was so loaded. McEvoy himself was unaware of the dangerous propensities of the load, and had never received any instructions relative to unloading it at night.

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* Subsequent opinion 195 P.2d 783.

"At the aforesaid time and place the McEvoy car was struck by another car and turned over. The bottles containing the chemicals broke and poured over the plaintiff, eating the clothing from her body, and she inhaled the fumes from the chemicals, both of which caused the damages complained of." The driver of the other car is unknown.

It is appellant's contention that the "conduct on the part of defendants in furnishing inherently dangerous substances for the use of their service men and sending these service men out with absolutely no precautions to prevent the breaking of the bottles and the escaping of these chemicals, and with absolutely no instructions or warning as to the dangerous nature of the chemicals and the necessity of properly safeguarding them from escaping, when they had knowledge of the dangerous nature of the chemicals and knew that said bottles often broke, created a situation wherein there was great danger of injury to third persons and required of defendants a correspondingly high degree or amount of care to prevent injury to said third persons"; and that the failure to exercise such care constitutes negligence.

Appellant relies on for examples, such cases as Katz v. Helbing et al., 215 Cal. 449, 10 P.2d 1001; Congdon v. California Drug & Chemical Co., 29 Cal.App. 200, 154 P. 1062; Burke v. W. R. Chamberlin & Co. et al., 51 Cal.App.2d 419, 125 P.2d 120, and others. The cases cited are of little if any aid in disposing of the question herein considered. The facts in the cited cases present entirely different situations as an examination thereof will reveal. For example, in the Katz case, defendants therein "had allowed a box containing caustic lime to remain on the sidewalk *uncovered* and *unguarded*". (Italics added.) In the within action appellant's principal complaint is that defendants could have done a number of things which, if they had been done, would have minimized the danger in the event of a collision. For example it is argued that defendants "could have used non-breakable containers to carry these chemicals, or they could have used racks to hold the jugs, or they could have labeled the jugs, or they could have instructed their service men with regard to the dangerous nature of the chemicals, or they could have required that their service men never carry passengers while carrying chemicals, or they could have required that all chemicals be loaded in the morning and unloaded at night."

It is at once evident that appellant's argument in the final analysis in effect is a series of "ifs". Such arguments are based on conditions, assumptions, suppositions and speculations that at most only tend to involve and complicate the sole issue. An argument of "ifs" creates only a speculative premise from which no valid logical argument can proceed and upon which no logical conclusion can be based. The fact remains, as the record reveals, that, the proximate cause of the injury was the collision. But in this connection appellant points out that the trial judge, "made the statement that 'there can be no claim that the plaintiff can recover on the theory of respondeat superior'. And the trial court in ruling on the motion and again in advising the jury of the granting of the judgment of non-suit emphasized the point that in his opinion Jack McEvoy was not, at the time the accident occurred, driving his automobile on business for his employer and hence not within the scope of his employment." Appellant argues that "the trial court erred in determining as a matter of law that McEvoy was not acting within the scope of his employment when the accident occurred. True, the driving of the vehicle at the time in question was not an act within the scope of his employment. But the acts of placing the chemicals in the car and leaving them there at all times, which are the acts which caused the injury to plaintiff, were performed within the scope of Jack McEvoy's employment."

Appellant's position is untenable. The fact that the chemicals were in the car was merely a condition and cannot by any process of reasoning disturb or alter the basic fact heretofore noted that the proximate cause of the injury was the collision. In a somewhat similar situation in Harrison v. Harter, 129 Cal.App. 22, 18 P.2d 436, 439, appears the following, "It is true that in the present instance without the gasoline, there would have been no fire, but without the collision there would have been no fire, regardless of where the gasoline was carried. In other words, *it was not the carrying of the gasoline that caused the trouble; it was the collision* following the reckless driving of the appellant. If this is not true, then in the instances which we have heretofore cited of cars being upset by collisions followed by fire and the burning of the inmates of the overturned car, the injured would likewise be without remedy, on the assumption that it was the fire that caused the injury of the inmates of the car and not the collision which overturned the car." (See also Marovich v. Central Calif. Traction Co., 191 Cal. 295, at page 303, 216 P. 595; Oakland Bank of Savings v. Murfey, 68 Cal. 455, at page 461, 9 P. 843; Hale v. Pacific Tel. & Tel. Co., 42 Cal.App. 55, 183 P. 280.)

In the light of the record appellant's contentions cannot be upheld.

The judgment is affirmed.

YORK, P.J., and WHITE, J., concur.

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82 Cal.App.2d 76

## PEOPLE v. ESPOSTI.

Cr. 2473.

District Court of Appeal, First District, Division 1, California.

Oct. 27, 1947.

Hearing Denied Nov. 24, 1947.

**1. Infants 🔑20**
**Rape 🔑53(1)**

Prosecuting witness' testimony sustained convictions of attempt to commit rape and contributing to minor's delinquency. Pen.Code, §§ 261, subd. 1, 1159; Welfare and Institutions Code, § 702.

**2. Rape 🔑7**

Penetration of lips of female's vagina is sufficient to constitute rape. Pen.Code, § 263.

**3. Rape 🔑15**

To constitute attempted rape, no penetration is necessary. Pen.Code, § 1159.

**4. Rape 🔑15**

The fact that man desisted from attempt to have intercourse with 14-year-old girl when told by her that he was hurting her did not purge him of crime of attempt to commit rape. Pen.Code, §§ 261, subd. 1, 1159.

**5. Rape 🔑15**

A man penetrating lips of female's vagina may be convicted of attempt to commit rape, though rape itself is accomplished. Pen.Code, §§ 663, 1159.

**6. Rape 🔑53(1)**

A conviction, justified by prosecutrix' testimony, for attempt to commit rape, should not be set aside on theory that such testimony showed only defendant's intent to commit lewd and lascivious acts, not intent to commit rape. Pen.Codes, § 1159.

**7. Criminal law 🔑260(7)**

Where defendant's counsel stated in argument at trial that he joined in defendant's waiver of jury, defendant's contention, on appeal from conviction by court, that record failed to show such joinder, need not be further considered. Const. art. 1, § 7.

**8. Criminal law 🔑254**

In criminal case tried without jury, court need not make written fact findings supporting its judgment. Pen.Code § 689; Code Civ.Proc. §§ 632, 664.

**9. Criminal law 🔑254**

Trial court's findings in case tried without jury that defendant was not guilty of statutory rape charged in information, but was guilty of lesser included offense of attempt to commit rape and of misdemeanor of contributing to minor's delinquency, as charged in another count, and judgment sentencing defendant to imprisonment in state prison on conviction of attempt to commit rape and to imprisonment in county jail on conviction of such misdemeanor, constituted sufficient finding of guilt and judgment. Pen.Code, §§ 261, subd. 1, 1159; Welfare and Institutions Code, § 702.

**10. Criminal law ⟹254**

The trial court's finding that defendant was not guilty of statutory rape charged in information did not preclude finding that defendant was guilty of attempt to commit rape. Pen.Code, §§ 261, subd. 1, 1159.

**11. Criminal law ⟹200(7)**

The offense of contributing to minor's delinquency, being included in offense of attempt to commit statutory rape on such minor, judgment convicting defendant of both such offenses must be reversed as to conviction of lesser included offense. Pen. Code, §§ 261, subd. 1, 1159; Welfare and Institutions Code, § 702.

◆

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Primo B. Esposti was convicted of attempt to commit rape and contributing to the delinquency of a minor, and he appeals.

Conviction of attempt to commit rape affirmed and conviction of contributing to a minor's delinquency reversed, with direction.

Jos. G. Gallagher, of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and Clarence A. Linn, Dept. Atty. Gen., for respondent.

BRAY, Justice.

Defendant, who was charged with statutory rape (sec. 261, subd. 1, Penal Code) and a violation of section 702 of the Welfare and Institutions Code (contributing to the delinquency of a minor), was convicted by the court, sitting without a jury, of attempt to commit rape and of violation of said section 702. On appeal, the only ground stated by defendant was the alleged insufficiency of the evidence to sustain the judgment of the court. An amicus curiae brief was filed raising three additional points, and on argument the court raised a still further question. These will be discussed later.

*Evidence Sufficient to Justify Judgment.*

[1, 2] Defendant's attack on the sufficiency of the evidence is directed principally against the conviction of attempted rape. However, the prosecuting witness' story, if believed (and it was believed by the judge), was sufficient to sustain both convictions. It is not necessary to give in detail the sordid story told by the 14 year old prosecutrix. For some time before the date charged, she had been going to defendant's rooms on Saturdays, doing housework for defendant, for which he paid her each time $10. This defendant admits, except that he contends he paid her only $5. She testified that on almost every Saturday defendant would rub his private parts between her legs. On the day in question, she testified that he inserted his private parts into hers but stopped when she told him it hurt. A doctor who examined prosecutrix about six days later testified that there was no penetration of the vagina, no redness and the hymen was intact. Based upon this medical testimony, defendant makes the contention that this was a complete contradiction of the testimony of the prosecutrix. However, it is not such a contradiction. The doctor testified that the lips of the vagina might have been penetrated. This would be sufficient to constitute rape. Sec. 263, Penal Code. The girl's testimony is not inherently improbable. If it be a fact that he did not even enter the lips of her vagina, such fact is not inconsistent with her belief that he did.

[3-5] To constitute attempted rape it is not necessary that there be any penetration whatever. Under the girl's testimony his acts constituted an attempt to have intercourse with her, from which he desisted when told that he was hurting her. The fact that he desisted does not purge him of the crime of attempt to commit rape. Under the girl's testimony he either entered the lips of her vagina, in which event he could be convicted of attempt to commit rape, although actually the rape itself was accomplished (sec. 663, Penal Code) or he attempted to have intercourse with her, but because of her immaturity and her complaint of pain, desisted, which likewise would be an attempt to commit rape.

[6] Defendant's contention that the girl's testimony shows only an intent on the part of the defendant to commit

lewd and lascivious acts, and not an intent to commit rape, is well answered in People v. Johnson, 131 Cal. 511, at page 513, 63 P. 842, at page 843, where the court disposes of a somewhat similar contention. "We do not think the crime charged against this defendant, and of which he was convicted, is of such a nature that we should attempt to shield him upon imaginary reasons, or upon a theory that might possibly account for his acts as being done with the intent only to gratify an unnatural desire."

### *Jury Waiver.*

[7] The "Brief of Amicus Curiae in Support of Appellant" (which apparently is just another brief for defendant rather than a true amicus curiae brief) makes three contentions. None of these contentions were made in the court below, nor were they raised in defendant's brief. First, it is contended that the record fails to show that the counsel for defendant joined in the waiver of jury by defendant, as required by Article I, section 7 of the Constitution. Inasmuch as, at argument, the counsel for defendant at the trial stated that he did join in such waiver, it becomes unnecessary to discuss the point further.

[8, 9] The second point of the amicus curiae is likewise without merit. While it is not quite clear, apparently the contention is that the judgment referred to in section 689 of the Penal Code, "No person can be convicted of a public offense unless * * * upon *a judgment of a court,* a jury having been waived in a criminal case," must be supported by findings as in a civil case under section 632 of the Code of Civil Procedure. (Emphasis added.) (Section 664 of the Code of Civil Procedure referred to in this behalf, merely requires a judgment to be entered.) No authorities are cited to support this contention. On the last day of the trial, after reciting the proceedings, including the calling of witnesses, and the fact that both the People and the defendant rested, the minute order states: "Court Judgment. Thereupon the Court finds the defendant, Primo B. Esposti Not Guilty of the crime of Felony, to-wit: Violating Section 261 of the Penal Code as charged in count one of the Information, but Guilty of the lesser and included offense of Felony, to-wit: Attempt to commit Rape and Guilty of the Crime of Misdemeanor, to-wit: Violating Section 702 of the Welfare and Institutions Code, as charged in Count two of the Information. Thereupon the Court ordered the cause continued for Judgment until February 10th, 1947, at the hour of 11 o'clock, A.M."

At the time to which the case was continued for judgment, a judgment was entered which, after reciting the usual preliminaries, states:

"And no sufficient cause being shown or appearing to the Court, thereupon the Court renders its Judgment:

"Judgment

"That whereas, the said defendant, Primo B. Esposti, having been duly convicted in this Court of the crime of Felony, to-wit: Attempt to Commit Rape;

"Sentences

"It is therefore ordered, adjudged and decreed that the said defendant, Primo B. Esposti, be punished by imprisonment in the State Prison of the State of California, at San Quentin, for the period of time prescribed by law; and that whereas, the said defendant, Primo B. Esposti, having been duly convicted in this Court of the crime of Misdemeanor, to-wit: Violating Section 702 of the Welfare and Institutions Code, It is therefore ordered, adjudged and decreed that the said defendant, Primo B. Esposti, be punished by imprisonment in the County Jail of the City and County of San Francisco, for the term of one (1) year, said sentences to run concurrently."

It has never been the practice of trial courts in criminal cases tried without a jury to make written findings of fact, and we know of no requirement that they do so. The findings and judgment by the court above set forth are a sufficient finding of guilt and judgment; especially is this so when no complaint of the lack of findings nor as to the form of judgment was made in the court below, or even now is being made by the defendant's counsel of record. People v. Cornell, 29 Cal.App. 430, 155 P. 1026.

[10] The third point of the amicus curiae is equally technical and without merit. The contention is that because the

court found the defendant not guilty of the crime of rape, it could not find the defendant guilty of the crime of attempt to commit rape. It is a bit difficult to follow this reasoning. Section 1159 of the Penal Code provides that the defendant may be found guilty of an attempt to commit the offense with which he is charged. Here he was charged with rape and was found guilty by the court of an attempt to commit rape. People v. Tilley, 135 Cal. 61, 67 P. 42, cited in support of this contention, was a case decided in 1901 when the courts had a more technical view of criminal proceedings than they do now. There a defendant was charged with the crime of receiving stolen property committed as stated in the information. The jury found the defendant "guilty of receiving stolen property." While the court said that had the jury brought in a verdict in the single word "guilty" such verdict would be a proper one, it held that the verdict of "guilty of receiving stolen property" without adding the additional matter of how it was committed as set forth in the indictment, was an invalid verdict. Just how that case applies here does not appear.

The same is true of People v. Ah Gow, 53 Cal. 627, where the court held void a jury verdict, "We, the jury, do find the defendant guilty of the indictment as charged to him"; also of People v. Small, 1 Cal.App. 320, 82 P. 87, 88, where the court held a verdict of "guilty of the crime of felony, to wit, obtaining money by false pretenses"; also of People v. Cummings, 117 Cal. 497, at page 499, 49 P. 576, at page 577, where the verdict found the defendant "guilty of defrauding C. Schnelle" of a certain promissory note. The court held that there was no such crime and went on to say, "A good verdict must contain, either in itself or by reference to the indictment, all the elements of the crime." These cases are no longer authority for the form of jury verdicts, as statutory changes and a more liberal viewpoint of the courts, plus the fact that now courts can require juries to modify or complete imperfect verdicts, have made these decisions obsolete.

*Double Jeopardy.*

[11] At argument, this court called the attention of the counsel to the fact that, in view of the decision in People v. Greer, 30 Cal.2d 589, 184 P.2d 512, decided after the briefs in this case had been filed, it would appear that defendant had been doubly convicted. An opportunity was then given counsel to submit further points and authorities, if they so desired. The attorney general, in a letter filed in the proceeding, stated: "An application of the Greer case to the instant case compels the conclusion that the offense charged as a violation of sec. 702, Welfare and Institutions Code is included in the offense charged as a violation of sec. 261(1) of the Penal Code and that the defendant has been twice convicted of the included offense." Counsel for defendant, in a letter likewise so filed, stated: "I have read the Greer case very carefully and am convinced that the only point that would help the appellant herein is the holding in Subdivision 11 of the Greer case, that where a defendant is convicted of two charges stated in separate counts, that the conviction is illegal, but that of necessity in view of the People v. Degnen, 70 Cal.App. 567, at page 578, 234 P. 129, at page 133, that the lessor and included offense must necessarily be reversed."

In an opinion of this court recently filed, People v. Chapman, 185 P.2d 424, we discussed at some length the effect of a conviction of a defendant of violations of sections 288 and 261 (1) of the Penal Code, and section 702 of the Welfare and Institutions Code, all arising out of the same incident with the same child. We there held, pursuant to the decisions in the Greer case, supra, that the violations of sections 261 (1) of the Penal Code and 702 of the Welfare and Institutions Code were offenses included in the offense set forth in section 288 of the Penal Code. Here the conviction of defendant of attempt to violate the provisions of section 261 (1) of the Penal Code and of violation of the provisions of section 702 of the Welfare and Institutions Code, likewise arose out of the same incident with the same child. Inasmuch as the later offense is an offense included within the former, it is necessary to reverse the conviction of the included offense.

That portion of the judgment convicting defendant of the offense of attempt to commit rape, and the order denying defendant's motion for a new trial thereon, are affirmed. That portion of the judgment convicting defendant of the offense of violation of section 702 of the Welfare and Institutions Code, and the order denying defendant's motion for a new trial thereon, are reversed, and the trial court is directed to proceed in accordance with the views herein expressed.

PETERS, P. J., and WARD, J., concur.

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**PEOPLE v. MALONE.**

**Cr. 4130.**

District Court of Appeal, Second District, Division 3, California.

Oct. 24, 1947.

**1. Criminal law ⇨1178**

Abandoned point, that count of indictment charging the offering of a bribe was insufficient, would not be considered. Pen. Code, §§ 67, 653f.

**2. Abortion ⇨11**

In abortion prosecution, when it is shown that the woman is healthy and in normal condition and that any one of acts proscribed by abortion statute was used or employed with intent thereby to procure a miscarriage, evidence is sufficient to sustain implied finding of jury that production of miscarriage was not necessary to save the woman's life. Pen.Code, § 274.

**3. Abortion ⇨12**

In abortion prosecution, prosecutrix' testimony that she was in good health, and contradicting evidence of defense, if any, merely gave rise to a conflict in evidence presenting issue for jury as to whether production of miscarriage was necessary to save the prosecutrix' life. Pen.Code, § 274.

**4. Criminal law ⇨1159(2)**

In determining whether corroboration of prosecutrix is sufficient to sustain conviction for abortion, appellate court merely determines whether there is any substantial corroborative evidence and whether, when error is found, the error committed has lead to the verdict reached and does not determine whether the corroborative evidence, by itself, is as compatible with innocence as it is with guilt. Pen. Code, §§ 1108, 1111; Const. art. 6, § 4½.

**5. Criminal law ⇨1159(6)**

If circumstances reasonably justify verdict of jury, opinion of reviewing court that those circumstances might also be reconciled with innocence of accused will not warrant interference with determination of jury. Const. art. 6, § 4½.

**6. Abortion ⇨11**

Evidence corroborating prosecutrix in abortion prosecution need not establish precise facts testified to by prosecutrix and if corroborating evidence creates more than a suspicion of guilt it is sufficient even though it be slight and when standing by itself entitled to but little consideration. Pen.Code, §§ 1108, 1111.

**7. Abortion ⇨11**

In abortion prosecution, testimony of woman on whom act is performed as to her good health does not require special corroboration. Pen.Code, §§ 1108, 1111.

**8. Abortion ⇨11**

All of material details of illegal transaction constituting offense of abortion need not be corroborated but corroboration which satisfactorily tends to prove offense and to connect defendant with commission of offense is sufficient. Pen.Code, §§ 1108, 1111.

**9. Abortion ⇨11**

In abortion prosecution, corroboration of prosecutrix as to nonnecessity of production of miscarriage to save life of prosecutrix was sufficient to sustain conviction. Pen.Code, §§ 274, 1108, 1111.

**10. Abortion ⇨11**

In abortion prosecution testimony of the aborted woman as to condition of her health need not be corroborated by direct evidence but her condition may be inferred from any substantial evidence which is not that of the aborted woman. Pen.Code, §§ 274, 1108, 1111.

**11. Abortion** ⚷11

In abortion prosecution, testimony relating to one count may be considered by jury in corroboration of testimony of another woman on whom abortion was alleged to have been performed in another count. Pen.Code, §§ 274, 1108, 1111.

**12. Abortion** ⚷11

Inferences from defendant's testimony may suffice to corroborate an aborted woman. Pen.Code, §§ 274, 1108, 1111.

**13. Abortion** ⚷11

In abortion prosecution, fact that accused bargained with respect to his fee is corroborative evidence. Pen.Code, §§ 274, 1108, 1111.

**14. Abortion** ⚷11

In abortion prosecution, defendant's admissions, active and passive, and his declarations constitute corroboration. Pen. Code, §§ 274, 1108, 1111.

**15. Abortion** ⚷11

In abortion prosecution, defendant's consciousness of guilt is corroborative of a prosecutrix. Pen.Code, §§ 274, 1108, 1111.

**16. Abortion** ⚷13
**Criminal law** ⚷780(3)

In abortion prosecution, instruction relative to testimony and corroboration of accomplices and aborted women was proper. Pen.Code, §§ 274, 1108, 1111.

**17. Criminal law** ⚷508(9)

A jury may, after applying proper test for weighing testimony of an accomplice, give it the same weight as the testimony of any other witness. Code Civ.Proc. § 2061, subd. 4; Pen.Code, § 1111.

**18. Criminal law** ⚷809

In abortion prosecution where jury was properly instructed that accomplice must be corroborated and was fully instructed as to essential requisites of corroborating evidence, confusion was not created by instruction informing jury that they were the judges of effect and value of evidence. Pen.Code, §§ 274, 1108, 1111.

**19. Criminal law** ⚷512, 742(2)

The jury passes on accomplice's credibility as a witness and if other evidence tends to connect defendant with commission of offense, testimony of accomplice is to be considered by jury as is any other testimony and must be given the weight to which jury may conclude that it is entitled. Code Civ.Proc. § 2061, subd. 4; Pen.Code, § 1111.

**20. Criminal law** ⚷742(2)

In abortion prosecution, whether individual who accompanied aborted woman to defendant's office talked to him about fee and was present while he was working on the aborted woman was an accomplice was properly submitted to jury. Pen.Code, §§ 274, 1108, 1111.

**21. Criminal law** ⚷507(6)

An aborted woman is not, solely by reason of fact that she submitted to an abortion, an accomplice of person performing the abortion and her testimony may be corroborated by testimony of accomplice. Pen.Code, §§ 274, 1108, 1111.

**22. Criminal law** ⚷824(1)

In criminal prosecution, court must give, sua sponte, instructions on general principles of law pertinent to case where they are not proposed or presented in writing by parties but it is not court's duty to give such instructions on specific points developed through evidence introduced at trial, unless instructions are requested by party desiring them.

**23. Criminal law** ⚷824(1)

In abortion prosecution, failure to give instruction with respect to nursing was not error in absence of request therefor. Business and Professions Code, § 2725 et seq.

**24. Abortion** ⚷11

In abortion prosecution, evidence was insufficient to establish that defendant, a registered nurse, was acting under direction of licensed physician and surgeon. Business and Professions Code, §§ 2725, et seq., 2726.

**25. Abortion** ⚷2

License as registered nurse did not authorize defendant to perform acts on which prosecution for abortion was based. Business and Professions Code, §§ 2725 et seq., 2726.

**26. Abortion** ⚿13

In abortion prosecution, where defendant testified that he was licensed as a chiropractor and introduced his license as chiropractor in evidence, instruction appraising jury of proper scope of practice of chiropractor was proper and was within issues even though defendant claimed that he performed act as registered nurse under direction of licensed physician and surgeon.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

William H. Malone was convicted of performing abortions and of offering a bribe, and he appeals.

Affirmed.

Gavin Morse Craig and Gavin W. Craig, both of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Frank Richards, Deputy Atty. Gen., and W. E. Simpson, Dist. Atty., Jere J. Sullivan and Robert Wheeler, Deputy Dist. Attys., all of Los Angeles, for respondent.

VALLEE, Justice pro tem.

Appellant, a chiropractor and a registered nurse, was charged by information with performing abortions upon a Miss Miller, a Mrs. Ehrlich, and a Mrs. Pherigo (counts I, II, and V, respectively), with offering a bribe (count III), and with soliciting another to accept a bribe (count IV). During the trial count IV was dismissed. Appellant was convicted by a jury of the offenses charged in counts I, II, III and V. He appeals from the judgments and orders denying his motions for new trial which followed.

[1] In his opening brief appellant attacked the sufficiency of count III upon the ground that it did not plead facts sufficient to state a public offense. Apparently his attack was predicated upon the mistaken belief that count III charged a violation of Penal Code section 653f. In his brief, the attorney general advised appellant that the offense charged in count III was a violation of Penal Code section 67 and not of section 653f. In his closing brief, appellant withdraws his attack upon count III and, in effect, abandons his appeal from the judgment rendered upon that count and from the order denying his motion for a new trial with respect thereto. Appellant's abandonment of the point makes it unnecessary for us to pass upon it.

Appellant concedes that the evidence is sufficient to support the charge pleaded in count II, but contends that it is insufficient to support the charges pleaded in counts I and V of the information. He first says that proof that the acts committed by him were not necessary to preserve life is an essential element of the offense charged in counts I and V; that the burden was upon the prosecution to prove that element of the offense; that the prosecution did not sustain the burden. Penal Code section 274 provides: "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable * * *". The acts denounced are unlawful "unless the same is necessary to preserve * * * life." This language, although an exception or proviso, it is said, is in fact a part of the description of the offense and, being such, the burden of proving non-necessity to preserve life is upon the People. 22 C.J.S., Criminal Law, § 572, p. 886. The question has not been decided in this state. See, People v. Balkwell, 143 Cal. 259, 76 P. 1017; People v. Brewer, 19 Cal.App. 742, 127 P. 808; People v. Card, 40 Cal.App. 22, 180 P. 53; People v. DeVaughn, 2 Cal.App.2d 447, 38 P.2d 192; People v. Knowles, 7 Cal.App.2d 398, 46 P.2d 788; People v. Smitherman, 58 Cal.App.2d 121, 135 P.2d 674; People v. Emery, 79 Cal.App.2d 226, 179 P.2d 843. In each of these cases it was not necessary to decide the question as, in each, there was ample evidence of non-necessity to preserve life. The weight of authority in other jurisdictions is that the burden is upon the prosecution. See, State v. Meek, 70 Mo. 355, 358, 35 Am.Rep. 427;

State v. Longstreth, 19 N.D. 268, 121 N.W. 1114, 1118, Ann.Cas.1912D, 1317; State v. Wells, 35 Utah 400, 100 P. 681, 683, 136 Am.St.Rep. 1059, 19 Ann.Cas. 631; State v. De Groat, 259 Mo. 364, 168 S.W. 702, 707; State v. Smith, 336 Mo. 126, 76 S.W. 2d 1077; State v. Magnell, 3 Pennewill, Del., 307, 51 A. 606; State v. Brown, 3 Boyce 499, Del., 85 A. 797; Howard v. People, 185 Ill. 552, 57 N.E. 441; Diehl v. State, 157 Ind. 549, 62 N.E. 51; State v. Aiken, 109 Iowa 643, 80 N.W. 1073; State v. Shoemaker, 157 Iowa 176, 138 N.W. 381; State v. Moon, 167 Iowa 26, 148 N.W. 1001; State v. Sonner, 253 Mo. 440, 161 S.W. 723; State v. Goodson, 299 Mo. 321, 252 S.W. 389; State v. Schuerman, 70 Mo.App. 518; State v. Darrow, 56 N.D. 334, 217 N.W. 519; Moody v. State, 17 Ohio St. 110; State v. Glass, 5 Or. 73; State v. Clements, 15 Or. 237, 14 P. 410; State v. Montifoire, 95 Vt. 508, 116 A. 77; Note: 153 A.L.R. 1266; Contra: Williams v. United States, 78 U.S.App.D.C. 147, 138 F.2d 81, 153 A.L.R. 1213; State v. Lee, 69 Conn. 186, 37 A. 75; State v. Nossaman, 120 Kan. 177, 243 P. 326; State v. Bly, 99 Minn. 74, 108 N.W. 833; Bradford v. People, 20 Hun, N.Y. 309. Non-necessity to preserve life may be shown by circumstantial evidence. People v. Hoyt, 20 Cal.2d 306, 313, 125 P. 2d 29; State v. De Groat, supra, 259 Mo. 364, 168 S.W. 702, 706; State v. Longstreth, supra, 19 N.D. 268, 121 N.W. 1114, 1118, Ann.Cas.1912D, 1317; State v. Wells, supra, 35 Utah 400, 100 P. 681, 136 Am.St. Rep. 1059, 19 Ann.Cas. 631; Diehl v. State, supra, 157 Ind. 549, 62 N.E. 51, 58; Note, 19 Ann.Cas. 636. In each of the California cases cited above there was circumstantial evidence which, either alone or with other evidence, was held sufficient proof of non-necessity to preserve life.

[2, 3] When it is shown that the woman was healthy and in a normal condition and that any one of the acts proscribed by Penal Code section 274 was used or employed with intent thereby to produce a miscarriage, the evidence is sufficient to sustain the implied finding of the jury that the production of the miscarriage was not necessary to save the woman's life. Howard v. People, supra, 185 Ill. 552, 57 N.E. 441; State v. De Groat, supra; Guiffrida v. State, 61 Ga.App. 595, 7 S.E.2d 34, 36; State v. Smith, supra, 336 Mo. 126, 76 S.W. 2d 1077; State v. Longstreth, supra; State v. Wells, supra. In People v. Knowles, supra, 7 Cal.App.2d 398, 46 P.2d 788, it is said that the testimony of the prosecutrix that she was in good health is sufficient proof of non-necessity to preserve life. In support of the holding, the court cited People v. Balkwell, supra, 143 Cal. 259, 76 P. 1017, and People v. Brewer, supra, 19 Cal.App. 742, 127 P. 808. Here each prosecutrix testified that she was in good health. Appellant so concedes and he apparently further concedes that her testimony was sufficient to make a prima facie showing of non-necessity to preserve life, but, says appellant, other evidence in the case overcame the prima facie showing. In support of this argument he cites People v. Murphy, 60 Cal.App.2d 762, 141 P.2d 755, 761; saying that that case holds that the testimony of the prosecutrix that she was in good health is to be disregarded because of "contradicting" evidence of the defense. The Murphy case does not so hold. If it did, it would be out of line with numerous decisions of the supreme and appellate courts of this State. All that the Murphy case holds, as we read it, is that the corroborative evidence did no more than "generate a suspicion of guilt" and that it was, therefore, insufficient. The testimony of the prosecutrix and "contradicting" evidence of the defense, if any, merely gave rise to a conflict in the evidence, a conflict for the jury to resolve. People v. Erno, 195 Cal. 272, 278, 232 P. 710; People v. Farrington, 213 Cal. 459, 463, 2 P.2d 814; People v. Spencer, 58 Cal.App. 197, 224, 208 P. 380; People v. Lamb, 67 Cal.App. 263, 265, 227 P. 969; People v. Connell, 15 Cal. App.2d 380, 59 P.2d 433; People v. D'Elia, 73 Cal.App.2d 764, 767, 167 P.2d 253.

[4-8] Appellant next says that the corroboration of the prosecutrix was not sufficient as to both counts I and V. Penal Code section 1108 provides: "Upon a trial for procuring or attempting to procure an abortion, or aiding or assisting therein * * * the defendant cannot be convicted upon the testimony of the woman up-

on or with whom the offense was committed, unless she is corroborated by other evidence." Penal Code section 1111 provides: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." Appellant says that such cases as People v. Murphy, supra, 60 Cal.App.2d 762, 141 P.2d 755; People v. Davis, 210 Cal. 540, 293 P. 32; People v. Braun, 31 Cal.App.2d 593, 88 P.2d 728, and People v. Gilbert, 30 Cal.App.2d 321, 86 P.2d 135, hold, first, that in order to determine whether the corroboration was sufficient the testimony of the prosecutrix or accomplice should be eliminated and the rest of the evidence considered by itself, and second, that if the corroborating evidence, by itself, is as compatible with the theory of innocence as with the theory of guilt, a judgment of conviction must be reversed. He grants that People v Wilson, 25 Cal.2d 341, 153 P.2d 720, a much later case, is less stringent in its requirements as to corroboration than the earlier cases. No case called to our attention holds that it is for an appellate court to determine whether the corroborating evidence, by itself, is as compatible with innocence as it is with guilt. That is a question for the trier of fact. All that the appellate court does is to determine whether there is any substantial corroborative evidence, and whether, when error is found, the error committed has led to the verdict reached. Under section 4½ of Article VI of the Constitution, this court has "the power to weigh, to a limited extent, the evidence in its entirety upon which a conviction has been had, still 'we are not substituted for the jury. We are not to determine, as an original inquiry, the question of the defendant's guilt or innocence.'" People v. Roe, 189 Cal. 548, 561, 209 P. 560, 566. If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also be reconciled with the innocence of appellant will not warrant interference with the determination of the jury. People v. Newland, 15 Cal.2d 678, 104 P.2d 778; People v. Gomez, 41 Cal.App.2d 249, 106 P.2d 214. The nature and character of the corroborative evidence required by Penal Code sections 1108 and 1111 have been stated in numerous recent decisions. If corroborating evidence creates more than a suspicion of guilt, it is sufficient even though it "be slight and, when standing by itself, entitled to but little consideration." Corroborating evidence need not establish the precise facts testified to by the witness whose testimony it supports. The testimony of the woman upon whom the act is performed as to her good health does not require special corroboration. People v. Negra, 208 Cal. 64, 280 P. 354, 356; People v. Wilson, supra, 25 Cal.2d 341, 153 P.2d 720; People v. Thompson, 16 Cal.App. 748, 750, 117 P. 1033; People v. Lee, 81 Cal.App. 49, 53, 252 P. 763; People v. Shaw, 17 Cal.2d 778, 802, 112 P.2d 241; People v. Lorraine, 28 Cal.App.2d 50, 53, 81 P.2d 1004; People v. Dorrance, 65 Cal.App.2d 125, 150 P.2d 10; People v. Collins, 80 Cal.App.2d 526, 182 P.2d 585. It is not necessary that all of the material details of the illegal transaction constituting the offense of abortion be corroborated. It is only necessary to supply corroboration which satisfactorily tends to prove the offense and to connect the defendant with the commission of that offense. People v. Lorraine, supra, 28 Cal.App.2d 50, 53, 81 P.2d 1004; People v. Smitherman, supra, 58 Cal.App.2d 121, 123, 135 P.2d 674; Commonwealth v. Drake, 124 Mass. 21; Reg. v. Boyes, 121 Reprint 730; 1 Cor.Jur. 332, sec. 112. The corroboration is sufficient if considered by itself it tends, in some way, to connect the defendant with the offense charged. People v. Negra, supra, 208 Cal. 64, 280 P. 354; People v. Thompson, supra, 16 Cal.App. 748, 117 P. 1033; People v. Watson, 21 Cal.App. 692, 132 P. 836; People v. Lee, supra, 81 Cal.App. 49, 252 P. 763; People v. Tinnin, 136 Cal.App. 301, 28 P.2d 951;

People v. Lorraine, supra; People v. Hickok, 28 Cal.App.2d 574, 83 P.2d 39; 1 Cal. Jur. 114, sec. 12.

[9] With these principles in mind, a review of the evidence satisfies us that there was abundant corroboration of each prosecutrix as to the non-necessity to preserve life, with respect to both questioned counts I and V.

Miss Miller, the woman upon whom the abortion charged in count I was alleged to have been performed, first went to appellant's office on October 5, 1946. She was twenty years of age. Appellant bargained over his fee. He wanted $300. He took $250 and two watches. He packed her and gave her pills. On October 6th and October 7th he traveled from Los Angeles to her home in Santa Monica, where he worked on her and gave her more pills. On October 7th, appellant removed the fetus. On October 8th, Miss Miller was taken to the General Hospital. During the time appellant had Miss Miller under his care he made no effort to secure the services of a qualified physician and surgeon. The record of the General Hospital shows that she had not had any childhood or adult diseases or any operations, or accidents. A physician who examined Miss Miller at the General Hospital on October 9, 1946, testified that at the time of the examination she had a pulse of 100, temperature 98, respiration 22, blood pressure 120 over 80; the heart was normal; the chest was normal; the abdomen was normal. She was discharged from the hospital on October 17, 1946.

On October 7th, 1946, one Press, a friend of Mrs. Ehrlich, the woman upon whom the abortion charged in count II was performed, met appellant in a welding shop where appellant was having an obstetrical tool welded. Press observed the welding, said it looked like a doctor's tool, and asked appellant if he was a doctor. Appellant replied in the affirmative. Press asked appellant if he could take care of a pregnant lady who was in a bad way. Appellant said, "Yes," told Press it would cost $250, and more if he had to give her a transfusion; that that was his line of business, a routine thing. Appellant saw Mrs. Ehrlich that evening (October 7th) in his office. Press was present. Mrs. Ehrlich was in good health. She gave appellant a check. He gave her a pill, worked on her and packed her. As he was doing so, the officers appeared upon the scene. When arrested, defendant offered the arresting officer $1,000 in cash and some real estate if the officer would book him on a misdemeanor charge rather than on a felony charge.

Mrs. Pherigo, the woman upon whom the abortion charged in count V was alleged to have been performed, testified that she was the mother of two children; that she was twenty-five years of age. She wanted an abortion performed because she and her family lived in one room and her husband was not working. On December 19, 1946, she had missed two menstrual periods but was in good health. Appellant first saw Mrs. Pherigo on that date in the evening at the home of her mother-in-law in Hawthorne where he worked or her using metallic instruments, packed her and gave her pills. After doing so he, Mrs. Pherigo's sister-in-law, Irene Pherigo, and Mrs. Pherigo, sat around and talked awhile. After that Mrs. Pherigo went to her own home. The next day she went back to the home of her mother-in-law. Appellant went there in the morning and was there with Mrs. Pherigo in a bedroom when the officers appeared and he was arrested. On December 19, 1946, appellant was waiting trial upon counts I, II, III and IV. The arresting officer said to appellant at the time of the arrest, "Well, doc, I see you are aborting again." Appellant did not reply. Mrs. Pherigo was taken immediately to the General Hospital. She was examined by a physician at the hospital on December 20th, 1946. The physician who examined her testified that: her temperature was 102; her blood pressure 115 over 60; pulse 100; she appeared to be a fairly well developed and nourished, white, female. In his opinion there was an inevitable abortion induced criminally and septic. Mrs. Pherigo was in the hospital approximately five days. Her hospital record shows that she had a normal menstrual period in early September, 1946; that she missed her periods in October and

November; that on December 20th, 1946, she was in normal health in every respect except for enlargement of the breasts and a criminal abortion which was probably incomplete.

Appellant admitted the operation charged in each count. His defense was that the operation was necessary, in each instance, to preserve life.

[10-15] It is not necessary to corroborate the testimony of the aborted woman as to the condition of her health by direct evidence. Her condition may be inferred from any substantial evidence which is not that of the aborted woman. People v. Negra, supra, 208 Cal. 64, 69, 280 P. 354; People v. Wilson, supra, 25 Cal.2d 341, 347, 77 P.2d 238; People v. Bonner, 5 Cal.App. 2d 314, 42 P.2d 694; People v. Ross, 46 Cal.App.2d 385, 395, 116 P.2d 81. Testimony relating to one count may be considered by the jury in corroboration of the testimony of the woman upon whom an abortion was alleged to have been performed in another count. People v. Solano, 48 Cal.App.2d 126, 130, 119 P.2d 381; People v. Doetschman, 69 Cal.App.2d 486, 490, 159 P.2d 418; People v. Collins, 80 Cal.App. 2d 526, 182 P.2d 585. Inferences from the defendant's testimony may suffice to corroborate an aborted woman. People v. Wilson, supra, 25 Cal.2d 341, 77 P.2d 238. The fact that appellant bargained with respect to his fee is corroborative evidence. People v. Smitherman, supra, 58 Cal.App. 2d 121, 135 P.2d 674. Appellant's admissions, active and passive, and his declarations constitute corroboration. People v. Armstrong, 114 Cal. 570, 572, 46 P. 611; People v. Sullivan, 144 Cal. 471, 473, 77 P. 1000; People v. Richardson, 161 Cal. 552, 557, 120 P. 20; People v. Wilson, supra, 25 Cal.2d 341, 347, 153 P.2d 720; People v. Brewer, supra, 19 Cal.App. 742, 747, 127 P. 808; People v. Watson, 21 Cal. App. 696, 697, 132 P. 836; People v. Bisbines, 132 Cal.App. 239, 241, 22 P.2d 762; People v. Collins, infra, 4 Cal.App.2d 86, 87, 40 P.2d 542; People v. Lorraine, supra, 28 Cal.App.2d 50, 52, 81 P.2d 1004; People v. Hickok, supra, 28 Cal.App.2d 574, 581, 83 P.2d 39; People v. Pritchard, supra, 58 Cal.App.2d 791, 792, 137 P.2d 697; People v. Garner, 60 Cal.App.2d 63, 65, 140 P.2d 146; People v. Dorrance, supra, 65 Cal.App. 2d 125, 130, 150 P.2d 10. Defendant's consciousness of guilt is corroborative of a prosecutrix. People v. Hoyt, 20 Cal.2d 306, 313, 125 P.2d 29; People v. Card, supra, 40 Cal.App. 22, 25, 180 P. 53; People v. Collins, supra, 4 Cal.App.2d 86, 87, 40 P.2d 542; People v. Rice, 29 Cal.App.2d 614, 620, 85 P.2d 215; People v. Garner, supra, 60 Cal.App.2d 63, 65, 140 P.2d 146. The circumstances under which the acts were committed, all shown by evidence which was not that of the aborted woman, constitute adequate corroboration. Hundreds of duly licensed physicians and surgeons were available at all hours. The jury had a right to conclude from the facts and circumstances recited that the acts of appellant were those of a guilty man rather than emergencies, as he claimed them to be. People v. Collins, supra, 4 Cal.App.2d 86, 87, 40 P.2d 542. The testimony of each prosecutrix with respect to the condition of her health, and non-necessity of an abortion to preserve life, was fully corroborated by other evidence.

[16] Appellant next says that the court erred in its instructions relative to the testimony and corroboration of accomplices and aborted women. The court gave the following instructions to the jury:

(a) "You are instructed that a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

"Section 1111, Penal Code.

"The testimony of an accomplice ought to be viewed with distrust. This does not mean that you may arbitrarily disregard such testimony, but you should give to it the weight to which you find it to be entitled after examining it with care and caution and in the light of all the evidence in the case.

"If the crime of abortion, the commission of which is alleged in Count 2 of the information and involving Emilie Ehrlich was committed as charged then, as a matter of law the witness William Press was an accomplice.

"In the crime of abortion the woman involved is not an accomplice and her testimony may corroborate the testimony of an accomplice of a person attempting an abortion."

(b) "Under our law, the defendant may not be found guilty of the crime charged against him in Count I of the information upon the testimony of Marjorie Miller alone. Her testimony must be corroborated by other evidence. That corroboration may be supplied by the testimony of Miss Mary Prusack, either alone or in connection with other evidence in the case, provided that such evidence offered for the purpose of corroboration meets certain requirements shortly to be stated.

"Also the defendant may not be found guilty of the crime charged against him in Count II of the information upon the testimony of Emilie Mae Ehrlich alone. Her testimony must be corroborated by other evidence. That corroboration may be supplied by the testimony of William Press, either alone or in connection with other evidence in the case, provided that such evidence offered for the purpose of corroboration meets certain requirements shortly to be stated.

"Likewise, the defendant may not be found guilty of the crime charged against him in Count V of the information upon the testimony of Jane Pherigo alone. Her testimony must be corroborated by other evidence. That corroboration may be supplied by the testimony of Irene Pherigo, either alone or in connection with other evidence in the case, provided that such evidence offered for the purpose of corroboration meets certain requirements shortly to be stated."

(c) Under the law of this state, upon a trial for procuring or attempting to procure an abortion, the defendant may not be convicted upon the testimony of the woman upon or with whom the offense is alleged to have been committed, unless her testimony is corroborated by other evidence. The corroboration required by the law must do more than raise a mere suspicion against the defendant, but it is sufficient if by itself it fairly and logically tends to connect the defendant with the commission of the alleged offense. Such corroboration may be provided by the testimony of another witness by evidence showing the circumstances surrounding the alleged transaction, or by the testimony or admissions, if any, of the defendant, or by the testimony of an accomplice if there be such."

(d) "Corroborative evidence is additional evidence to the same point. It need not be sufficient to support the conviction. It must do more than cast a suspicion upon the accused. It must in and of itself and independent of the evidence which it supports, fairly and logically tend to connect the defendant with the commission of the alleged offense in question. It may be circumstantial as well as direct, and the entire conduct of the accused himself both as a witness in his own behalf and at times other than at the trial as shown by the evidence may be looked to for corroborative circumstances." (The lettering of the instructions is by appellant for convenience of discussion.)

The court also instructed the jurors that they were "the sole and exclusive judges of the effect and value of evidence addressed to them and of the credibility of the witnesses who have testified in the case."

[17-19] Appellant complains of the portion of the instruction designated (a). He says it left the jury free to give the same weight to the testimony of an accomplice as that of any other witness and that that part in which the jury was told that it should give the testimony of an accomplice "the weight to which you find it to be entitled," together with the instruction that the jurors are "the sole and exclusive judges" of the effect and value of evidence addressed to them, created a conflict and confusion. The instruction was a correct statement of the law. We know of no rule of law which says that a jury may not, after applying the tests for weighing the testimony of an accomplice, give it the same weight as the

testimony of any other witness. What the law says is that "the testimony of an accomplice ought to be viewed with distrust" (Code Civ.Proc., sec. 2061, sub. 4), and that a conviction cannot be had upon the uncorroborated testimony of an accomplice and that the corroborating evidence shall tend to connect the defendant with the commission of the offense (Pen.Code, sec. 1111). The jury was told that an accomplice must be corroborated and it was fully instructed as to the essential requisites of corroborating evidence. No confusion was created by the instruction informing the jurors that they were the judges of the effect and value of evidence. The mere fact that a witness is an accomplice does not mean that his testimony is to be rejected. The jury passes upon his credibility as a witness. If there is other evidence "tending to connect the defendant with the commission of the [offense]," then the testimony of the accomplice "is to be considered by the jury, as is any other testimony, and must be given the weight to which the jurors may conclude that it is entitled." People v. Negra, supra, 208 Cal. 64, 69, 280 P. 354; People v. Clough, 73 Cal. 348, 354, 15 P. 5; People v. Davis, 210 Cal. 540, 558, 293 P. 32; People v. Harper, 25 Cal.2d 862, 876, 156 P.2d 249; People v. Hoosier, 24 Cal.App. 746, 752, 142 P. 514; People v. Flood, 41 Cal. App. 373, 378, 182 P. 766; People v. Collier, 111 Cal.App. 215, 228, 295 P. 898; People v. Taber, 13 Cal.App.2d 27, 30, 55 P.2d 1189; People v. King, 30 Cal.App.2d 185, 198, 85 P.2d 928; People v. Ross, 46 Cal.App. 2d 385, 398, 116 P.2d 81. In support of his contention, appellant relies upon People v. Haack, 86 Cal.App. 390, 260 P. 913. In that case it was held that the following instruction was an incorrect statement of the law (86 Cal.App. at page 396, 260 P. at page 916.): " 'The court instructs the jury that the testimony of an accomplice is competent evidence, and the credibility of such accomplice is for the jury to pass upon as they do upon any other witness; and, while the testimony of an accomplice will not sustain a verdict when uncorroborated, but if the testimony carries conviction, and the jury are convinced of its truth, they should give to it the same effects as would be allowed to a witness who is in no respect implicated in the offense.' " The instruction was held incorrect because it told the jury that the uncorroborated testimony of an accomplice will not sustain a verdict and immediately advised that if the testimony of an accomplice carries conviction and if the jury be convinced of its truth the jury shall give to it the same effect as would be allowed to a witness who is in no respect implicated in the offense. The court went on to say, in effect, that the testimony of an accomplice may be given the same effect as may be given the testimony of one who is not implicated in an offense if such testimony be corroborated by evidence tending to connect the defendant with the crime charged, separate and apart from the testimony of the accomplice. The court here did not tell the jury that the testimony of an accomplice may be given the same effect as the testimony of one who is not an accomplice as was done in the Haack case.

[20] Appellant urges that the court should either have told the jury that Mrs. Prusack and Irene Pherigo were accomplices or that the jury should determine whether they, or either of them, were accomplices. Mrs. Prusack had accompanied Miss Miller to appellant's office, talked to him about the fee, and was present while he was working on her. The court expressly instructed the jury that the person who was active in connection with the abortion charged in count II was an accomplice. It left the question of whether Mrs. Prusack or Irene Pherigo was an accomplice to the jury under instructions correctly defining an accomplice. Neither Mrs. Prusack nor Irene Pherigo was, as a matter of law, an accomplice. Under such circumstances, the court properly left the question to the jury. People v. Darrow, 212 Cal. 167, 169, 298 P. 1; People v. Alvarez, 73 Cal.App.2d 528, 532, 166 P.2d 896.

[21] Appellant next contends that the court erred in directing the jury that the testimony of the women who were alleged to have submitted to abortions, could be corroborated by accomplices of appellant. In making this contention appellant vigor-

ously attacks the reasoning of the Supreme Court in People v. Clapp, supra, 24 Cal.2d 835, 151 P.2d 237, and People v. Wilson, supra, 25 Cal.2d 341, 153 P.2d 720. He says that the prevailing opinions in those cases are wrong, that the dissenting opinions are right, that the decisions should be overruled and the reasoning of the dissenting opinions adopted as the law. That is a question for the Supreme Court, not for this court. The Clapp case held that the aborted woman is not, solely by reason of the fact that she submitted to an abortion, an accomplice of the person performing the abortion and that her testimony may be corroborated by testimony of an accomplice. The Wilson case held that the aborted woman and an accomplice could corroborate each other. The criticized instructions were correct statements of the law as enunciated in those cases.

[22, 23] Appellant next complains because the court did not instruct the jury concerning the law as set forth in the provisions of the Business and Professions Code relative to nursing (Business and Professions Code, secs. 2725 et seq.). Appellant's point is grounded upon the fact that he was a registered nurse and his assertion that in performing the abortions for which he was convicted, he was acting under the direction of a duly licensed physician and surgeon. There is no substantial evidence that appellant did any act upon any of the aborted women under the direction of a physician or surgeon. Further, Appellant did not request the giving of any such instruction. He says that it was the duty of the court to give an instruction on the subject sua sponte. He is mistaken. The rule is that it is the duty of the court in criminal cases to give, sua sponte, instructions on the general principles of law pertinent to such cases where they are not proposed or presented in writing by the parties themselves. It is not the duty of the court to give such instructions upon specific points developed through the evidence introduced at the trial, unless such instructions are requested by the party desiring them. People v. Warren, 16 Cal.2d 103, 116, 104 P.2d 1024; People v. Bender, 27 Cal.2d 164, 175, 163 P.2d 8. Any instruction concerning the law with respect to nursing would have been an instruction upon a specific point developed through the evidence introduced at the trial. There was no duty upon the trial court to give any such instruction in the absence of a request therefor.

[24, 25] Appellant next insists that his acts were lawful under the "Nursing Code." By "Nursing Code" he refers to Business and Professions Code, sections 2725 et seq. He again argues that he was acting under the direction of a physician and surgeon and that, therefore, his acts were lawful under the "Nursing Code." As we have said, there is no substantial evidence that appellant was acting under the direction of a licensed physician and surgeon. Business and Professions Code section 2726 reads: "This chapter confers no authority to practice medicine or surgery or to undertake the prevention, treatment or cure of disease, pain, injury, deformity, or mental or physical condition in violation of any provision of law." Appellant's license as a registered nurse did not authorize him to do any of the acts with which he was charged.

[26] Appellant next contends that the court erred in giving the following instruction: "A license to practice chiropractic authorizes the holder thereof to practice chiropractic in the State of California as taught in chiropractic schools or colleges and also to use all necessary mechanical and hygienic and sanitary measures incident to the care of the body, but shall not authorize the practice of medicine or surgery, nor the use of any drug or medicine now or hereafter included in Materia Medica." Appellant's argument is that since he was working under the direction of a licensed physician and surgeon and because he testified that he was not using his chiropractic license annd because there was no evidence to the contrary, the quoted instruction was outside the issues presented by the evidence. Appellant testified that he was licensed as a chiropractor in California. He introduced his license as a chiropractor in evidence. He testified that he did not have any "extensive" chiropractic practice. The instruction was within the issues. It was proper to apprise the jury of the proper scope of the practice of a

chiropractor. People v. Marineau, 55 Cal. App.2d 893, 907, 132 P.2d 22.

The judgments and orders appealed from are, and each is, affirmed.

SHINN, Acting P. J., and WOOD, J., concur.

82 Cal.App.2d 70

## NASON et ux. v. LETH-NISSEN et ux.

Civ. 13436.

District Court of Appeal, First District,
Division 1, California.
Oct. 27, 1947.

**1. Appeal and error ⇨1004(1)**

An appellate court may reduce or reverse allegedly excessive judgments for personal injuries only where excess appears as a matter of law, or is such as to suggest at first blush passion, prejudice, or corruption of jury.

**2. Appeal and error ⇨1004(1)**

On appeal from allegedly excessive judgment in personal injury action, it was not a question of what damages the District Court of Appeal would award or whether it considered the damages high, but whether it could say that they were so excessive as to suggest passion or prejudice.

**3. Appeal and error ⇨1004(1)**

An element to be considered in determining whether damages in personal injury action were excessive was the decreasing value of the dollar.

**4. Damages ⇨131(1)**

$1,014 for burn one inch in diameter on top of housewife's head as result of negligent treatment in beauty shop, was not excessive where burn caused housewife pain at times for fully six months, and during that period she was sick and nervous from burn and could not do her housework as well as formerly.

**5. Trial ⇨127**

Generally, only theory on which reference to insurance is ever admissible in a personal injury action is where it is incidental to an admission of liability by defendant and a part of the same statement, and then it is admissible, not to prove the fact of insurance, but solely because it is a part of the admission.

**6. Trial ⇨127**

In action, which was tried before court, for injuries consisting of head burn sustained by customer in course of permanent wave treatment in beauty shop, testimony of customer that when she informed one of the proprietors of the beauty shop about the burn, he told her to go and get a lawyer and that he was heavily insured, was inadmissible so far as it referred to insurance, because reference to insurance was not incidental to an admission of liability, but it was error without prejudice where evidence established negligence of beauty operator. Const. art. 6, § 4½.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Fred S. Nason and Sophie H. Nason, his wife, against Peter Leth-Nissen and Ottilie Leth-Nissen, individually and doing business under the firm name and style of Leth's Beauty Studio, to recover for burns sustained by Sophie Nason in the course of a permanent wave treatment in defendants' beauty shop. From a judgment in favor of the plaintiffs, the defendants appeal.

Judgment affirmed.

Hoffman & Draper, of San Mateo, for appellants.

Hugh F. Mullin, Jr., of San Mateo, for respondents.

BRAY, Justice.

Plaintiff Sophie Nason sustained a head burn in the course of a "permanent wave" treatment in defendants' beauty shop. In a trial without a jury, the court awarded plaintiffs daamges in the sum of $1,014.

There are only two points raised by defendants on this appeal: (1) that the evidence is wholly insufficient to support the amount awarded, and therefore the damages are grossly excessive; and (2) the trial court erred in refusing to strike certain testimony concerning insurance.

*Damages Not Excessive.*

[1] In considering the first point raised by defendants it is necessary to keep in mind the yardstick by which an appellate court must measure those damages. "The power of the appellate court to reduce or reverse judgments on the ground that they are excessive exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush passion, prejudice or corruption on the part of the jury. [Citing cases.] Subject to this limitation the damage resulting from pain, suffering, or injuries of the nature of that here complained of, being incapable of exact measurement, its compensation in terms of money is necessarily only approximate, and must be left to the jury to determine." Hallinan v. Prindle, 17 Cal.App.2d 656, 671, 62 P.2d 1075, 1082.

The evidence shows that on May 25, 1944, plaintiff received a burn on the left portion of her scalp, approximately an inch in diameter. Her first medical treatment was four days later. The doctor to whose office she went, testified that the burn was crusted and there was a degree of inflammatory reaction around it. The hair was matted into the crust and it looked like a first and second degree burn. He saw and treated her on four occasions at his office. Plaintiff testified that she suffered from pain from it at times for fully six months, and for that period was dragged out, sick and nervous from it and could not do her housework as well as formerly. She stated that it was still tender at the time of trial, which was over two years from the date of the injury. The burn cleared up in a matter of ten days, and the doctor felt at that time that plaintiff would have no further trouble with it. The doctor further testified that the area of such a burn in his opinion could remain sore and tender for five or six months, and that it was a very painful burn. Plaintiff testified that during the six month period she was able only to have her hair "caught up a bit, just have it combed a bit," and at times had to receive oil treatments for her scalp. Plaintiff was a housewife and not a wage earner, and hence there was no loss of wages, nor any expense incurred as a result of the injury, other than the doctor's bill of $14. There was no hospitalization, no permanent scar, and the hair eventually grew back on the injured spot.

Defendants rely upon the case of Steinbrun v. Smith, 123 Cal.App. 697, 11 P.2d 868, as authority for the contention that the damages awarded here are grossly excessive. In that case a jury awarded $1,500 damages, of which approximately $300 was special damage. The trial court took $300 off the general damages, reducing the award to $1,200. The appellate court held that even this amount was excessive and reduced the general damages another $300. At first blush the injuries detailed in the opinion were more serious than those received by plaintiff here. However, a study of the opinion shows no evidence that the injuries existed nor was pain suffered, for more than fourteen days. Moreover, that was a jury case, while this is a court case. Again, here, the plaintiff testified (and the judge who observed her testify, evidently believed her) that the pain from the burn continued at times for five or six months, that she was sick and nervous from it over that period, and that more than two years later the spot was still tender.

[2] It is not a question of what damages this court would award or whether we consider them high, but whether this court can say that the damages are so excessive as to suggest passion or prejudice.

[3] Another element to be considered is the decreasing value of the dollar. "The value of the sum awarded is to be measured not by the number of dollars named in the verdict but in their comparative ability to furnish the necessaries of life." Butler v. Allen, 73 Cal.App.2d 866, 870, 167 P.2d 488, 490, hearing denied in Supreme Court. See also Estrada v. Orwitz, 75 Cal.App.2d 54, 170 P.2d 43.

[4] While the award here was probably high, we cannot say that it was so excessive as to suggest passion or prejudice on the part of the judge.

*Testimony Concerning Insurance.*

Plaintiff was testifying concerning a visit she made to defendants' shop the day following the accident, and was asked by her counsel to give the conversation she had with defendant Peter Leth-Nissen. The following then occurred:

"I came into the shop and the door was open, he has the first booth and he was standing there, and I walked over and I said: 'Mr. Nissen, will you please look at my head? What am I to do about this. It gives trouble and I have a burn.' So, very insultingly he said: 'Will you get out of here?' I said: 'I beg your pardon, Mr. Nissen, I just want to show you my hair.' And he said: 'You go and get your lawyer, I am heavily insured.'

"Mr. Draper [for the defendants]: We move to strike that as incompetent, irrelevant and immaterial and outside the issues of the case.

"The Court: That was the conversation?

"Mr. Draper: Yes, 'You go and get your lawyer, I am heavily insured.'

"The Court: Objection overruled if that is what he said."

**[5, 6]** As a general rule, the only theory upon which such reference to insurance is ever admissible in a personal injury action of this type is when it is incidental to an admission of liability by defendant and a part of the same statement. It is then admissible not to prove the fact of insurance, but solely because it is a part of the admission. Handley v. Lombardi, 122 Cal.App. 22, 9 P.2d 867; Noble v. Bacon, 129 Cal.App. 177, 18 P.2d 699; North v. Vinton, 17 Cal.App.2d 214, 61 P.2d 950. It is very doubtful if the statement of the defendant to plaintiff could in any way be characterized as an admission of liability. But assuming that the failure of the court to strike the portion referring to insurance from the record was error, it was error without prejudice. This was not a jury case. It must be presumed that every judge in California knows that he must not be influenced by the question of whether a litigant is or is not insured. The judge heard the statement that defendant was insured. Striking it from the record would not strike it from his mind, if he were going to let the fact of insurance influence him. Nor, if the judge erroneously considered the defendant's statement as an admission of liability, was there any prejudice. Defendants' statement that the issue of liability is close is not borne out by the record. The liability of defendants was well established by the testimony, not only of the plaintiff, but of the operator Jane Shults, one of defendants' employees. Defendants' defense, supported by defendant Nissen's own testimony and that of one of the beauty operators, was that, despite due care on the part of the operator, a patron will ocacsionally be burned. The lower court did not believe, and with reason, that obtaining a "permanent" was such a hazardous adventure for a woman.

Defendants rely principally upon the case of Mason v. Wolff, 40 Cal. 246, for the proposition that any error, if error it was, in the admission of evidence by a court sitting without a jury, must be deemed to be prejudicial. That case was decided before the adoption in 1914 of section 4½ of Article VI of the Constitution, which provides: "No judgment shall be set aside * * * on the ground of * * * the improper admission or rejection of evidence * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Moreover, the true rule, even before 1914, is well expressed in the concurring opinion of McFarland, J., in Rogers v. Borchard, 82 Cal. 347, at page 350, 22 P. 907, at page 908: "I concur in the judgment, because it appears that the deed erroneously admitted in evidence must necessarily have entered largely into the considerations which moved the court to give judgment for respondent. I do not think that Judge Temple intended to say, or did say, in Mason v. Wolff, 40 Cal. [246], 249, that a judgment must be reversed for every abstract error committed in ruling upon the admissibility of evidence, when the case is tried without a jury; and I fear that the leading opinion in the case at bar might bear that construction. Greenleaf on Evidence says (volume 1, § 49) as follows: 'In trials of fact without the aid of a jury, the question of admissibility of evidence, strictly speaking, can seldom be raised; since, whatever be the ground of objection, the evidence objected to must, of necessity, be read or heard by the judge, in order to determine its character and value. In such cases the only question, in effect, is upon the sufficiency and weight of the evidence.' While this language may state the principle too strongly, still, in my opinion, a judgment in a case tried without a jury should not be reversed for the erroneous admission of one piece of evidence, unless the error shows that the case was tried upon a wrong theory, or appears to have been in some way material, important, and clearly prejudicial" to the rights of the losing party. See also Yates v. Morotti, 120 Cal.App. 710, 721, 8 P.2d 519.

As said in C. O. Bashaw Co. v. Wood & Stevens, 72 Cal.App. 94, at page 101, 236 P. 346, at page 349, "* * * we have examined the record, and are convinced that appellant suffered no material prejudice because of the rulings of the trial court in the admission of testimony."

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

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82 Cal.App.2d 88

## ANDERS et al. v. STATE BOARD OF EQUALIZATION.

**Civ. 7363; Sac. 5821.**

District Court of Appeal, Third District, California.

Oct. 27, 1947.

Hearing Denied Dec. 22, 1947.

**1. Licenses 🔑30**

Evidence of application of tips received by waitresses to minimum wages of waitresses fixed by Industrial Welfare Commission was competent on question whether tips were part of employer's gross receipts within Retail Sales Tax Act. St. 1933, pp. 2599, 2600, §§ 2(b, f), 3.

**2. Master and servant 🔑69**

The payment of minimum wages fixed by Industrial Welfare Commission was an obligation created by law, which became part of employment contract. Labor Code, §§ 1182, 1194, 1195.

**3. Master and servant 🔑61**

In absence of an agreement to the contrary, tips received by employees belong to them.

**4. Licenses 🔑29**

Where, under employment contract, tips received by waitresses, to extent of amount equal to minimum wages fixed by Industrial Welfare Commission, were credited on minimum wages due and payable, such portion of tips were part of employer's "gross receipts" within Retail Sales Tax Act, and sales tax was properly collected on such part of the tips. St. 1933, pp. 2599, 2600, §§ 2(b, f), 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Gross Receipts".

**5. Licenses 🔑29**

Under employment agreement that waitresses' tips, to extent of amount equal to minimum wages, were to be credited on minimum wages, tips in excess of minimum wages belonged to the waitresses and were properly disregarded in levying retail sales taxes against employer. St. 1933, pp. 2599, 2600, §§ 2(b, f), 3; Labor Code, §§ 1182, 1194, 1195.

**6. Master and servant 🔑69**

Statutes authorizing Industrial Welfare Commission to fix reasonable minimum wages of women employed in any occupation, trade, or industry, and authorizing any women so employed to maintain action against employer to recover full amount of unpaid minimum wages, are not unconstitutional or discriminatory as between men and women, or otherwise. Labor Code, §§ 1182, 1194, 1195.

**7. Master and servant 🔑61**

Ownership of tips received by employee in course of employment is proper subject of contract. Labor Code, §§ 351–356.

**8. Master and servant** ⚷61

Employer's failure to comply with statutory procedure of giving notice of his claim to tips or portion thereof or keeping records as to tips does not render void agreement with respect to ownership or application of tips to wages, but merely punishes such omission as a misdemeanor. Labor Code, §§ 351-356.

**9. Licenses** ⚷29

Where tips were credited by waitresses to payment of minimum wages, in compliance with agreement with employer, the employer was estopped from asserting that employer wrongfully failed to comply with statutory procedure of giving notice of claim to tips and keeping records and thereby defeat liability for retail sales taxes. Administrative Code, Tit. 18, § 2003 (c), rule 53; Labor Code, §§ 351–356; St. 1933, pp. 2599, 2600, §§ 2(b, f), 3.

**10. Evidence** ⚷47

Trial court could take judicial notice of rule of Board of Equalization requiring amount of tips received by employer to be included in measuring retail sales taxes. Code Civ.Proc. § 1875, subd. 3; Pol.Code, § 725.3.

**11. Statutes** ⚷219

The construction of the Retail Sales Tax Act by Board of Equalization, with respect to including tips for which employer received credit on payment of minimum wages, as part of gross receipts subject to Retail Sales Tax Act, was not necessarily controlling but was entitled to great weight in determining that issue. Administrative Code, Tit. 18, § 2003(c), rule 53; St. 1933, pp. 2599, 2600, §§ 2(b, f), 3.

◆

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Suit by C. Anders and A. V. Spencer, copartners, doing business under the firm name and style of Carl's, against the State Board of Equalization of the State of California to recover retail sales taxes paid under protest. From an adverse judgment, plaintiffs appeal.

Affirmed.

Thorpe & Bridges, of Los Angeles, for appellants.

Fred N. Howser, Atty. Gen., and E. G. Benard, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

The plaintiffs have appealed from a judgment which was rendered against them in a suit to recover retail sales taxes paid under protest. The taxes were assessed by the State Board of Equalization under the Retail Sales Tax Act in the sum of $2,319.82. They were levied on a portion of the tips received by waitresses incident to sales of food and drinks furnished to patrons of plaintiffs in their drive-in restaurant conducted in Los Angeles. By agreement between the employers and the waitresses, said tips, to the extent of an amount equal to the minimum wages fixed by the Industrial Welfare Commission, were credited on the minimum wages due and payable. The trial court rendered judgment against plaintiffs on the theory that such tips were a part of the "gross receipts * * * from the sale of all tangible personal property."

The cause was heard and determined on a written stipulation of facts containing the statement that plaintiffs are a copartnership doing a restaurant business at Los Angeles under the firm name of "Carl's," and that they employed waitresses to serve food and drinks to their patrons in the restaurant and in cars parked at said place of business. The stipulation also contains the following statements:

"That at all times herein mentioned the employment arrangement between plaintiffs and their waitresses and car hops was substantially as follows:

"The employee retained all tips and gratuities *as compensation for the employee's service.* The plaintiffs guaranteed to the employee that if the tips and gratuities did not equal the minimum wages as provided by the laws of the State of California and the orders, rules and regulations of the boards and commissions administering said laws, the plaintiffs *would pay to the employees such sums as added to the tips and gratuities received by them would equal the minimum wage provided by the laws of the State of California* and the orders, rules and regulations of the boards and commissions administering said laws. That is, if the tips and gratuities received by the employee did not equal the minimum wage fixed by the Industrial Welfare Commission of the State of California, the plaintiffs would make up the difference.

* * * * * *

"That said reassessment in the sum of $2319.82 *was based upon tips and gratuities which had been received by waitresses and car hops* of plaintiffs during the periods covered by said assessment and *which had been credited by said employees against the minimum wage guaranteed by the plaintiffs.* That is, the amount of $64,950.50 reassessed was the amount of tips received by waitresses and car hops of plaintiffs from April 1, 1937, to March 31, 1940, and credited against the minimum wage guaranteed by plaintiffs to said employees. * * *." (Italics added.)

[1] It was further stipulated that *the waitresses made no claim against plaintiffs to the ownership of said tips so applied,* as a part of their minimum wages, and that said evidence of the application of such tips to the minimum wages of the waitresses should be deemed to have been received in evidence over plaintiffs' objection that it is immaterial and incompetent.

We are of the opinion the challenged evidence was competent for the reasons hereafter assigned, and that the objection thereto was properly overruled.

[2] We construe the foregoing stipulation to mean that plaintiffs and their employees agreed that the tips received by the latter should belong to plaintiffs, *to the extent of the amount of fixed minimum wages,* the payment of which the employers guaranteed. The payment of minimum wages was an obligation created by law, which became a part of the contract of employment. If no part of the tips belonged to the employers, the plaintiffs have not paid the minimum wages required by law, and would still be liable for such wages. The stipulation indicates that the respective parties to the contract of employment agreed and assumed that minimum wages had been paid from the tips received, for it states that the tips "had been credited *by said employees* against the minimum wage guaranteed by the plaintiffs." It further states that the waitresses make no claim against plaintiffs to the ownership of the tips, to the extent of the amount of minimum wages. Clearly that means they mutually agreed that the tips, to the amount necessary to pay minimum wages, should belong to plaintiffs. It is significant that the stipulation does not state that all tips received shall *belong to the waitresses.* All that it states in that respect is that all tips shall be *retained* by the employees as compensation for services. In support of the judgment, that language may reasonably be construed to mean the waitresses might *retain* all tips subject to the crediting of sufficient tips to satisfy plaintiffs' obligation to pay minimum wages, which portion should belong to the employers.

The question to be determined is whether tips received by waitresses in a restaurant on account of their services, to the extent of their minimum wages fixed by law, become part of the gross receipts of the employer for sales of tangible personal property, to-wit, food and drinks, in view of the contract of employment to the effect that such tips shall be credited to the payment of minimum wages as a part of the waitresses' compensation for services, and that they were actually so credited.

[3, 4] We are of the opinion the tips received by the waitresses, to the extent of the minimum wages provided for by law, in the sum of $16.75 per week for each waitress, became a part of plaintiffs' gross receipts for services in connection with their sales of tangible personal property, since it was agreed between plaintiffs and their waitresses, in effect, that such tips belonged to the employers and would be credited on payments of minimum wages, and that they were actually so credited. It is stipulated that the receipts in question, aggregating the sum of $2,319.82,

were "based upon tips and gratuities which had been received by waitresses and car hops of plaintiffs during the periods covered by the assessment," and that they "had been credited by said employees against the minimum wages guaranteed by the plaintiffs." In spite of the usual rule that, in the absence of an agreement to the contrary, tips received by employees belong to them, by the terms of the contract and understanding in this case the tips, to the extent of the amount of minimum wages fixed by law, belonged to plaintiffs, and they were credited by the employees thereon, rendering them a part of plaintiffs' gross receipts for services performed incident to retail sales of tangible personal property. It follows that the Board of Equalization properly levied and collected sales taxes on said tips as a part of the gross receipts from the sales of tangible personal property.

The tips, which are the basis for the taxes levied, were received "from April 1, 1937, to March 31, 1940." The taxes were levied under the Retail Sales Tax Act of 1933 (Stats. 1933, p. 2599, Deering's Supp. of Codes and Laws, 1933, p. 2359, Act 8493). That act was subsequently amended, but only with respect to provisions which do not affect the validity of the taxes imposed in the present case. The sales taxes were levied under Section 3 of that act. Such taxes constitute an "excise" or "privilege tax", as distinguished from personal property taxes. Roth Drug, Inc., v. Johnson, 13 Cal.App.2d 720, 730, 57 P.2d 1022. The Retail Sales Tax Act is not unconstitutional or discriminatory. Roth Drug, Inc., v. Johnson, supra. The term "Sale" is defined in Section 2(b) of the act, as "any transfer, exchange or barter * * * of tangible personal property, for a consideration, and includes the furnishing, preparing or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing or serving such tangible personal property." Section 2(f) of that act declares that "'Gross receipts' means the total amount of the sale price of the retail sales of retailers, *including any services that are a part of such sales, valued in money, whether received in money or otherwise, including all receipts, cash, credits and property of any kind or nature,* and also any amount for which credit is allowed by the seller to the purchaser, without any deduction therefrom on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, losses or any other expense whatsoever. * * *" (Italics added.)

In the present case the waitresses were required by the terms of their employment to perform the services incident to furnishing the customers with food or drinks, regardless of whether they also received tips from customers in addition to the normal cost prices therefor. They agreed with plaintiffs that such tips, *to the extent of the amount of their minimum wages,* would apply on the payment of minimum wages. In effect, such tips, *to that extent,* become the property of the employer. They were received by the waitresses as plaintiffs' employees and agents. They were applied and credited as wages pursuant to contract. They were received incident to the services performed in the sales of food and drinks. It is immaterial that such receipts were not actually paid by the waitresses to plaintiffs and entered on their books of accounts, and then returned in cash to the waitresses, but were retained and credited by the waitresses on their minimum wages. That transaction was a mere business routine adopted by consent to avoid labor and inconvenience. Since such tips, to the extent of the amount of minimum wages, were derived incident to the sales, and by contract became the property of plaintiffs, they were a part of the receipts of the sales, and therefore properly taxable pursuant to Section 2(b) of the act.

[5] The fact that the balance of all tips received by the waitresses, over and above the amount of minimum wages, belonged to them, is likewise immaterial. That was also a part of the agreement with the employers that they should retain such excess tips as their compensation for services. Since the tips in excess of minimum wages were not claimed by plaintiffs, or required to be credited by the employees, they belonged to the waitresses, and the Board of Equalization properly disregarded them in levying the taxes. Ordinarily, in the ab-

sence of an agreement between the employer and the employee, tips received by the latter are deemed to be voluntary contributions from the donors to the employee, and belong to the latter. Herbert's Laurel-Ventura, Inc., v. Laurel Ventura Holding Corporation, 58 Cal.App.2d 684, 694, 138 P.2d 43; In re Farb, 178 Cal. 592, 599, 174 P. 320, 3 A.L.R. 301; Williams v. Jacksonville Terminal Co., and Pickett v. Union Terminal Co., consolidated for hearing, 315 U.S. 386, 397, 62 S.Ct. 659, 86 L. Ed. 914, 925; 13 A.L.R. 921, note.

[6, 7] The minimum wages of employees fixed by law are deemed to be a part of the contract of employment. Hays v. Bank of America, 71 Cal.App.2d 301, 304, 162 P. 2d 679. The Industrial Welfare Commission of California is authorized to fix reasonable minimum wages of women engaged in any occupation, trade or industry. Labor Code, sec. 1182. Any woman, so employed, may maintain an action against the employer to recover the full amount of such unpaid minimum wages. Labor Code, secs. 1194, 1195. Those statutes are not unconstitutional or discriminatory as between men and women, or otherwise. California Drive-In Restaurant Ass'n v. Clark, 22 Cal.2d 287, 299, 140 P.2d 657, 663, 147 A.L.R. 1028. But the Clark case and the Farb case, supra, determine that the law does not preclude the employer and the employee from agreeing that tips, in whole or in part, shall belong to the employer, or that they shall be credited on account of compensation to be paid the employee. The ownership of tips received in the course of employment is a proper subject of contract as we have previously held. The appellants concede that "the employer and the employee can agree or contract with respect to the disposition of tips or the credit of the same on wages due the employee from the employer." In the Clark case, supra, the Supreme Court said that a quoted contention made by appellant in that case "does not mean that tips may not be considered wages under certain circumstances. * * * An employer may permit his employee to retain the tips and the arrangement may be that they shall be compensation." Likewise, the Supreme Court said in the Farb case, supra, 178 Cal. at page 599, 174 P. at page 323, 3 A.L.R. 301:

"* * * There is nothing essentially immoral in the contract itself whereby the employe agrees to work for a certain wage and to surrender all tips to his employer. Supreme Court of Iowa (correctly we think) approved an instruction to the effect that while the plaintiff, a bootblack, would be entitled to any gifts by way of tips, the employer might, if he could, prove an agreement on plaintiff's part to turn the tips over to him. Zappas v. Roumeliote, 156 Iowa 709, 137 N.W. 935. If it is lawful, as between employer and employe, to provide for the ownership of tips given into the possession of the latter, it can hardly be said that the patron's ignorance of it makes the contract unlawful."

The following authorities support the validity of agreements between employers and employees, not in conflict with existing statutes, regarding the ownership and disposition of tips received by the employees for services which they were hired to perform: Zappas v. Roumeliote, 156 Iowa 709, 137 N.W. 935; Polites v. Barlin, 149 Ky. 376, 149 S.W. 828, 41 L.R.A.,N.S., 1217; Harrison v. Kansas City Terminal Railway, D.C., 36 F.Supp. 434; In re Farb, supra; Williams v. Jacksonville Terminal Co., and Pickett v. Union Terminal Co. [315 U.S. 386, 62 S.Ct. 664], consolidated and determined together, supra. In the two cases last cited, notices were given to "red cap" employees by each terminal company requiring them to "report daily to the undersigned the amounts received by you as tips or remuneration for such services." Agreements were subsequently made by the terms of which the ownership of the tips was determined and the Terminal Companies guaranteed the employees the full amount of minimum wages fixed by the Railroad Labor Act, 45 U.S.C.A. § 151 et seq., and the Fair Labor Standards Act, 29 U.S.C.A. § 201 et seq. The Terminal Companies credited a portion of the tips received to the payment of their guaranteed minimum wages. Suits were brought by the employees to recover their minimum wages which they claimed were due regardless of the application of tips received. The companies answered and moved for summary judgments. The District Court granted the motion and rendered judgment against plaintiffs. Those judgments were affirmed by the Circuit Court. On motion the United States Supreme Court granted writs of certiorari to review the records.

These cases appear to be determinative of the main issue in the present action. The court said in the case last cited:

"In the belief that the Act [Fair Labor Standards Act] required payment of the minimum wage without deduction of tips, the red caps, by their representative, Williams, brought an action against the terminal in the United States District Court for the recovery of unpaid minimum wages.

* * * * * *

"In businesses where tipping is customary, the tips, *in the absence of an explicit contrary understanding,* belong to the recipient. [Citing authorities.] Where, however, an arrangement is made by which the employee agrees to turn over the tips to the employer, in the absence of statutory interference, no reason is perceived for its invalidity. The employer furnishes the facilities, supervises the work and *may* take the compensation paid by travelers for the service, whether paid as a fixed charge or as a tip. A tip to a red cap is compensation for service. It is customarily given and always expected when such service is rendered." (Italics added.)

In response to petitioners' contention that the retaining of tips by the red caps could not be deemed to be payment of minimum wages by the employers, the court said:

"* * * Such a conclusion, however, does not foreclose a decision that in certain specific situations the so-called tips may be in reality the employee's compensation for his services and therefore wages.

* * * * * *

"It, of course, can make no practical difference whether the red caps first turn in their tips and then receive their minimum wage or are charged with the tips received up to the minmum wage per hour. * * * the employer was left free, in so far as the Act was concerned, to work out the compensation problem in his own way. Other courts are in accord with our view. [Citing authorities.]"

The foregoing case clearly holds that, in the absence of an agreement or statute to the contrary, tips are voluntary contributions or gifts from the donor to the employee and belong to the latter, but that the employer and employee may, by contract or mutual understanding, pass title to the tips, or a specified portion thereof, to the employer, to be paid to the latter in cash, or to be credited upon his obligation to pay wages. That case holds that, in the event it is agreed that a specified portion of the tips belong to the employer, it is immaterial whether it is paid to him in cash or credited to his obligation to pay the employee a minimum wage.

The ownership and application of tips to payment of wages, in the absence of a statute to the contrary, are legitimate subjects of contract between the recipient and his employer. It follows that the tips in this case, to the extent of the minimum wages due, were received by the waitresses for performance of duties incident to their employment, and that, by agreement or mutual understanding they became the property of plaintiffs and were credited by the waitresses upon plaintiffs' obligation to pay minimum wages. Such tips therefore became, to that extent, part of plaintiffs' gross receipts from sales of tangible personal property, and hence properly taxable under the Retail Sales Tax Act.

[8, 9] The statutes of California recognize the right of an employer to contract with his employee regarding the ownership or application of tips or gratuities by crediting them, or any part thereof, to wages due. Labor Code, secs. 351–356. The cited Labor Code sections are based on Statutes of 1929, page 1971. Sections 351 and 352 of the Labor Code require the employer to post notice in his place of business of his claim to such tips, or portion thereof, and the extent to which such tips are to be applied in lieu of wages. Section 353 requires the employer to keep records of such transactions open to inspection. Section 354 makes it a misdemeanor for the employer to fail to comply with any of such provisions. But the failure to comply with the procedure of giving notice or keeping the records does not render void the agreement with respect to the ownership or ap-

plication of the tips. The statute merely punishes such omission as a misdemeanor. It does not appear in this case whether the required notice was posted or the records kept. Since the tips were credited by the waitresses to the payment of minimum wages, in compliance with their agreement with plaintiffs, the latter should be estopped from asserting that they wrongfully failed to comply with the law and thereby defeat the state of taxes which would otherwise be a valid levy of assessment against them.

The California Drive-in Restaurant Ass'n v. Clark, supra, relied on by the appellants, does not apply to the facts of this case. That decision merely construed and upheld [22 Cal.2d 287, 140 P.2d 659] "order 12–A", a rule of the Industrial Welfare Commission, which provided that "No employer may include tips or gratuities received by employees designated in section 1 hereof as part of the legal minimum wages fixed by said section of this Order." That was a mere administrative order. It appears to conflict with sections 351 and 352 of the Labor Code, the first of which provides in part that:

"Every employer or agent who collects, takes, or receives any gratuity or a part thereof, paid, given to, or left for an employee by a patron, *or who deducts any amount from wages due an employee on account of such gratuity, or who requires an employee to credit the amount, or any part thereof, of such gratuity against and as a part of the wages due the employee from the employer,* shall keep posted in a conspicuous place at the location where his business is carried on, * * * a notice, * * *." (Italics added.)

Order 12–A was not an issue in this case. It does not apply to the Retail Sales Tax Act. Moreover, the respondent in this case relies on a contrary rule which was adopted by the Board of Equalization, which was effective at all times involved in this suit. Rule 53, Title 18, Section 2003(c), California Administrative Code, provides:

"Where an employer requires his employees to turn over to the employer the amount of tips, or a portion thereof, received in connection with the serving of meals or drinks, the amount of such tips received by the employer will be considered as gross receipts from the sale of the meals or drinks and must be included in the measure of the tax.

"Amounts designated as service charges, added to the prices of meals, are a part of the selling price of the meals and, accordingly, must be included in the retailer's gross receipts subject to tax even though such service charges are made in lieu of tips and are paid over by the retailer to his employees."

[10] The foregoing rule appears to be in accordance with the law as we have previously held. It appears to fit the facts of this case exactly. The trial court was entitled to take judicial notice of that rule of the Board of Equalization. Sec.1875, subd. 3, C.C.P.; Sec. 725.3, Pol.Code; Allen v. Industrial Accident Commission, 3 Cal.2d 214, 43 P.2d 787; Wood v. Kennedy, 117 Cal.App. 53, 60, 3 P.2d 366.

[11] The construction of the Retail Sales Tax Act by the Board of Equalization, with respect to the including of tips for which plaintiffs received credit on payment of minimum wages, as part of the gross receipts subject to retail sales tax, is not necessarily controlling, but is entitled to great weight in determining that issue. Coca-Cola Co. v. State Board of Equalization, 25 Cal.2d 918, 156 P.2d 1. In that case, it is said, 25 Cal.2d at page 921, 156 P.2d at page 2:

"Although not necessarily controlling, as where made without the authority of or repugnant to the provisions of a statute, the contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized." (Citing authorities.)

We think the construction of the board in this case is in accordance with the law.

Likewise, the case of Herbert's Laurel-Ventura, Inc., v. Laurel Ventura Holding Corporation, supra, upon which the appellants also rely, does not determine the issues in this case. That action involved merely the construction of a lease to determine whether tips received by waitresses in a cafe should be included in the total receipts to ascertain the amount of rental due the owner of the property by the terms of the lease. The lease provided that "Lessee shall pay to Lessor a minimum yearly rental of Six Thousand Dollars ($6,000.00) * * *, or shall pay to Lessor a sum equal to six per cent (6%) of the yearly gross receipts of the business, * * *."

The respondent, lessee, employed waitresses for the agreed compensation of furnishing them with meals and consenting that they "should retain all tips or gratuities left with them by patrons of respondent," but agreed that, if the total amount of their tips was less than $16.75 per week, the employer, lessee, would pay the waitresses the difference between the sum received in tips and said minimum wages. The lessee posted notices in the cafe, declaring that "All tips or gratuities given to our Car-Hops are retained by them as part compensation for their services." The court determined that "Each of them received tips in excess of the guaranteed sum; consequently *no deficit was ever paid.*" The waitresses in that case did not credit any portion of their tips to minimum wages due to them, as they did in the present case. Under such circumstances, pursuant to the agreement in that case, it was properly held that none of the tips belonged to the lessee, and it was therefore not required to include them, or any part of them, as receipts of its business for the purpose of ascertaining the amount of rental due under the lease. That case recognizes the right of employers and employees to contract with respect to the ownership of tips received. In distinguishing it from the Williams case, supra, and from other cases cited by the appellant, the court said [58 Cal.App.2d 684, 138 P.2d 49]:

"Those actions were brought by 'red caps' to enforce payment of wages after they had appropriated tips which *under their contract with the railroads were to be the moneys of the railroads* and be credited against the salaries of such employees. In those cases, the red caps collected the tips on behalf of their employers. Necessarily such moneys were the property of the railroads and such was the understanding at the time of their receipt by the red caps." (Italics added.)

We conclude that the tips received in the present case, to the amount of minimum wages of the waitresses, were the property of plaintiffs, a part of the gross receipts from sales of tangible personal property, and therefore properly taxed by the State Board of Equalization.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; CARTER, J., dissenting.

82 Cal.App.2d 275

## BLACKMAN et al. v. HOWES et al.

Civ. 15854.

District Court of Appeal, Second District,
Division 3, California.
Nov. 5, 1947.

**1. Appeal and error** ⚷927(3)

In determining whether judgment of nonsuit was proper, appellate court would consider every inference which could reasonably be drawn and every presumption which could fairly be deemed to arise in support of plaintiffs, accept all evidence adduced, direct, indirect and circumstantial tending to sustain plaintiffs' case, and disregard all inconsistencies and conflicting evidence.

**2. Fraud** ⚷58(1)

Proof that defendant made a false representation as to a material fact knowing it to be false with intent to induce plaintiff to rely thereon and that plaintiff reasonably believed it to be true, relied thereon and suffered damage thereby establishes a cause of action for "fraud".

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

**3. Fraud** ⚷64(5)

Where facts are susceptible of opposing inferences, whether a party relied upon a false representation, notwithstanding prior information which, if investigated, might have led to discovery of falsity, is a question of fact for the trier of fact.

**4. Fraud** ⚷22(1)

Where one is justified in relying and in fact does rely upon false representations, his right of action for fraud is not destroyed because means of knowledge were open to him.

**5. Fraud** ⚷20, 50

Mere circumstance that one makes an independent investigation or consults with others does not necessarily show that he relied on his own judgment rather than upon representations of other party or raise a presumption of law to that effect so as to defeat cause of action for fraud.

**6. Fraud** ⚷20

Buyer is not chargeable with knowledge of conditions which he fails to discover because of some deception of the seller.

**7. Fraud** ⚷20

A party is precluded from asserting reliance upon a false representation only where he had the means at hand for determining its truth or falsity and resorted to such means without interference by other party, and after investigation learned that statement was false.

**8. Fraud** ⚷20

A party, having information sufficient to arouse suspicion of fraud, is not precluded from recovery where other party, knowing the facts, successfully allays the suspicion by a false representation.

**9. Fraud** ⚷36

Negligence of plaintiff is no defense to action for fraud based on an intentional misrepresentation.

**10. Fraud** ⚷22(1)

A buyer need not employ experts to investigate matters of a technical nature as to which seller has full knowledge and buyer none, and if for such reason the investigation is incomplete, buyer may show that he relied upon seller's representation as to the matters which he did not investigate.

**11. Fraud** ⚷11(1)

Vendors' statement that lot they sought to sell was not a filled lot was a "representation of a fact" upon which action for fraud could be based and not merely an "expression of opinion".

See Words and Phrases, Permanent Edition, for all other definitions of "Expression of Opinion" and "Representation of Fact".

**12. Fraud** ⚷64(5)

In passing on motion for judgment of nonsuit in action by purchasers for fraud in sale of realty, trial court could not indulge in any inference that purchasers did not rely upon vendors' false representation that lot in question was not a filled lot or that purchasers were indifferent to ordinary means of information as to truth or falsity of representation in view of evidence that vendors in response to direct inquiry assured purchasers lot was not filled and fact that lot was filled was not obvious to anyone.

**13. Fraud** ⚷=20

False representation that lot was not filled made by vendors in response to direct inquiry was calculated to induce those to whom it was made to purchase the lot and where they did in fact make the purchase, a strong inference could be drawn that the representation induced such purchase.

◆

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by Myron Blackman and others against Oren Howes and others to recover damages for fraud in sale of realty. From a judgment of nonsuit, plaintiffs appeal.

Judgment reversed.

A. J. Blackman, of Los Angeles, for appellants.

W. L. Pollard and Guy F. Bush, both of Los Angeles, for respondents.

VALLEE, Justice pro tem.

Appeal from a judgment of nonsuit in an action for damages sustained by reason of fraud in the sale of real property. Appellants alleged that respondents induced them to purchase a vacant lot upon the false and fraudulent representation that the lot was a solid lot, when in fact it was a filled lot, with resultant damage. The trial was without a jury.

The sole question here is whether there is any evidence which required the denial of the motion for a judgment of nonsuit and it may be narrowed to the query: Is there any evidence that appellants relied upon the false and fraudulent representation of respondents that the lot was not a filled lot?

[1] In stating the evidence and in determining whether the judgment of nonsuit was proper, we accept as proved every fact which the evidence tended to prove and which was essential to be proved to entitle appellants to recover, we resolve every conflict in the evidence in favor of appellants, consider every inference which can reasonably be drawn and every presumption which can fairly be deemed to arise in support of appellants, accept all evidence adduced, direct, indirect and circumstantial, which tends to sustain appellants' case, and disregard all inconsistencies and conflicting and contradictory evidence. Lashley v. Koerber, 26 Cal.2d 83, 84, 156 P.2d 441; Kirk v. Los Angeles Ry. Corp., 26 Cal.2d 833, 837, 161 P.2d 673, 164 A.L.R. 1. It seems a work of supererogation to have to state this elemental and oft-repeated principle. We do so because respondents argue as though we had before us an appeal from a judgment, supported by findings of fact and conclusions of law, which, in turn, are supported by the evidence.

Respondents Howes were the owners of a lot. They knew it was a filled lot. They employed respondent Deutsch, a licensed real estate broker, to sell the lot and told Deutsch at the time he was employed that it was a filled lot. Deutsch put a "For Sale" sign on the lot. Appellants had previously employed Antonson, a licensed real estate broker, to find a vacant lot for them. Antonson's wife, a licensed real estate saleswoman, worked for him. Antonson and his wife saw Deutsch's sign and showed appellants the lot. Negotiations for purchase and sale then began between the Antonsons and Deutsch. The entire transaction was handled by and between Deutsch and the Antonsons. The principals did not have any intercourse, one with the other, during the transaction. To all outward appearances the lot was a solid lot, not a filled lot. The fact that it was a filled lot could only be discovered by boring into the soil. During the negotiations, appellant Mrs. Blackman was told by a "neighbor," someone living in the vicinity of the lot, that the lot was a filled lot, that "it had been used as a dump and later filled in" and "not to buy it because it was a dump." Mrs. Blackman told her husband that the "neighbor" had told her the lot was filled. This was before appellants made any agreement to purchase the lot and before they paid any money for the lot. Upon getting this information from the "neighbor," Mrs. Blackman immediately told Mrs. Antonson what the "neighbor" had told her and asked Mrs. Antonson to call Deutsch at once and ascertain whether the information was true. Mrs. Antonson then called Deutsch on the telephone and said " 'Mr. and Mrs. Blackman would like to know if this lot is a filled lot' and 'I think it is,' and Mr. Deutsch said, 'No, anybody can see it isn't a filled lot.' " Mrs. Antonson also testified that Deutsch said, "No, it is not a filled lot." Mrs. Antonson relayed the statement of Deutsch to appellants. Appellants testified that they relied upon Deutsch's statement that the lot was not a filled lot. Thereafter, they purchased the lot, paying $7500 for it. They would not have purchased the lot had the representation not been made. Appellants employed a designer and builder to design and build a residence for them on the lot. Plans were prepared. They called for a foundation on a solid lot. When the builder started to excavate he discovered that the lot was filled and so informed appellants. This was the first time that appellants had definite information that the lot was filled. The plans had to be revised and the character of the foundation changed to fit the unanticipated conditions and the requirements of the Department of Building and Safety of the city of Los Angeles. The value of the lot filled was between thirty and forty percent less than the value of the lot unfilled, terra firma. Appellants went to considerable expense in redesigning a house and building on the filled lot which they would not have had to incur if the lot had been unfilled.

Respondents contend, in support of the judgment, that the statement of Deutsch to Mrs. Antonson was simply an expression of opinion, and that appellants had no right to rely, and did not rely, upon the statement of Deutsch.

[2-11] A cause of action for fraud was proven if there is evidence that a material representation was made, that it was false, that respondents knew it to be false, that it was made with intent to induce appellants to rely upon it, that appellants reasonably believed it to be true, that it was relied upon by appellants and that appellants suffered damage thereby. All of these elements are present either by direct evidence or by reasonable inference. When the facts are susceptible to opposing inferences, whether a party relied upon a false representation, notwithstanding prior information which, if investigated, might have led to discovery of the falsity of the representation, is itself a question of fact to be determined by the trier of fact. Hobart v. Hobart Estate Co., 26 Cal.2d 412, 440, 159 P.2d 958. Where one is justified in relying, and in fact does rely, upon false representations, his right of action is not destroyed because means of knowledge were open to him. In such a case, no duty in law is devolved upon him to employ such means of knowledge. Teague v. Hall, 171 Cal. 668, 671, 154 P. 851. "The mere circumstance that one makes an independent investigation or consults with others does not necessarily show that he relied on his own judgment rather than upon the representations of the other party, nor does it give rise to a presumption of law to that effect." Sullivan v. Helbing, 66 Cal.App. 478, 483, 226 P. 803, 805. A buyer is not chargeable with knowledge of conditions which he fails to discover because of some deception of the seller. Hanscom v. Drullard, 79 Cal. 234, 237, 21 P. 736; Carpenter v. Hamilton, 18 Cal.App.2d 69, 72, 62 P.2d 1397. When, as here, the buyer has only a suspicion of fraud and the seller lulls the buyer into inaction by a false representation, the seller will not be permitted to assert that the buyer lost his rights by accepting the assurance of the seller that there was no fraud. Kalkruth v. Resort Properties, Ltd., 57 Cal.App.2d 146, 150, 134 P.2d 513. It is only where a party to whom a representation is made has the means at hand for determining its truth or falsehood and resorts to such means, without interference by the other party, and after investigation learns that the statement was false, that he is precluded from asserting that he relied upon the representation. This is so because his investigation and ascertainment of the facts exclude the idea that any reliance was placed upon the falsehood. The law presumes, in such a case, that the party relied upon his own investigation and not upon the representations of the party with whom he is dealing. This rule, urged by respondents as applicable here, is stated in Car-

penter v. Hamilton, supra, 18 Cal.App.2d 69, at page 71, 62 P.2d 1397, at page 1399: "But the right to rely upon the representations, of course, does not exist where a purchaser chooses to inspect the property before purchase, and, in making such inspection, learns the true facts, for the obvious reason that he has not been defrauded unless he has been misled, and he has not been misled where he has acted with actual or imputed knowledge of the true facts. Ruhl v. Mott, 120 Cal. 668, 53 P. 304; Gratz v. Schuler, 25 Cal.App. 117, 142 P. 899; Oppenheimer v. Clunie, 142 Cal. 313, 75 P. 899." There was no such state of facts before the trial court. Appellants could not and did not, by inspection of the property before purchase, learn the true facts. A party, having information sufficient to arouse suspicion, is not precluded from recovery where the seller knows the facts and successfully allays the suspicion by a false and fraudulent representation. Feckenscher v. Gamble, 12 Cal.2d 482, 495, 85 P.2d 885; Kramer v. Musser, 57 Cal.App.2d 942, 136 P.2d 74. Negligence of a plaintiff is no defense to an intentional misrepresentation. Seeger v. Odell, 18 Cal.2d 409, 414, 115 P.2d 977, 136 A.L.R. 1291; Security-First Nat. Bank v. Earp, 19 Cal.2d 774, 777, 122 P.2d 900. Respondents' assurance could reasonably be found to have allayed any suspicion of appellants that the lot was filled. The applicable rule was stated in Dow v. Swain, 125 Cal. 674, 683, 58 P. 271, quoted with approval in Shearer v. Cooper, 21 Cal.2d 695, at page 704, 134 P.2d 764, 769: "'Every case must be judged for itself, and the circumstances which warrant or forbid relief cannot be scheduled. If the seller knows the facts [and to that should be added, or if he represents them as known to him], and the buyer is ignorant, and to the knowledge of the seller the buyer relies upon the representations,' there is no reason why relief should not be granted, 'although an imperfect examination was made. It may have been imperfect because of the representations.' See, also, Neff v. Engler, 205 Cal. 484, 271 P. 744." The misrepresentation was not such that its falsity must have been so obvious to the appellants as to preclude any justifiable reliance thereon by them. Seeger v. Odell, supra, 18 Cal.2d 409, 414, 115 P.2d 977, 136 A.L.R. 1291. The truth of the representation could be checked accurately only by the employment of experts. A buyer is not required to employ experts to investigate matters of a technical nature, as to which the seller has full knowledge and the buyer none, and if for this reason the investigation is incomplete he (the buyer) may show that he relied upon the representation as to the matters which he did not investigate. Dow v. Swain, supra, 125 Cal. 674, 58 P. 271; Fay v. Mathewson, 179 Cal. 318, 180 P. 939; Stockton v. Hind, 51 Cal.App. 131, 196 P. 122; Carpenter v. Hamilton, supra, 18 Cal.App.2d 69, 72, 62 P.2d 1397; Kramer v. Musser, supra, 57 Cal.App.2d 942, 946, 136 P.2d 74. The statement of Deutsch to Mrs. Antonson was not simply an expression of opinion. It was a representation of a fact, that the lot was not a filled lot.

[12, 13] In passing upon the motion for judgment of nonsuit, the trial court, with the evidence recited before it, could not indulge in any inference that appellants did not rely upon respondents' false and fraudulent representation. Neither, in view of the evidence, could it indulge in any inference that appellants were careless or indifferent to ordinary and accessible means of information as to the truth or falsity of the representation. The evidence is without conflict that the fact that the lot was filled was not obvious to anyone. It may reasonably be inferred that the false representation of respondents was made for the purpose of discouraging further investigation by appellants and for the purpose of inducing them to rely upon the representation alone. After respondents falsely stated to appellants that the lot was not a filled lot, appellants paid respondents $7500, had a house designed for construction on a solid lot, and began excavating for foundations sufficient only for that house on a solid lot. From this evidence alone it may be inferred reasonably that respondents' false representation, in fact, did discourage the making of an investigation and that it was of such a nature as to lull appellants into a state of inaction. Appellants testified that they believed and relied upon respondents'

representation that the lot was not filled and testified that they would not have purchased the lot had they known it was filled. The representation made to appellants was one calculated to induce them to buy the lot and they did, in fact, make the purchase. Under these circumstances a strong inference may be drawn that the representation induced appellants to make the purchase. De Garmo v. Petitfils Confiserie, 93 Cal. App. 261, 269, 269 P. 692; Divani v. Donovan, 214 Cal. 447, 453, 6 P.2d 247; Pohl v. Mills, 218 Cal. 641, 652, 24 P.2d 476. Appellants had a right to rely upon respondents' representation and not make an investigation. There was no duty resting upon them to make an investigation after the positive, unequivocal statement of respondents that the lot was not a filled lot.

We conclude that the court erred in granting the motion for judgment of nonsuit.

Judgment reversed.

SHINN, Acting P. J., and WOOD, J., concur.

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### SECOND SERIES

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30 Cal.2d 799

**ELEVATOR OPERATORS AND STARTERS' UNION, LOCAL NO. 117, OF SAN FRANCISCO, et al. v. NEWMAN.**

**NEWMAN v. ELEVATOR OPERATORS AND STARTERS' UNION, LOCAL NO. 117 OF SAN FRANCISCO, et al.**

**S. F. 17248, 17577.**

Supreme Court of California.

Oct. 28, 1947.

Rehearing Denied Nov. 24, 1947.

**1. Principal and agent** 🔑33

One who has appointed an agent for a specified term is not precluded from revoking the agency. Civ.Code, § 2356.

**2. Associations** 🔑18

An unincorporated association may remove officers who have lost confidence of members or who refuse to conform to policies established by the association. Civ. Code, § 310(1).

**3. Trade unions** 🔑5

Where amendment to constitution and by-laws of union provided that only members who were employed as elevator operators under jurisdiction of union should be allowed to hold office in union with exception of members filling a full-time office, the amendment applied to unexpired terms of officers holding office at time of adoption of amendment.

**4. Principal and agent** 🔑33

Save in case of an agency coupled with an interest, a principal has power to revoke an agent's authority at any time before agent has completed performance. Civ.Code, § 2356.

**5. Principal and agent** 🔑41

If principal curtails right of revocation of agent's authority by contracting not to revoke authority for a definite time, a revocation of authority within the designated period renders principal liable for damages.

**6. Mandamus** 🔑3(7)

Mandamus does not lie when there is no cause of action for reinstatement to a position but merely a claim for damages for breach of employment contract.

**7. Set-off and counterclaim** 🔑29(2, 3)

In action by union to secure possession of union books and records and for damages for detention of property, defendant's claim for back salary on ground that union had breached contract of employment was proper subject of counterclaim and cross-complaint. Code Civ.Proc. §§ 438, 442.

**8. Set-off and counterclaim** 🔑29(1)

The manner in which complaint is drawn is not conclusive, but facts surrounding cause of action and not form of complaint are determinative of what constitutes transaction, for purpose of counterclaim and cross-complaint. Code Civ.Proc. §§ 438, 442.

**9. Appeal and error** 🔑1078(1)

Issues which were not tried or briefed by the parties would not be considered on appeal.

**10. Trade unions** 🔑5

Where constitution and by-law of international union provided that any officer or member who has a grievance in any local union may appeal to general executive board and former officer's appeal from decision of local union vacating office had been unconditionally denied, resort to court on claim for damages for breach of contract was not precluded on ground that remedies within union had not been exhausted.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy and Sylvain J. Lazarus, Judges.

Action by Elevator Operators and Starters' Union, Local No. 117, of San Francisco, Cal., and others, against Frederick Newman to secure possession of certain union books and records and for $5,000 damages. The defendant filed a counterclaim and cross-complaint for payment of salary, for declaratory relief, and for an injunction. Action by Frederick Newman against Elevator Operators and Starters' Union, Local No. 117, of San Francisco, Cal., and others, for writ of mandate to compel the union to admit plaintiff to office of treasurer, and to compel payment of salary. From adverse judgments, Frederick Newman appeals.

Judgment in action by the union reversed with directions, and judgment in the mandamus proceeding affirmed.

Prior opinion, 180 P.2d 42.

Melbert B. Adams, of San Francisco, for appellant.

Albert Picard and Francis McCarty, both of San Francisco, for respondents.

Charles P. Scully, of San Francisco, amicus curiae for respondents.

TRAYNOR, Justice.

Respondent union (hereinafter called the union) is an unincorporated association whose constitution and by-laws make it an integral part of the Building Service Employees' International Union. Appellant Newman has been a member of the union since its organization. He was elected its first treasurer, and served in this capacity on a part-time basis until the present controversy. He was last elected on December 14, 1943, for a two-year term expiring December 31, 1945. Section 9 of Article 4 of the constitution and by-laws of the union provides that the treasurer shall be elected for a two-year term, and that all officers of the union shall hold office until their successors are duly elected and qualified. During his last term appellant received a salary of $70 per month, paid to him until May 15, 1944.

On April 11, 1944, the members of the union adopted an amendment to the constitution and by-laws providing "Only members who are employed as elevator operators under the jurisdiction of the union * * * shall be allowed to hold office in the union with the exception of members filling a full-time office. This section to become effective (30 days) after passage by the membership." Previously there was no requirement that officers of the union be employed as elevator operators. Appellant, who was not employed as an elevator operator, opposed the adoption of the amendment and refused thereafter to take such employment. A controversy arose between him and the union as to whether he was entitled to hold the office until the end of the term for which he was elected without complying with the requirement established by the amendment. Upon the expiration of the thirty-day period the union declared appellant's office vacant and ceased to pay appellant the salary of treasurer. On May 23, 1944, a new election was held and another member of the union was elected treasurer. Appellant refused to yield to the election of a new treasurer, maintaining that until the end of his term he was the duly elected and qualified treasurer of the union and as an incident to his office was entitled to draw the salary attached thereto. He refused to give up possession of the books, records, and papers of the union in his custody. Officers of the union, acting on behalf of the union, brought an action against him to recover them and $5,000 damages for detention of its property. Appellant filed a counterclaim for payment of his salary. He also filed a cross-complaint praying for payment of his salary, for declaratory relief that he was the duly elected, acting, and qualified treasurer of the union, and for an injunction to prevent the union from paying the treasurer's salary to the newly-elected treasurer. The trial court gave judgment for the union for the possession of the books, records, and papers in appellant's custody. It refused to award damages and struck appellant's counter-claim and cross-complaint. It stated in its findings: "That none of the matters set forth in the counterclaim or cross-complaint of the defendant constitutes a counterclaim or cross-complaint to the amended complaint herein; that subdivision (e) of section 3 of the by-laws of the plaintiff union reads as follows: 'The treasurer shall keep all records required to be kept by him in files provided for the purpose by the union. Such files shall be kept in the office of the union.' That without regard to whether said defendant is or is not the treasurer of said union the said plaintiff is entitled to judgment herein for the recovery of the personal property set forth in the amended complaint herein; that the said counterclaim or cross-complaint have been stricken out by this court without prejudice to further procedure." Defendant and cross-complainant appeals.

Since the judgment in the action brought by the union failed to determine whether appellant was the treasurer of the union for the remainder of his term, appellant petitioned for a writ of mandamus to compel the union to admit him "to the use and enjoyment of the office of treasurer of respondent union and to compel payment unto petitioner of the salary due him as such." The trial court issued the alternative writ, which was discharged upon trial of the case. In its findings the trial court stated among other things that the amendment requiring that part-time officers of the union be employed as elevator operators affected the tenure of petitioner's office, that this amendment was a "legal and valid amendment of the constitution and by-laws of said union," and that petitioner was "not entitled to the sum of seventy (70) dollars or any other amount per month or any amount at all from May 15, 1944, to the date of judgment herein or for any other period." Petitioner appeals. His appeals from the judgment in the mandamus proceeding and from the judgment in the first action have been consolidated.

Since the term for which appellant was elected expired on December 31, 1943, there is no longer any controversy as to whether he is now entitled to reinstatement as treasurer of the union. The issues have therefore become moot except for appellant's claim for back salary for the part of his term of office that was unexpired when the union ceased to pay his salary.

Appellant contends that the back salary is due him on the ground that he was the treasurer of the union until the end of the term for which he was elected, that he was entitled to reinstatement to his office, and that as an incident to his right to reinstatement he was entitled to receive the salary connected with the office.

In his pleadings as well as in his briefs on appeal appellant contended that the amendment is invalid on the ground that it was not proposed to the members of the union in the manner required by the constitution and by-laws of the union and the international union. The trial court found in the mandamus proceeding, however, that on April 11, 1944, the union "duly and regularly amended" its constitution and by-laws by adopting the amendment in question and that petitioner was estopped from objecting to the method of adoption thereof on the ground that for many years he had "acquiesced in said method of amendment and voted for and assisted in the adoption of amendments of the said constitution and by-laws in the said same manner, and that by amendments made in the same manner the term of office of treasurer was increased from one (1) year to two (2) years while petitioner held said office, and in the same manner an amendment was adopted pursuant to which respondent union increased the salary of petitioner during his term of office and said petitioner accepted the increased salary and did not contend that the amendment pursuant to which the union so acted was not valid or make any objections to the adoption thereof." In the course of the appellate proceedings appellant waived his objection to the manner of adoption of this amendment. We assume, therefore, that the amendment was properly adopted.

Appellant relies on cases holding that an officer of an unincorporated association elected for a specified term of office cannot be removed from his office upon charges brought against him without having been given notice of the charges and an opportunity to reply thereto. Bentley v. Hurley, 222 Mo.App. 51, 299 S.W. 604; Goller v. Stubenhaus, 77 Misc. 29, 134 N.Y.S. 1043, 1050: see 7 C.J.S., Associations, § 19.

Respondents contend that it is immaterial whether appellant could have been removed from his office for alleged misconduct without adequate cause and proper investigation, since the amendment merely placed a condition upon his continuance in office that was reasonably connected with the purposes of the union, and that rights to an office of an unincorporated association are subject to the right of the association to amend its by-laws to alter the terms and conditions of holding the office. In Fugure v. Mutual Soc. of St. Joseph, 46 Vt. 362, 368, cited by respondents, the court recognized that plaintiff's right to a widow's allowance of twenty-five cents per day under the by-laws of an unincorporated association was validly limited by an amendment to the by-laws, adopted after plaintiff's husband joined the association, whereby a ceiling was placed on the amount of allowance available to a widow. The court based its holding, however, on the charitable character of the allowances, stating that they "were derived solely from voluntary assessments upon the members of the society. * * * And experience might prove that, without assessments greater than the members could bear, there must be a limitation to the stipend to the widows." This case can hardly be regarded as a precedent with regard to rights not based on charitable contributions. In Stohr v. San Francisco Musical Fund So., 82 Cal. 557, 560, 22 P. 1125, on which respondents also rely, an unincorporated association amended its by-laws regarding the period for which members were entitled to sickness benefits after plaintiff had become ill. It was held that plaintiff's right to benefits was a contract right, which under the terms of the contract was subject to changes without his consent, since the by-laws reserved the power to the members to amend them; and that the rule of law allowing such amendments "must be held to enter into and form a part of the contract." 82 Cal. 557, 560, 22 P. 1125, 1126. The decision in that case was based on the fact, however, that the by-laws did not specify the period during which a member was to receive sickness benefits. The court clearly distinguished the case from cases in which the member had acquired a right to sickness benefits for a specified period of time. 82 Cal. 557, 561, 562, 22 P. 1125. Since appellant's term of office was specified in the constitution and by-laws of the union, there is no basis for applying the holding in Stohr v. San Francisco Musical Fund Soc., supra. Nor do Bowie v. Grand Lodge, 99 Cal. 392, 34 P. 103, or Robinson v. Templar Lodge, 117 Cal. 370, 49 P. 170, 59 Am. St.Rep. 193, also relied on by respondents, support the contention that a right acquired under the by-laws of an unincorporated association can be retroactively defeated by an amendment to the by-laws even though the right was definitely defined and acquired before the adoption of the amendment to the by-laws, and no power was reserved to the members either by a special provision in the by-laws or by a rule of law to affect that right. See also, Wist v. Grand Lodge, 22 Or. 271, 29 P. 610; 7 C.J.S., Associations, § 12, p. 34.

There is an important difference, however, between a right of a member of an unincorporated association under the constitution and by-laws of an association to receive benefits and the right of an officer for a specified term to hold the office to which he was elected. An unincorporated association exists to carry out policies formulated by the majority of its members. The right of the members to determine policies would be vitiated if officers could continue in office even though a conflict developed between them and the members over policy. If an officer had a vested right to his office, superior even to the power of the members to amend the constitution and by-laws, he would represent the association even though he opposed the policies of its members or lacked the very qualifications the members require as a matter of policy.

[1, 2] The law does not prevent one who has appointed an agent for a specified term from revoking the agency. Civ.Code, sec. 2356; Long Beach Drug Co. v. United Drug Co., 13 Cal.2d 158, 174, 88 P.2d 698, 89 P.2d 386; Stoll v. Stoll, 5 Cal.2d 687, 691, 56 P.2d 226; 1 Cal.Jur. 702; Rest., Agency, Sec. 118(b). There is even more reason to allow an unincorporated association to remove officers who have lost the

confidence of the members or who refuse to conform to the policies established by the association. Appellant refers to the fact, however, that labor unions have grown in strength of recent years, and contends that they should have no greater power in the removal of officers than corporations have in the removal of directors. He relies on the common-law rule that in the absence of a provision in the by-laws authorizing the shareholders of a corporation to shorten the term of office of directors, they have no power, except for cause, to remove directors before the expiration of their specified terms. Ballantine, Corporations, 2d Ed., 434; 2 Fletcher, Cyc. Corp. Secs. 352, 356, 357. There was no such rule at common law with regard to the officers of unincorporated associations. There is no reason now to adopt such a rule for such associations, for the common law rule has been changed for corporations in this state. The rule as it applied to corporations was criticized as unsound on the ground that "the shareholders, although the sovereign owners, must submit to the control of their corporation being retained by the elected directors during their term of office, even though they have become entirely unsatisfactory." Ballantine, Id., 434. This state abandoned the rule by providing in Section 310(1) of the Civil Code: "The entire board of directors or any individual director may be removed from office by a vote of shareholders holding a majority of the outstanding shares entitled to vote at an election of directors." Other states have adopted similar statutes. Ballantine, Id., 435. The policy that prompted abandoning the common-law rule as to the removal of corporate directors applies with equal force to officers of unincorporated associations.

[3] Appellant contends that the amendment should be interpreted as applying only to part-time officers taking office after its passage, since a by-law, like a statute, will not be construed to operate retrospectively unless it expressly so provides. See, 6a Cal.Jur. 323. It appears from the terms of the amendment, however, that it applies to the unexpired terms of officers holding office as well as to officers taking office in the future, for it provides that it shall take effect thirty days after its passage and that only members employed as elevator operators shall be allowed "to *hold* any office in the union with the exception of members filling a full time office." (Italics added.) Moreover, those who proposed the amendment and assisted in its adoption have construed it as applying to officers holding office at the time of the adoption of the amendment as well as to officers taking office subsequently thereto. The two part-time officers besides appellant who were not employed as elevator operators voted for the amendment and resigned during the thirty-day period specified by the amendment.

[4, 5] It does not follow, however, that appellant is not entitled to back salary because the union had power to remove him from his office. Even though he was not entitled to reinstatement to his office and to his salary as an incident to holding the office, the exercise of the power to remove him from his office before the expiration of the specified term for which he was elected could constitute a breach of a contract of employment. As this court said with regard to the revocation of the authority of an agent: "Save in the case of an agency coupled with an interest, a principal has the *power* to revoke an agent's authority at any time before the agent has completed performance. Civ.Code, § 2356; Flanagan v. Brown, 70 Cal. 254, 11 P. 706; Parke v. Frank, 75 Cal. 364, 17 P. 427; Blumenthal v. Goodall, 89 Cal. 251, 26 P. 906; 1 Cal. Jur. p. 705. A principal may, however, curtail his *right* of revocation by contracting not to revoke the authority for a definite time. If the principal does so contract, he still retains the power to terminate the agency, and the termination cannot be prevented by the agent, but a revocation of authority within the designated period renders the principal liable for damages for the violation of a legal right of the agent, just as in the case of any other breach of contract. Parke v. Frank, supra; Blumenthal v. Goodall, supra; Ropes v. John Rosenfeld's Sons, 145 Cal. 671, 79 P. 354; Sill v. Ceschi, 167 Cal. 698, 140 P. 949; Boehm v. Spreckels [183 Cal. 239], 191 P. 5." Roth v. Moeller, 185 Cal. 415, 418, 197

P. 62, 63; Stoll v. Stoll, 5 Cal.2d 687, 691, 56 P.2d 226; Long Beach Drug Co. v. United Drug Co., 13 Cal.2d 158, 174, 88 P.2d 698, 89 P.2d 386; see, 2 Mechem Agency, Sec. 568. In some states statutes empower banks or other private corporations to dismiss officers or other employees at pleasure. There is a conflict of authority whether such a statute, in the absence of special provisions, should be construed to mean that the corporation can exercise its power of removal only subject to liability for damages to officers or employees employed for specified terms. Cox v. First Nat. Bank, 10 Cal.App.2d 302, 305, 52 P.2d 524; In re Paramount Publix Corp., 2 Cir., 90 F.2d 441, 111 A.L.R. 889 and cases there cited; see, Ballantine, Corporations, 2d Ed., 437; 39 Colum.L.Rev. 353; 50 Harv.L.Rev. 418; 47 Yale L.J. 1079, 1081: Unif. Business Corp. Act, sec. 32.

The question arises in the present case whether the rule empowering an unincorporated association to remove officers elected for a specified term makes the contract of employment implied in the election to office terminable at the pleasure of the association, in the absence of a special contract that the officer will be employed for the term for which he was elected. There is also the question whether appellant had a right to a fixed salary or whether his salary was subject to the discretion of the union. The constitution and by-laws of the union provide that "The salaries of officers and committees shall, upon the recommendation of the Executive Board be fixed and determined by the Union." Sec. 5 of Art. IV. It is contended that the salaries can be revised upward or downward at any time and that since the union could have decided that the office should carry no salary, appellant cannot recover damages. This court cannot determine these questions on this appeal.

[6] Appellant's claim for back salary was tried only in the mandamus proceeding. His claim was based, not on breach of contract, but on the theory that he had a right to reinstatement to the office. It is settled that mandamus does not lie when there is no cause of action for reinstatement to a position, but merely a claim for damages for breach of contract. Irvine v. Gibson, 19 Cal.2d 14, 16, 118 P.2d 812; McPherson v. City of Los Angeles, 8 Cal.2d 748, 749, 68 P.2d 707; Northrup v. Haynes, 15 Cal.App.2d 665, 666, 59 P.2d 1056; Coombs v. Smith, 17 Cal.App.2d 454, 455, 62 P.2d 380; see 34 Am.Jur. 849.

[7, 8] In the action brought by the union, appellant based his claim for back salary in his cross-complaint not only on the ground that he had a right to be reinstated as treasurer and that back salary was due him as an incident to that right, but also on the ground that the union had breached a contract of employment. Such a claim was a proper subject of a counter-claim and a cross-complaint. "Under the 1927 amendment to section 438, Code of Civil Procedure, the sole requisites of a counterclaim are that it 'must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action.' Terry Trading Corporation v. Barsky, 210 Cal. 428, 292 P. 474, 477; Luse v. Peters, 219 Cal. 625, 28 P.2d 357. Upon counterclaim a defendant may recover damages exceeding the plaintiff's demand. Sections 626, 666, 857a, Code Civ. Proc." Todhunter v. Smith, 219 Cal. 690, 692, 693, 28 P.2d 916, 918; see 16 Cal. L. Rev. 363, 366. In the present case appellant's claim for back salary tended to diminish or defeat the union's recovery of money damages allegedly sustained by the detention of its books, records, and papers. Such a claim was also a proper subject of a cross-complaint. Section 442 of the Code of Civil Procedure provides: "whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint." Respondents contend that the amended complaint and the cross-complaint did not relate to the same transaction, on the ground that the amended complaint merely alleged that the union was the owner of the books, records and papers mentioned in the action, that defendant had possession there-

of, that he refused to deliver possession to the union, and that it did not mention that appellant was the treasurer of the union or that he was removed from his office. It is settled, however, that "The manner in which the complaint is drawn is not conclusive. The facts surrounding the cause of action and not the form of the complaint are determinative of what constitutes the transaction. Hanes v. Coffee [212 Cal. 777, 300 P. 963]; Story & Isham Co. v. Story, 100 Cal. [30] 31, 34 P. 671; Terry Trading Co. v. Barsky, 210 Cal. 428, 292 P. 474." California Trust Co. v. Cohn, 214 Cal. 619, 625, 7 P.2d 297, 299; Martin v. Hall, 219 Cal. 334, 337, 26 P.2d 288. In the present case the facts underlying the action for recovery of the books, records, and papers of the union, and for money damages were the same as those on which appellant based his claim for back salary, namely, appellant's removal from office and his refusal to concede that the union could deprive him of the benefits thereof within the specified term for which he was elected.

[9] The trial court's decision to strike appellant's counter-claim and cross-complaint denied appellant a trial of his claim for damages for breach of contract. This claim involves issues of fact, and we cannot determine the merits of the claim on this appeal without depriving the parties of their right to a trial of these issues. Moreover, the question whether appellant has a claim for damages for breach of contract has not been briefed by the parties. The briefs relate only to appellant's right to reinstatement to the office and the claim for back salary that would follow from the existence of such right.

[10] There is no merit in respondent's contention that appellant has failed to exhaust his remedies within the union. Article XVI of the constitution and by-laws of the international union provides that "Any officer or member who has a grievance or believes an injustice has been done in any way in any local union may appeal to the General Executive Board." Pursuant to this provision appellant appealed from the decision of the union vacating his office, and his appeal was unconditionally denied. It would be futile to appeal to the same board for damages on the ground that his removal from office constituted a breach of contract. Nissen v. International Brotherhood, 229 Iowa 1028, 295 N.W. 858, 141 A.L.R. 598; Lo Bianco v. Cushing, 115 N.J. Eq. 558, 171 A. 778; Heasley v. Operative Plasterers and Cement Finishers' International Association, 324 Pa. 257, 188 A. 206, 168 A.L.R. 1473.

In case No. S.F. 17577 (mandamus proceeding) the judgment and order denying the motion to vacate the judgment are affirmed. In case No. S.F. 17248 (action on behalf of the union) the judgment is reversed with directions to allow the filing of defendant's counter-claim and cross-complaint and to proceed to a trial of the single issue of defendant's claim for back salary.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.

82 Cal.App.2d 305

## In re TUBBS' ESTATE.
## WAAGE v. TUBBS.

Civ. 15995.

District Court of Appeal, Second District, Division 2, California.

Nov. 6, 1947.

**1. Appeal and error** ⚷712

Matters not in the record may not be considered on appeal.

**2. Executors and administrators** ⚷109(1), 497

Where special proceeding for taking of deposition was instituted and carried on by one personally prior to commencement of probate proceedings in which he was appointed administrator, cost of taking of depositions could not be charged against estate and neither administrator nor his attorneys were entitled to extraordinary fees in that behalf. Code Civ. Proc. §§ 2083–2089.

**3. Executors and administrators** 🔑497

Where person subsequently appointed administrator and his attorneys were correctly informed that maker of trust deed in decedent's favor owned note and trust deed, there was no occasion for taking of a deposition to ascertain whereabouts of deed of trust and of determining whether it could be claimed as an asset of decedent's estate, and no extraordinary fees in that behalf would be allowed to administrator or his attorneys. Code Civ. Proc. §§ 2083–2089.

**4. Executors and administrators** 🔑497

Where interview with person who was subsequently appointed administrator of decedent's estate and taking of deposition for purpose of perpetuating testimony occurred prior to filing of petition for letters of administration, they were not a part of the proceedings in administration of the estate and no extraordinary fees could be allowed therefor. Code Civ. Proc. §§ 2083–2089, Probate Code, §§ 902, 910.

**5. Executors and administrators** 🔑109(1), 111(2), 497

An administrator is not entitled to recover from estate any expenses incurred when taking steps to apply for letters of administration, and neither administrator nor his attorneys are entitled to allowances for extraordinary services performed prior to the initiation of probate proceedings. Probate Code, §§ 902, 910.

**6. Evidence** 🔑20(2)

It is common knowledge of which the court may take judicial notice that banks and trust companies are experienced in the matter of conducting foreclosure sales under trust deeds.

**7. Executors and administrators** 🔑501

Evidence showed that attorney for administrator did not assist trustee in the foreclosure of deed of trust and that attorney was not entitled to extraordinary fees in that behalf.

**8. Executors and administrators** 🔑497

Where person claiming to own trust deed and note made in favor of decedent inclosed with request a form of assignment and release reciting the date, volume, and page of record of deed of trust, no extraordinary allowance could be made to administrator or attorneys for services performed in searching records in order to find the record of deed of trust involved.

**9. Executors and administrators** 🔑497

Special fees for services rendered in ascertaining whether deed of trust was barred by statute of limitations could not be allowed administrator's attorneys, since only a casual examination of the digest to determine that it was valid and enforceable was required.

**10. Executors and administrators** 🔑497

Services performed in locating assets of the estate are included in the ordinary services of an executor and extra compensation is not allowable.

**11. Executors and administrators** 🔑497

Where services rendered in relation to inheritance taxes were minor in character they were compensated by the statutory fees, and claims for special allowance should be disallowed. Probate Code, § 902.

**12. Executors and administrators** 🔑497

The allowance of more than half the value of distributable estate for alleged extraordinary services performed by administrator and his attorneys was an abuse of discretion, and statutory amounts awarded were sufficient where services were not rendered for the estate or were unnecessary or of an ordinary nature.

◆

Appeal from Superior Court, Los Angeles County; Raymond McIntosh, Judge.

Proceeding in the matter of the estate of George E. Tubbs, deceased, wherein William Ira Tubbs filed petition for an order and decree of settlement of account and final distribution, which was opposed by Irene Waage. From that portion of the order and decree of settlement allowing $500 to the administrator as special and extraordinary fees and $900 to his attorneys and $39.65 costs, Irene Waage appeals.

Part of order appealed from reversed.

Thompson & Thompson, Raymond G. Thompson and Wendell R. Thompson, all of Pasadena, for appellant.

Claude A. Watson and Montgomery G. Rice, both of Los Angeles, for respondent.

WILSON, Justice.

This appeal is by Irene Waage, one of the heirs of decedent, from that portion of the order and decree of settlement of account and final distribution insofar as the order allows and provides for payment of $500 to the administrator as special and extraordinary fees and $900 to his attorneys (they asked for $1500) and for $39.65 costs incurred in another proceeding to which reference will be made. The extraordinary fees petitioned for amount to more than one half the value of the distributable estate remaining after deducting the costs of administration.

Before the petition for letters of administration was filed by William Ira Tubbs he received a letter from an attorney who then represented Mrs. Waage referring to a trust deed that had been executed by her to decedent during his lifetime, stating that decedent had not signed a request for reconveyance and asking Tubbs to sign an assignment to Mrs. Waage of all his interest in the deed of trust. Tubbs conferred with his attorneys who now represent him as administrator. After one or two conferences with the attorney who had written the letter, Tubbs' attorneys advised the taking of the deposition of Mabel Inkersell, sister of Mrs. Waage, for the purpose of determining who held possession of the deed of trust. The deposition was taken pursuant to the provisions of the Code of Civil Procedure (secs. 2083–2089) relating to the perpetuating of testimony in cases where the *applicant* expects to be a party to an action. Tubbs, the applicant, and his attorneys knew that he as an individual did not expect to be a party to litigation. The attorneys advised proceeding under said sections of the code for the purpose of attempting to ascertain the whereabouts of the deed of trust and of determining whether it could be claimed as an asset of the estate of decedent.

[1, 2] Although neither the petition filed by Tubbs for the taking of Mrs. Inkersell's deposition nor the deposition itself is in the record on appeal references to the contents of both appear in respondent's brief. Matters not in the record cannot be considered on appeal. Nason v. Feldhusen, 34 Cal.App. 789, 793, 168 P. 1162; Gallatin v. Corning Irr. Co., 163 Cal. 405, 422, 126 P. 864, Ann.Cas.1914A, 74; Rogers v. Tennant, 45 Cal. 184, 186; Satterlee v. Bliss, 36 Cal. 489, 521. However it appears from the oral evidence that the application was filed by Tubbs, reciting that he expected to be a party to an action in court individually and not as administrator of the estate, and he did not refer to any contemplated probate proceeding or to the possibility that any such proceeding would be filed. Even though he had so alleged, since the special proceeding for the taking of the deposition was (1) instituted and carried on by Tubbs personally and (2) prior to the commencement of the probate proceedings, the cost of taking it cannot be charged against the estate, and neither Tubbs nor his attorneys are entitled to any extraordinary fees in that behalf.

[3] Furthermore, it appears that the deposition was unnecessary in any event. The letter from Mrs. Waage's attorney indicated, although it did not state clearly, that she was in possession of the note, and one of the attorneys for the administrator testified that in a conference with Mrs. Waage's counsel the latter said that the note and trust deed had been presented to her and that she owned them. This was sufficient information upon which an administrator could base a demand for possession. The deposition developed nothing in addition.

[4, 5] The interview which Tubbs had with his attorneys and the taking of Mrs. Inkersell's deposition for the purpose of perpetuating her testimony occurred prior to the filing of the petition for letters of administration and were not a part of the proceedings in the administration of the estate. An administrator is not entitled to recover from the estate any expenses in-

curred when taking steps to apply for letters of administration (Estate of Byrne, 122 Cal. 260, 261, 54 P. 957, 1015; Estate of Price, 136 Cal.App. 257, 259, 28 P.2d 717), and neither the administrator nor his attorneys are entitled to allowances for extraordinary services performed prior to the initiation of the probate proceedings. Probate Code, secs. 902, 910.

[6, 7] An item included in the services for which the extraordinary fees are asked relates to the foreclosure of the deed of trust. One of counsel for the administrator testified that he prepared a notice of default, made two or three visits to the office of the Title Insurance & Trust Company, although it appears that the Bank of America was the trustee, and prepared data required for the foreclosure. There is no evidence of any service rendered to the trustee that would entitle either the administrator or his attorneys to special compensation. It is common knowledge that banks and trust companies are experienced in the matter of conducting foreclosure sales under trust deeds and from the evidence of the attorney who testified it does not appear that he gave any assistance to the trustee.

[8] It is claimed that the administrator or the attorneys, or both, performed services in searching the records in the County Recorder's office for the purpose of finding the record of the deed of trust. Such search was entirely unnecessary since there was enclosed with the letter from Mrs. Waage's attorney to Tubbs a form of assignment and release which Tubbs was requested to sign reciting the date, volume and page of the record.

[9] Special fees are demanded for services rendered in ascertaining whether the deed of trust was barred by the statute of limitations. It required only a casual examination of the digest to determine that it was valid, subsisting and enforceable until paid. Welch v. Security-First Natl. Bank, 61 Cal.App.2d 632, 635, 143 P.2d 770; Hamaker v. Williams, 22 Cal.App.2d 256, 257, 70 P.2d 973; Bank of Italy v. Bentley, 217 Cal. 644, 655, 20 P.2d 940; Flack v. Boland, 11 Cal.2d 103, 106, 77 P.2d 1090; Sacramento Bank v. Murphy, 158 Cal. 390, 396, 115 P. 232; Travelli v. Bowman, 150 Cal. 587, 590, 89 P. 347; Grant v. Burr, 54 Cal. 298, 301.

[10] Services performed in locating assets of the estate are included in the ordinary services of an executor and extra compensation is not allowable. Estate of Parker, 186 Cal. 668, 670, 200 P. 619.

[11] The administrator and his counsel assert a claim for services performed in the matter of obtaining a clearance from the inheritance tax appraiser and investigation of facts relating to inheritance taxes. It is not claimed that the appointment of a tax counsel, auditor or expert was required in the preparation of inheritance tax returns, or that there was any extensive or complicated work in connection with taxes. See Prob.Code, sec. 902. The services rendered in relation to inheritance taxes were minor in character and are compensated in the statutory fees. Such claims must therefore be disallowed.

[12] Since it does not appear that either the administrator or his attorneys performed any services whatsoever in addition to the ordinary services required in the administration of an estate, the allowance of extraordinary compensation to them is unauthorized and the court abused its discretion in awarding fees in excess of the statutory amounts.

That portion of the order appealed from is reversed.

MOORE, P. J., and McCOMB, J., concur.

82 Cal.App.2d 302

**MILTON KAUFFMAN, Inc., v. SMITH.**

**Civ. 15962.**

District Court of Appeal, Second District, Division 2, California.

Nov. 6, 1947.

Hearing Denied Jan. 5, 1948.

**1. Specific performance ⚷97(1)**

Where purchaser's cash payment and deed of trust were not deposited in escrow until after filing complaint in his action for specific performance, purchaser could not maintain action because of his failure to fulfill terms of contract.

**2. Specific performance ⚷121(3)**

In action for specific performance of agreement to convey realty, evidence relating to value of the property sustained finding that consideration stipulated by contract was inadequate.

**3. Vendor and purchaser ⚷13**

The market value of property is measured by highest price estimated in terms of money which land would bring if exposed for sale in open market, with reasonable time for finding a purchaser, buying with knowledge of all uses and purposes to which property was adapted.

**4. Specific performance ⚷117**

In action for specific performance, plaintiff must allege and prove adequacy of consideration and that agreement is not as to the other party unconscionable or inequitable.

**5. Specific performance ⚷49(2), 53**

Purchaser was not entitled to specific performance of contract to convey realty where court found that stipulated consideration was inadequate and that contract had been obtained from vendor through misrepresentations.

◆

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Milton Kauffman, Inc., against Ella Judd Smith for specific performance of an agreement to convey real property. Judgment for the defendant and the plaintiff appeals.

Judgment affirmed.

Sullivan, Lane & Clarke and Robert J. Sullivan, all of Los Angeles, for appellant.

Howard F. Shepherd, of Los Angeles, for respondent.

WILSON, Justice.

This is an action for specific performance of an agreement made by respondent to convey real property to appellant. Judgment was entered in favor of respondent and appellant appeals, assigning as errors the insufficiency of the evidence to sustain several findings of fact.

By an agreement in writing respondent agreed to convey to appellant approximately 19½ acres of land in Los Angeles County for the sum of $22,000. A deposit of $1,000 was made on the purchase price at the time of the execution of the agreement. Within a few days thereafter respondent returned the deposit and notified appellant that she refused to perform the contract. The ground of refusal was that the contract was unfair, unjust and inequitable to her for the reason that the consideration agreed to be paid for the property was grossly inadequate.

[1] At the outset our attention has been called to the fact that the verified complaint alleges that pursuant to the contract of sale appellant deposited in escrow the sum of $10,000 in cash together with a deed of trust on the property securing appellant's note in the sum of $11,000. The complaint was filed on March 7, 1946. The escrow clerk who had charge of the escrow produced the escrow record and testified therefrom that the sum of $10,000 was not deposited until April 12, 1946, one month and five days after the complaint was filed, and the deed of trust was not deposited until March 29, or 22 days after the commencement of the action. This evidence was not denied. Since the cash payment and the deed of trust were not deposited in escrow until long after the complaint was filed the allegations in the verified complaint were untrue and appellant was not in a position to maintain the action for the reason that at the date of its commencement appellant had not fulfilled the terms of the contract on its part to be performed.

[2] The complaint contains an allegation that the consideration named in the agreement was the fair, just and reasonable value of the property and was otherwise in all respects fair, just and equitable. Respondent denied this allegation and alleged that at the time the agreement was executed the fair, just and reasonable value of the property was not less than $35,000.

Respondent and a bank appraiser testified that the value of the property on the date of the agreement was $30,000. Milton Kauffman, president of appellant, testified that the property was worth $800 to $1,000 an acre. There was other evidence on behalf of appellant that the price named in the contract was the fair market value of the property. On cross-examination of Kauffman it was shown that appellant had filed an action for damages for breach of the same contract wherein the verified complaint alleged the value of the property to have been $50,000 and that appellant had been damaged in the sum of $28,000, the difference between the alleged value and the contract price.

The court found that the consideration named in the agreement was not the fair, just or reasonable value of the property on the date of the agreement, and that the fair market value thereof on that date was $30,000. Appellant concedes that all conflicts in the evidence are to be resolved in favor of the judgment but argues in the same breath that the trial court ignored the evidence in favor of appellant, and that respondent's evidence as to value is based upon a misconception of that term as it has been defined in the decisions of the appellate courts. We find nothing in the record to justify this criticism.

[3] It is the universal rule that the market value of property is measured by the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all the uses and purposes to which it was adapted and for which it was capable. The test is "the fair market value of the land in view of all the purposes to which it is naturally adapted." Sacramento Southern R. R. Co. v. Heilbron, 156 Cal. 408, 409, 412, 104 P. 979, 981.

[4] In an action for specific performance the plaintiff must allege and prove adequacy of consideration and that the agreement is not as to the other party unconscionable or inequitable. Mayers v. Alexander, 73 Cal.App.2d 752, 762, 167 P.2d 818. In Wilson v. White, 161 Cal. 453, 464, 119 P. 895, $14,000 was held to be an inadequate consideration for property valued at $15,000, and in Haddock v. Knapp, 171 Cal. 59, 151 P. 1140, where the consideration agreed to be paid was $1,800 for property worth $2,500 a decree refusing specific performance was sustained.

[5] The court also found upon sufficient substantial evidence, not necessary to be related in detail, that the contract had been obtained from respondent through misrepresentations.

Since the findings in favor of respondent on the questions of adequacy of consideration and misrepresentations are sustained by the evidence it is unnecessary to discuss appellant's assignments of error predicated on alleged insufficiency of the evidence to sustain other findings.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

82 Cal.App.2d 238

## LUNDRIGAN v. CITY OF LOS ANGELES et al.

Civ. 15730.

District Court of Appeal, Second District, Division 3, California.

Nov. 4, 1947.

**1. Municipal corporations ⚷187**

In order for a widow of a member of the police department of Los Angeles to be entitled to a pension on account of death as a result of injury received during the performance of duty or from sickness caused by discharge of such duty, there must be a causal relation, mediate or immediate, between duty performed by decedent and immediate cause of death.

**2. Stipulations 🔑14(7)**

A stipulation that the facts stated in hypothetical question were true did not render assertion by deceased that he was in good health up until a recent date which was included in the hypothetical question conclusive when sole purpose of stipulation was to obtain opinions of medical experts as to deceased's physical condition over a long period of years covered by hypothetical question and case was tried on theory that evidence upon which hypothetical question was based was properly before court.

**3. Evidence 🔑571(1)**

Where physicians qualified as medical experts on questions before the court, their opinions were part of the evidence to be weighed by the trial court.

**4. Evidence 🔑555**

Where hypothetical question showed that deceased had sustained a chest injury, expert medical witness was entitled to consider that fact in light of his learning and experience, and, where he testified that chest injuries might cause an injury to a kidney, he could not be said to have assumed facts not in evidence in forming his opinion.

**5. Evidence 🔑558(1)**

Where medical expert testified that he thought evidence was somewhat less than conclusive that injuries sustained caused cancer, but that he thought they were the probable cause, mere fact that in cross-examination witness used the word "assumed" in answer to questions did not show that witness assumed that the injuries caused cancer rather than being of the opinion that they did.

**6. Municipal corporations 🔑187**

In action by widow of policeman to recover pension for death allegedly due to injuries received in a performance of duty, burden was upon petitioner to show a causal relation between duty performed by deceased and immediate cause of his death, but petitioner was not required to establish relation beyond any doubt.

**7. Death 🔑76**

The existence of a causal relation between injuries and carcinoma of kidney which was immediate cause of death is a scientific question requiring expert testimony.

**8. Municipal corporations 🔑220(9)**

Pension laws should be liberally construed and applied with a view to conferring the benefits intended.

**9. Municipal corporations 🔑187**

Findings of trial court that immediate cause of death of policeman was carcinoma of right kidney, which was caused by injuries received in performance of duty, were sustained by the evidence.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Petition by Marie Lundrigan against City of Los Angeles and others for a writ of mandate to compel payment of a pension to petitioner as the widow of a member of Los Angeles police department. From a judgment for petitioner, the defendants appeal.

Judgment affirmed.

Ray L. Chesebro, City Atty., and John J. Tully, Jr., and O. M. Lloyd, Deputy City Attys., all of Los Angeles, for appellants.

Joseph Scott, J. Howard Ziemann and C. J. Scott, all of Los Angeles, for respondent.

WOOD, Justice.

In this proceeding for a writ of mandate to compel payment of a pension to petitioner as the widow of a member of the Los Angeles police department, judgment was in favor of petitioner. Defendants appeal from the judgment on the ground that there was no evidence to sustain findings that there was a causal connection between the death of petitioner's husband and injuries received by him while performing his duties as a policeman.

[1] Section 183 of the charter of the City of Los Angeles provides that a widow of a member of the police department is

entitled to a pension if the husband died "as a result of any injury received during the performance of his duty, or from sickness caused by the dischrge of such duty." Said provision requires that a causal relation, mediate or immediate, must be shown between the duty performed by the decedent and the immediate cause of death. Platt v. City of Los Angeles, 72 Cal.App.2d 753, 754, 165 P.2d 714.

Decedent was appointed a member of the police department on June 1, 1927, and continued to be a member of that department until the time of his death, February 24, 1945. During that period of time he received numerous injuries while performing his duties as a patrolman. He died at the age of 44, and the cause of death was carcinoma (a form of cancer) of the right kidney, with metastasis to the regional nodes and to the liver. Petitioner alleged that injuries received by decedent during the course of his employment in 1928, in 1934, and in 1941, were the direct and proximate cause of his death.

Petitioner testified that decedent was injured the first time in 1928 (when he was struck by an automobile), at which time he complained of pains across his back, right side and flank, and she does not remember how long he was off duty; that he was next injured in 1935 when he was struck by an automobile, at which time he complained of headaches and pains in his back and body where he had been hit; that the next injury occurred in November, 1943, when he was struck by an automobile, at which time he complained of pains over his left lung, his heart region, left shoulder and back and said he ached all over; that at that time he was off duty about 24 days and in bed about two-thirds of the time; that from November, 1943, to November, 1944, he complained "a good deal of his back and kidneys and had vomiting spells"; that he entered a hospital November 20, 1944, where he was operated upon and where he remained until January 12, 1945; that he reentered the hospital February 5, 1945, where he died on February 24, 1945. (She further testified that she obtained a decree of separate maintenance August 11, 1942; that on August 22, 1942, decedent returned to their home and they lived together thereafter except for a period from the latter part of November, 1943, to Christmas Day of that year; that they were separated 7 or 8 months at the time the decree was granted but she saw him practically every week.)

A witness called on behalf of plaintiff testified that he had known decedent about 23 years; that they were very close friends and he visited decedent in his home about twice a month regularly; that decedent first complained to him of being in pain about 1935; that on several occasions during 1935 he complained to him about having pain in his back; that during 1936 he also complained about having a pain in his back, and on occasions he was lying on the couch with a heating pad on his back; that the next time decedent complained of pain to him was in 1939 when decedent said that his back hurt at times; that that was the last time he saw decedent; that decedent complained only about his back to the witness; that most of his visits to decedent were on Sundays, and he would say decedent was lying down 90% of the times he visited him.

At the close of the testimony of these two witnesses the trial was continued until a later date, pursuant to a previous stipulation, to allow counsel for petitioner and defendants an opportunity to prepare a hypothetical question, which they would stipulate was a proper question, to be submitted to medical experts for study. One month later, and after the medical experts had had an opportunity to study the hypothetical question, the trial was resumed and two physicians were called as witnesses on behalf of petitioner and two on behalf of defendants. The hypothetical question was introduced as plaintiff's Exhibit 1 and it consisted of:

(1) A resumé of a medical record of the receiving hospital of the City of Los Angeles, which showed decedent's illnesses and injuries, diagnoses, treatment and time off duty from November 18, 1927, to the time of his death, and which disclosed that among the injuries he had sustained while performing his duties as a policeman were the following:

| | | |
|---|---|---|
| January 9, 1928— | Statement: | Dragged by automobile. |
| | Diagnosis: | Contusion with ecchymosis (black and blue marks), crest of ilium (top of hip bone), right, near anterior superior spine. |
| January 14, 1929— | Statement: | Condition followed strain of right hip 1/9/28, making an arrest. |
| | Diagnosis: | Left inguinal hernia. |
| September 28, 1928— | Statement: | Scratched by a prisoner. |
| | Diagnosis: | 5 or 6 abrasions right wrist, volar surface. |
| October 21, 1930— | Statement: | Hurt finger on auto fender. |
| | Diagnosis: | Fracture, distal phalanx, left little finger. |
| June 10, 1931— | Statement: | Struck hand against auto fender. |
| | Diagnosis: | Laceration left hand. |
| May 16, 1932— | Statement: | Struck by rear of auto. |
| | Diagnosis: | Contusion, head of right fibula. |
| June 24, 1933— | Statement: | While directing traffic struck left hand on door of auto. |
| | Diagnosis: | Contusion with swelling, dorsum of left hand. |
| August 20, 1934— | Statement: | Injured back of right hand and head while directing traffic. |
| | Diagnosis: | Small hematoma, mid parietal. And contusion and abrasion dorsum right hand. |
| November 22, 1934— | Statement: | Left hand twisted and wrenched by steering wheel. |
| | Diagnosis: | Sprain of left wrist. |
| April 15, 1935— | Statement: | Injured right hand pumping flat tire on police automobile. |
| | Diagnosis: | One-half inch shelving laceration right hand web of thumb. |
| January 4, 1936— | Statement: | Handle of passing car door struck left elbow. |
| | Diagnosis: | Contusion left arm near elbow, contusion ulnar nerve with paresthesis. |
| November 17, 1936— | Statement: | Strained back when reaching to get hold of person about to step in front of streetcar. |
| | Diagnosis: | Lumbago. |
| December 28, 1936— | Statement: | Scratched hand on fender while marking tires. |
| November 5, 1937— | Statement: | Sprained back going upstairs at Central Station. |
| | Diagnosis: | Sprain, left lumbar. |
| November 1, 1941— | Statement: | Injured while subduing prisoner. |
| | Diagnosis: | Swelling, left anterior chest, left second and third ribs. Contusion right mandible. Possible fracture. |
| September 17, 1942— | Statement: | Punctured hand on nail on desk. |
| | Diagnosis: | Puncture wound, left hypothenar eminence. |

(In addition to the above, the medical record shows approximately 42 entries to the effect that decedent, during the time he was an officer, had various illnesses, such as colds, influenza, pleurisy, pains in his chest and ribs, biliousness and nausea.)

(2) A letter, dated November 16, 1944, written by a doctor to the surgeon of the receiving hospital, which stated that decedent consulted him and complained of scattered muscular pains, particularly over the back and hips; that an examination disclosed a possible gastric pathology, and that decedent would remain under the care of the clinic for several weeks, but it would probably be all right for him to return to his regular work.

(3) A letter written at the request of petitioner by Dr. Brace, the clinical director of the veterans administration, to the Los Angeles police and pension board, which stated that the decedent was admitted to that 'Facility" on July 19, 1937, for the treatment of tonsilitis, and that a tonsilectomy was performed; that he was again admitted to the hospital November 20, 1944; that he came by ambulance and stated that he had been in good health until three weeks prior to the admission when he had pains in his abdomen and back and was nauseated; that during a routine examination it was found that he had a mass in the right upper abdomen, which was consistent with a tumor of the kidney; that a nephrectomy (removal of kidney) was done which revealed a papillary carcinoma of the kidney; that his post-operative course was complicated by severe illness; that examination by the tumor board on December 15, 1944, revealed a palpable node in the left supraclavicular region and a recent scar in the right flank which was healing; that a diagnosis of carcinoma of the right kidney with metastasis, post-operative, was made, and X-ray therapy recommended; that when he recovered from the post-operative illness the X-ray therapy was carried out; that decedent became ambulant, afebrile and his only complaint was a pain in the left back; that he was discharged on January 9, 1945, with advice to report for a "followup" examination; and that the decedent was last admitted to the hospital on February 5, 1945.

(4) A letter written after the death of decedent, at the request of petitioner, by the clinical director of the veterans hospital to the department of pensions, which stated that decedent was discharged from the hospital on January 9, 1945, where he had been operated upon for a right nephrectomy; that he was readmitted to that hospital on February 5, 1945, for treatment of carcinoma of the right kidney; that upon admission he complained of pain in the right flank, nausea and vomiting; that he was examined by the tumor board on February 9, 1945, which board made a diagnosis of carcinoma of the right kidney, post-operative, with metastasis to the regional nodes and to the liver; that medical palliation was recommended; that he did not respond to conservative therapy and became progressively worse until February 24, 1945, when he expired.

(5) An injury report dated January 16, 1929, made by decedent, which stated that after the injury on January 9, 1928, he was treated for hip bruises and at that time he complained of sharp pain in his left side, which the doctor said may have been the strain from holding on to the side of the automobile he "was dragged by," and the report also stated that that "pain left and then returned about 6 weeks or 2 months later, and has been bothering me ever since"; that several months ago he noticed a swelling in his side which proved to be a hernia, and he requested a leave of absence for an operation;

(6) A letter written by a captain in the personnel division of the police department to the chief of police, which stated that decedent's personal file disclosed the following record of injuries sustained by decedent "in line of duty":

"1-17-29: Herniotomy—Hit by car—1-9-28";

"8-21-34: Blood tumor forehead—Recurr. 1-9-28";

"11-5-37: Sprain left lower back—Slipped on steps";

"11-1-41: Contusion ribs, chest—Suspect resisting arrest";

"9-16-42: Puncture wound left hand—Moving typewriter."

(7) An injury report dated November 8, 1937, made by decedent, which stated that he slipped and fell while ascending stairs from the desk sergeant's office, and felt something snap in the lower left side of his back and had to brace himself with his hand to keep from doubling up; went home, massaged his back but obtained relief from the pain only about 30 minutes; that the following morning he reported to the receiving hospital and went there every day thereafter for light treatments and wore a surgical belt to relieve the pain in that area, which pain seemed to be getting worse instead of better; that the doctor recommended he remain off duty and immobile, if possible, which he would do as soon as convenient.

(8) An injury report dated November 3, 1941, made by the decedent, which stated that on October 31, 1941, a suspect had resisted arrest and a scuffle ensued in which decedent received several punches in the face and upper part of the chest; that about an hour afterward he had difficulty in breathing, and the left side of his chest hurt whenever he raised his left arm; that he was treated at the receiving hospital and reported for duty on November 1st and November 2nd, but the pain became more acute and it was difficult for him to move, and on November 3rd the doctor at the receiving hospital ordered him off duty.

(9) A resumé of the records of the office of medical examiner regarding decedent, dated August 17, 1945, and addressed to the police department, which shows the results of five physical examinations given decedent from April, 1933, to August, 1943, stating his weight, height and his blood pressure, blood count, urinalysis and findings.

(10) The substance of the testimony of petitioner and her lay witness.

It was stipulated that the assumed facts embodied in the hypothetical question were the facts of the case, except as to the testimony of the two witnesses, regarding which it was stipulated merely that they did so testify.

Dr. Herbert A. Rosenkranz, called on behalf of petitioner, testified that he was admitted to practice in California in 1911; that he had practiced medicine since that time except for 4 years when he was taking postgraduate courses; that he specializes in urology, that is, any diseases of the genito-urinary system, kidneys, bladder, etc., including cancer; that he was one of the chief urologists for the general hospital in Los Angeles county for 27 years; that while he was on active duty at the general hospital he saw about 12 cases of cancer of the kidney a year; that he had read the hypothetical question, and he was of the opinion that decedent died of papillary carcinoma of the kidney, caused by one or more of the injuries he had received; that he based his opinion on the fact that decedent was rather severely injured three or four times and on the fact that decedent had considerable pain from time to time in the kidney region; that rather frequent pain in the back is a symptom of tumor of the kidney; that the kidney is comparatively easy to injure because the liver holds it rigidly in one place and it cannot yield to external pressure; and that it is an established scientific fact in the medical profession that cancer of the kidney may arise from a single minor injury. He testified on cross examination that the decedent had so many injuries that could have caused kidney trouble that it was impossible to confine his opinion to any one injury as having caused it; that he considered that the injury to the hip on January 9, 1928, contributed to or caused the kidney condition; that the severity of that injury was indicated by the fact that decedent had a hernia considered to have been acquired in the line of duty on January 9, 1928 (referring to medical report in letter by police captain, and to decedent's injury report on January 16, 1929, contained in the hypothetical question); that another medical report made by the receiving hospital on January 14, 1929, contained a diagnosis of left inguinal hernia with the statement that the condition followed strain of the right hip on January 9, 1928; that the injury on November 17, 1936, when decedent strained his back, was diagnosed as lumbago, but lumbago is a "cover-up" term for a lot of conditions and he (the witness) did not believe the condition was lumbago; that decedent complained of pain in the right scalpular (shoulder blade) region and that is one of the "classical regious to which kidney pain is referred"; that he also based his opinion in part upon the chest injury which occurred on November 1, 1941, and that it is possible the chest injury caused the kidney condition; that he assumed there was a connection between the chest injury and the kidney condition; that anything which injures the chest might cause an injury to the kidney and a severe chest injury might rupture a kidney; that the decedent seemed to have suffered a fracture of the chest and that would indicate that the injury was rather severe. He also testified that it is a scientific fact that there is a cancer cell in the great majority of bodies; that some of these wake up and cause trouble at some stage in life, while others remain dormant; that an injury may activate a "slow" cancer and turn it into a "fast" one, and it may cause a dormant cancer cell to become an "acute malignant cancer"; that anyone without cancer cells can get cancer; that he would say the average person lives 5 or 10 years with cancer of the kidney and some last much longer; that it depends upon the variety of cancer, some progressing rapidly and some slowly; that a kidney tumor may last for 20 or 30 years, and the exact time of the injury would make no difference; and that cancer of the kidney is seldom diagnosed in its early stages unless there is bleeding, and many of them do not bleed.

Dr. Frank H. Chase, called on behalf of petitioner, testified that he was admitted to practice in California in 1915, and has practiced ever since; that he has been medical referee for the New York Life Insurance Company since 1925; that he has had no special training in cancer; that he has had the experience treating cancer that any physician would have over the period of 30 years; that he had seen many cases, had personally operated upon probably 12, and treated probably 24 more; that he did not think any of those cases were cancer of the kidney; that he had studied the hypothetical question; that in his opinion the cancer was the result of trauma received by decedent while he was a police officer; that in his opinion trauma causes most cancers, and irritation is a rather ordinary cause of cancer; that cancer cells are not stationary and can find their way to the kidney from other parts of the body; that cancer of the kidney could be caused by a chest injury or come from a cancer in the chest; that in the present case one of the injuries or all of them together could have caused the cancer; that in his opinion the injuries to the hip sustained on January 9, 1928, were the probable cause of the cancer; that the medical report dated January 14, 1929, which refers to this injury, shows that it apparently existed for a year, and it did seem to be more than a slight injury; that it is possible that the injuries sustained by decedent to his right leg on May 16, 1932, when he was struck by an automobile, could have caused the cancer or could have aggravated it; that another possible cause or aggravation of the kidney condition was the accident on January 4, 1936, when the decedent was struck on the left elbow by the door of a passing automobile; that he thinks that the chest injuries sustained November 1, 1941, while subduing a prisoner, were an aggravation of the kidney condition instead of a cause, for the reason he did not think the degree of pathology existing at the time of death could have developed in that space of time; that no one could say when the cancer started; that to diagnose cancer of the kidney there have to be pathological findings, and by the time there are pathological findings the disease is no longer young; that the cancer attacked the papilla of the kidney and may be one of several varieties, some of which grow rapidly and some slowly; that men live many years with cancer—sometimes as many as 20 or 30 years; that some of the conditions of decedent set forth in his medical history were symptoms of cancer of the kidney such as the diagnosis of indigestion made on May 14, 1930, biliousness on November 19, 1931, hemorrhoids on March 11, 1935—which are significant in that they are associated with impaired liver function, gall bladder upset on September 8, 1936, lumbago on November 17, 1936—which is the term usually employed when the cause for the backache is not known, upset stomach, loose bowels and continued nausea on February 16, 1940—with no history of error in diet, pleurisy on February 13, 1941—which is not an uncommon symptom, influenza, soreness and congestion in chest on April 17, 1943, and the gastro-intestinal upset which caused the operation to be performed. He also testified that the irritation theory of the cause of cancer contemplates repeated trauma; and that in the majority of cases the cancer occurs at the site of the trauma but it sometimes occurs elsewhere.

Dr. Roy W. Johnson, called on behalf of defendant, testified that he is a physician; that he was admitted to practice in California in 1934, and since then has specialized in radiology (the use of X-rays or radium in the treatment of disease) and that cancer constitutes about 80 percent of his work; that he treats possibly 10 cases of cancer of the kidney in a year; that he had studied the hypothetical question and, assuming the facts therein stated to be true, he did not believe death was caused by the injuries received in line of duty as set forth in the resumé of the medical record in the question; that no one knows the cause of cancer; that he thinks cancer occasionally occurs as the result of just one trauma; that there is such a thing as a cancerous cell, and a dormant cell can become active, break away and travel through the whole body; that it could move out of the lung into the kidney and cause the disease there; that cells from cancers can break off, spread around in the blood or in the lymphatic system to a distant point and grow there; that he has seen cases where the original cancer was the size of a pea, yet there were very large distal metastases; that in many cases the original cancer can be cured but the distant spread kills the patient; that the fact that the hypothetical man complained of pain in his back more or less continuously for some time would impress the witness with the idea he might have cancer of the kidney.

Dr. Jay J. Crane, on behalf of the defendants, testified that he was admitted to practice in California in 1921, and since then has specialized in diseases of the genitourinary tract; that he is now chief of the urological staff at the Los Angeles county general hospital; that he thinks "we see" 24 to 36, maybe 50, cases of cancer of the kidney a year in private practice and consultation at the general hospital; that decedent's death was not due to any injury he "could determine in the hypothetical question"; that in his opinion cancer of the kidney is not traumatic in origin; that be believes "probably cancer is inherited" in all cases, and he knows of no "authentic case" where they have "proven" cancer resulted from injury; that he doesn't know how you can prove or disprove whether some people have cancer cells in the body; that there is a theory in the medical profession that there are cancer cells; that a cancer cell originates in certain tissue; that it grows without rhyme or reason, and soon grows off its blood supply because it grows so rapidly, then it goes through a process of necrosis, pieces of it break off and parts of that tissue may be carried in the vessels or in the lymph to other tissues; that there is a certain pattern of circulation, and "cancer of the kidney breaks off and goes into the vena cava and the vena cava goes directly into the heart and lungs"; that there is a direct communication between the kidney and the lung, but before cancer of the kidney could be spread to the liver it has to go some place below the vein that carries the digestive fluids from the intestinal tract up to the liver; and that he did not believe decedent had the cancer over 2, 2½ years—maybe 1½ years, before he died.

The findings challenged on this appeal are numbers 6, 8, 9, and 10, and are to the effect that the immediate cause of decedent's death was carcinoma of the right kidney; that in January, 1928, decedent sustained injuries to his right side and back when he was struck by an automobile; that in August, 1934, when he was struck by an automobile, and in October, 1941, when he was assaulted by a man he was taking into custody, he sustained injuries which aggravated the injuries above referred to; that all of those injuries were sustained during the course of his duty as a police officer; that prior to the injuries sustained in January, 1928, decedent had been "in good health, but immediately thereafter and continuously and progressively up to the time of his death, and as a direct and proximate result" of those injuries, as well as those received thereafter, decedent "commenced" to suffer pain, particularly in his back, abdomen, and sides; that an operation was performed on November 28, 1944, from which he did not recover; and that as the proximate result of the operation and said injuries he died.

[2] As stated above, appellants contend there was no evidence to support those findings, and assert that there was no conflict in the evidence. They argue that the testimony of petitioner and her lay witness is entitled to no evidentiary value for the reason that the hypothetical question contained a letter written by Dr. Brace in which he stated that decedent told him he had been in good health until 3 weeks prior to entering the hospital on November 20, 1944. That letter was included in the portion of the hypothetical question which "was stipulated to be the facts of this case." Appellants urge, in effect, that by that stipulation the truth of the entire contents of the hypothetical question, with the exception of the testimony of petitioner and her lay witness referred to therein, was established and that therefore petitioner is bound by decedent's declaration that he was in good health until 3 weeks prior to November 20, 1944. It is not reasonable to suppose that the parties intended to stipulate that decedent was in good health until 3 weeks prior to November 20, 1944, when the purpose in preparing the hypothetical question and submitting it to medical experts was to obtain their opinions as to the decedent's physical condition over the various years covered by the hypothetical question. If it was intended to stipulate that decedent was in good health prior to November 1, 1944, there would have been no point in considering the question as to his health preceding that date. After the hypothetical question had been admitted in evidence the trial was continued, appellants vigorously presented their defense and inquired at length concerning decedent's health over a period of several years, and it does not appear that they then placed the same construction upon the stipulation as they now urge on appeal. Assuming that decedent believed that he was in good health prior to November 1, 1944, and that he did make the statement, it was at most his opinion as a layman concerning a matter of medical science. Furthermore, in view of the many injuries and illnesses, approximately 58, which were included in the hypothetical question pursuant to the stipulation, it seems clear that it was not intended that the decedent's opinion, as to his health prior to November 1, 1944, was to be determinative of the issue before the trial court. The case was tried upon the theory that the evidence, upon which the hypothetical question was based, was properly before the court, and was proper evidence upon which to base a hypothetical question. Moreover, it could be concluded from the evidence that decedent had carcinoma of the kidney at the time he made the statement. The hypothetical question shows that a routine examination on November 20, 1944, disclosed a mass in the right upper abdomen, and that a nephrectomy revealed a carcinoma of the right kidney which a medical expert, on behalf of petitioner, testified could not have progressed to that stage since 1941, and a medical expert, on behalf of defendants, testified that he did not believe decedent had the cancer over maybe 2, 2½ years, or maybe 1½ years.

[3] Appellants also argue, in support of their contention of insufficiency of the evidence, that the opinions of the expert witnesses who testified on behalf of petitioner are entitled to no evidentiary weight. They state that Dr. Rosenkranz is not a cancer specialist, and that Dr. Chase had no training in the treatment of cancer and never treated cancer of the kidney. The record shows that Dr. Rosenkranz is a specialist in urology, which includes the treatment of cancer of the kidney, and that he formerly was chief urologist (for a period of 27 years) for the Los Angeles county general hospital, during which time he saw about 12 cases of cancer of the kidney a year. Dr. Chase testified that he had no special training in the treatment of cancer, but that he had practiced medicine more than 30 years; that he had treated, or operated upon, approximately 36 cases of cancer. Those physicians were qualified as medical experts and their opinions were part of the evidence to be weighed by the trial trial court. Appellants also state that the opinion of Dr. Rosenkranz that decedent died as the result of injuries received in the performance of his duty was based to

a great degree upon the testimony of petitioner and her lay witness, whose testimony they assert was without weight. Although the testimony of the petitioner and her lay witness was not stipulated to be true, it was nevertheless evidence in the case. Furthermore, Dr. Rosenkranz testified on cross examination that he would be of the same opinion if the testimony of petitioner and her lay witness were eliminated from the hypothetical question, leaving the resumé of the medical records, letters and injury reports.

[4] Appellants further contend that the opinions of petitioner's medical witnesses were based upon mere possibility and assumption, and do not establish a causal connection between the death of decedent and the injuries received by decedent during the course of his employment. In this regard they assert that Dr. Rosenkranz assumed there was a connection between the injury sustained January 9, 1928, and the cause of death, and the injury sustained November 1, 1941, and the cause of death. Dr. Rosenkranz, as before stated, testified that he based his opinion, that the kidney condition was caused by one or more of the service connected injuries sustained by decedent, upon the fact, among other things, that he was rather severely injured 3 or 4 times, and upon the fact that he had pain from time to time in that kidney region. Referring to the injury sustained on January 9, 1928, petitioner testified that decedent complained at that time of pains across his back, right side and flank. There was also evidence that decedent suffered for many years with periodic backaches. Petitioner and her lay witness so testified, and the hypothetical question shows diagnoses on two occasions of lumbago, which, Dr. Chase testified, is a term used in the medical profession to describe backache when the cause is not known. Appellant's medical expert, Dr. Johnson, testified that the fact that the hypothetical man had backaches more or less continuously for some time would impress him with the idea he might have cancer of the kidney. It therefore cannot be said that Dr. Rosenkranz based his opinion that there was a causal connection between this injury and decedent's death upon possibility and assumption. Referring to the injury on November 1, 1941, there appeared the following questions and answers on cross examination:

"Q. Doctor, is it not a true statement that even though this hypothetical question nowhere states that there is any connection between this chest injury and the kidney condition, that you have assumed that such a connection exists? A. I assume that it exists.

"Q. Now, Doctor, insofar as you say that is because the severity of the injury may have caused kidney trouble, that would be an assumption on your part, wouldn't it? A. Could be a possibility."

It would seem that appellants consider any conclusion reached by the witness, which is not admitted by the hypothetical question, as an assumption. In other words, it appears that appellants are asserting that the opinion of Dr. Rosenkranz is an assumption, as distinguished from asserting that the basis for his opinion is an assumption. Dr. Rosenkranz testified that on that date (Nov. 1, 1941) the decedent seemed to have suffered a fracture of the chest which would indicate that the injury was rather severe; that anything that injures the chest might cause an injury to the kidney and a severe chest injury might rupture a kidney. Since the hypothetical question showed that a chest injury had occurred, the expert medical witness was entitled to consider that fact in the light of his learning and experience; and, in view of his testimony that chest injuries may cause injury to a kidney, he was not assuming facts not in evidence in forming his opinion.

[5] Appellants also assert that Dr. Chase "assumed" that the injuries sustained on January 9, 1928 and on November 1, 1941, caused or contributed to causing the cancer. Dr. Chase testified that he thought the evidence was "somewhat less than conclusive" that the injuries sustained on January 9, 1928, caused the cancer, but that he thought they were the probable cause, whereupon counsel for appellants asked "Have you assumed, Doctor, they are the probable cause of the cancer?" To which the witness replied, "I assume these injuries are among those that did cause can-

cer, I don't know which one did." Dr. Chase also testified that he considered the injury sustained on November 1, 1941, as a "possible cause" of the cancer and counsel for appellants asked, "Well, what did you do in arriving at this opinion, Doctor, assume that it would help cause it?" The witness replied, "I assumed that it, together with other trauma, caused the cancer." The word "assume" was used extensively throughout cross examination by counsel for appellants in questioning petitioner's expert witnesses. Although that word was used sometimes by the witnesses in answering those questions, it was not used in the sense of a mere supposition. It is evident from their testimony as a whole that those witnesses meant they were of such opinion or belief. Counsel for appellants cross examined petitioner's expert medical witnesses at length, and questioned them as to the injuries and illnesses which the witnesses considered had any bearing upon the kidney condition. In most instances the witness testified, as to the injuries or illnesses so indicated by him, that the particular injury was a "possible" cause or aggravation of the kidney condition, which he took into consideration, together with all the other possible causes, in forming his opinion as to what did cause the condition. The expert medical testimony on behalf of petitioner and also appellants shows that medical science has discovered no method of determining the exact cause of cancer or the exact time of its origin.

[6-8] Although the burden was upon petitioner to show a causal relation between the duty performed by decedent and the immedate cause of his death (Platt v. City of Los Angels, supra, 72 Cal.App.2d 753, 754, 165 P.2d 714), it did not require that petitioner establish the cause of the kidney condition beyond any doubt. The existence of a causal relation in cases of this kind is a scientific question requiring expert testimony. Cordell v. City of Los Angeles, 67 Cal.App.2d 257, 262, 154 P.2d 31. Some of the testimony given by appellants' experts was conflicting with that given by petitioner's experts, but the trial court resolved all conflicts in favor of petitioner. It was stated in the case of Cordell v. City of Los Angeles, supra, 67 Cal.App.2d at page 266, 154 P.2d at page 35: "Where the law requires proof of a fact or facts to be clear and convincing, the sufficiency of evidence to establish a given finding is primarily for the trial court to determine. If there be substantial evidence to support such conclusion, the determination is not open to review on appeal. It being the function of the trial court to determine what facts are established by the evidence, before its conclusion can be set aside upon the ground of 'insufficiency of the evidence' there must be a clear showing that upon no hypothesis whatever is there sufficient substantial evidence to support the decision reached in the court below. We must also assume in favor of the judgment the existence of every fact which could reasonably have been deduced from the evidence. Only when we can conclude that such facts are insufficient to support the judgment rendered may we interfere, because, in such a situation the question becomes one of law." The rule is established that pension laws should be liberally construed and applied with a view to conferring the benefits intended. England v. City of Long Beach, 27 Cal.2d 343, 346, 163 P.2d 865; Dillard v. City of Los Angeles, 20 Cal.2d 599, 602, 127 P.2d 917, 128 P.2d 537; Platt v. City of Los Angeles, supra, 72 Cal.App.2d at page 771, 165 P.2d 714.

[9] The evidence was sufficient to support the findings and the judgment of the trial court. It is unnecessary to consider appellants' further contention that the evidence, exclusive of the expert testimony, was insufficient to support the findings.

The judgment is affirmed.

SHINN, Acting P. J., and VALLEE, Justice pro tem., concur.

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## RUTHERFORD v. BERICK et al.

Civ. 13403.

District Court of Appeal, First District,
Division 1, California.

Nov. 10, 1947.

**1. Appeal and error 🔑1011(1)**

Where there is a conflict of evidence, District Court of Appeal is bound by findings of trial court, if there is any substantial evidence to support them.

**2. Brokers 🔑86(1)**

Testimony of business opportunity broker as to fact of there being an oral contract employing him to find a purchaser is alone sufficient to justify a finding in that respect even though burden of proving contract is on the broker as plaintiff.

**3. Brokers 🔑43(1)**

An agreement to pay a business opportunity broker a commission upon sale of a business or other personal property need not be in writing.

**4. Brokers 🔑57(2)**

Ordinarily, price at which a business opportunity broker is authorized to sell property is considered merely an asking price to guide broker in his negotiations with prospective purchasers, and if broker procures a purchaser willing to pay a lower price, owner cannot deprive broker of commission by conducting final negotiations himself and selling at a lower figure to purchaser procured by broker.

**5. Brokers 🔑57(2)**

An owner is entitled to make a special contract with business opportunity broker whereby broker is required to procure a purchaser willing to pay a particular price or meet specific conditions imposed by owner, and if owner sells property to a purchaser procured by broker, but on different terms from those stated in contract, broker is not entitled to a commission in absence of bad faith.

**6. Brokers 🔑86(6)**

Evidence authorized finding that price quoted by owner in listing tavern for sale with business opportunity broker was not definite net price, but was merely an asking price, so that when sale was closed between owner and prospect procured by broker for a lower price, broker was entitled to commission.

**7. Appeal and error 🔑996**

Where contract was susceptible of two interpretations and parol evidence introduced in aid of its interpretation was such that conflicting inferences could be drawn therefrom, District Court of Appeal would accept to interpretation adopted by trial court and not substitute another of its own, especially where interpretation given by trial court was reasonable.

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Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by William G. Rutherford against Fred Berick and others for breach of an oral contract, by which plaintiff was to find a purchaser for a business and, in a second cause of action, for breach of an alleged promise of both vendor and purchaser to pay plaintiff a broker's commission. From a judgment for plaintiff on first cause of action against named defendant, vendor, for a commission on a sale, named defendant appeals.

Affirmed.

David B. Fyfe, of San Rafael, for appellant.

Wallace S. Myers, of San Anselmo, for respondent.

BRAY, Justice.

The first amended complaint alleged two causes of action: first, the breach of an oral contract by which plaintiff was employed to find a purchaser ready, able and willing to purchase a business known as "Brothers Tavern," and secondly, an alleged promise of both the seller and buyer defendants to pay plaintiff a broker's commission. The court granted a nonsuit on the second cause of action, and a judgment in favor of plaintiff and against the seller, defendant Berick (hereinafter referred to as defendant) for a commission on the sale of the tavern.

Two points are raised on this appeal: (1) insufficiency of the evidence to justify the finding that there was a contract by which defendant employed plaintiff to sell the tavern in question, and (2) that if there was such a contract, it was to sell at a fixed *net* price, which price was never obtained.

[1, 2] Having in mind the rule that where there is a conflict of evidence this court is bound by the findings of the trial court if there is any substantial evidence to support it, there can be no doubt that the testimony of the plaintiff himself as to the fact of there being an oral contract is alone sufficient to justify the finding of the court in that respect, even though as held in Tomlinson v. Monroe, 41 Cal. 94, the burden of proving the contract is on the plaintiff.

Defendant's only argument on this point is that there was no definite, express contract shown. Such a claim overlooks entirely the testimony of plaintiff as to the agreement, which testimony the trial court in its opinion characterized as "straightforward and clear and * * * convincing."

[3] The second point is more serious and depends upon the exact terms of the oral contract. Defendant contends that the sale price suggested by the seller was a fixed *net* price, while plaintiff contends that such proposed sale price was merely an *asking* price. No contention is made that an agreement to pay a business opportunity broker's commission upon the sale of a business or other personal property need be in writing. Such an oral agreement is valid. Webster v. Parra, 72 Cal.App. 639, 237 P. 804.

[4] The rules concerning the right to a broker's commission under the two different situations is well stated in Palmtag v. Danielson, Cal.Sup., 183 P.2d 265, 267: "Ordinarily, the price at which a broker is authorized to sell property is considered merely an asking price to guide the broker in his negotiations with prospective purchasers. See Rest.Agency, § 447, Comment b. If the broker procures a purchaser willing to pay a lower price, the owner cannot deprive the broker of his commission by conducting the final negotiations himself and selling at a lower figure to the purchaser procured by the broker. See 128 A.L.R. 430; Leicht-Benson Realty Const. Corp. v. J. D. Stone & Co., 138 Va. 511, 121 S.E. 883, 43 A.L.R. 1103.

[5] "An owner is entitled, however, to make a special contract with the broker whereby the latter is required to procure a purchaser willing to pay a particular price or meet specific conditions imposed by the owner. In such cases, if the owner sells the property to a purchaser procured by the broker, but on different terms from those stated in the contract, the broker is not entitled to a commission in the absence of bad faith. Backman v. Guadalupe Realty Co., 78 Cal.App. 347, 353, 248 P. 296. In brokers' net contracts, a fixed net amount must be paid to the owner and the broker's compensation is limited to the excess of the payment by the purchaser over the net amount specified. Haigler v. Donnelly, 18 Cal.2d 674, 678, 117 P.2d 331."

Plaintiff was a licensed real estate and business opportunities broker. Defendant was the owner of an on-sale liquor business in Mill Valley known as "Brothers Tavern." About July 16, 1945, plaintiff appraised the value of defendant's home, at the latter's request. The conversation which gave rise to the contract between the parties occurred on or about July 20th at plaintiff's office. The defendant admits that a conversation took place at that time, but denies the salient features of it as given by plaintiff. According to plaintiff (and as the court accepted his version, so must we), he stated to defendant that he had a buyer for the tavern and wanted to know at what price it could be bought. Defendant told plaintiff that he already had an offer of $18,000. Plaintiff stated that the commission on the sale of business enterprises was 10% and defendant stated that in order for him to get the price to which he felt he was entitled, he would have to establish a selling price of $20,000. A discussion was had concerning the sale of defendant's house as well as the tavern. Plaintiff stated that he could get $13,500 for the house, and that the commission on the real estate would be 5%—but that if the house and tavern were both sold plaintiff would charge a commission of only 5% on the whole, rather than 10% on the tavern and 5% on the real estate, as customary. A price was then set of $33,000, $18,000 for the business, $13,500 for the house, and a $1,500 commission. The tavern price did not include liquor stock on hand, on the sale of which plaintiff was to receive no commission. Defendant authorized plaintiff to proceed on the basis discussed. Plaintiff procured a purchaser for the tavern, to whom he quoted a purchase price of $20,000, and introduced him to defendant. The purchaser was not willing to pay the price asked. Plaintiff took the purchaser to the bank to assist him in financing the purchase, if made. On two occasions, at least, defendant came to plaintiff's office to find out how things were going and to inquire if the purchaser had sufficient backing. After that, defendant and the purchaser left plaintiff out of the transactions. Finally, defendant agreed to accept, and the purchaser to pay, $15,000 for the tavern. Later, the purchaser, defendant and plaintiff met at the country club and defendant told plaintiff that the deal for the sale of the tavern was being closed and the necessary papers were being placed in escrow. He also stated that he had given the purchaser an oral option to buy defendant's house, but that the purchaser needed to sell his own home to get sufficient money for this purpose, and that when plaintiff sold the purchaser's home defendant would pay plaintiff's commissions. Plaintiff would not agree to this. At no time in all the negotiations which took place prior to the sale did defendant ever tell plaintiff he was not to receive a commission. It is apparent from the evidence that prior to the time the sale was actually consummated, defendant himself did not consider that plaintiff's right to a commission was based on his finding a purchaser who would not pay less than $18,000. The sale of the tavern was closed at $15,000 plus the value of the inventory. Defendant refused to pay plaintiff any commission. At the trial the court gave judgment in favor of plaintiff for a commission of 10% on the sale price, or $1,500.

[6] While it is true that at the time plaintiff was employed by the oral contract to sell the tavern, defendant stated that he wanted $18,000, and that the commission was to be added to that price, the whole conversation and the dealings between the parties support the finding of the court that the price stated was not the definite *net* price referred to in Palmtag v. Danielson, supra, 183 P.2d 265, which unless procured, denies the broker his commission. It was merely the *asking* price to guide the broker in his negotiations with prospective purchasers and a price which the seller hoped to get. But at no time was there any definite statement made by defendant that he would not pay a commission if that price was not obtained, nor that in the event of his acceptance of a lower price, there would be no commission paid.

The facts of this case are somewhat similar to those in the Palmtag case, supra. There the contract was in writing and provided: "I have a price of $40,000.00 on the property and if you should arrange the sale, I will pay you 5% commission or a *net to me* of $38,000." (Emphasis added.) The broker produced a purchaser, who, however, was unwilling to pay $40,000, but would pay $35,000. After some discussions between the prospective buyer and seller, the seller attempted to terminate the broker's agency. Thereafter, the seller accepted the buyer's offer. The seller took the position that under the contract the property would have to sell for more than $38,000 before he would be obligated to pay any commission. The court said: "The contract, although ambiguous, does not reasonably lend itself to defendant's construction. Defendant stated: 'I have a price of $40,000.00 on the property and if you should arrange the sale, I will pay you 5% commission or a net to me of $38,000.00.' If the phrase beginning 'or a net to me * * *' is excluded, the letter clearly states nothing more than an asking price for the guidance of the broker. The addition of 'or a net to me of $38,000.00' is illustrative of the amount that defendant would receive if the broker sold the property at $40,000. The $38,000 figure has no independent significance, but is merely the amount remaining after the commission is subtracted from the proposed sale price. Interpreted in this manner, the phrase may be explained without doing violence to the remaining language in the contract.

"If the contract were construed to require $38,000 net to defendant, the provision for a 5 per cent commission would have little meaning. In such a case, a sale price of between $38,000 and $40,000 would result in less than a 5 per cent commission to the broker. The requirement of a $38,000 net minimum would also subordinate the proposed sale price of $40,000. The $40,000 would no longer be the proposed sale price, but would be transformed into a pivotal amount determining whether the broker should receive a 5 per cent commission or less. * * *

"Moreover, the trial court's interpretation of the contract is supported by the evidence. See Estate of Rule, 25 Cal.2d 1, 11, 152 P.2d 1003, 155 A.L.R. 1319. There was evidence from which the trial judge could infer that it was not the meaning of the contract that a price of $38,000 net to the owner was a condition precedent to the payment of plaintiff's commission."

[7] So, here, while the contract is possibly susceptible of the interpretation that the amount set was a *"net"* rather than an *asking* price, it is also susceptible of the interpretation which the trial court gave it, and as said in Estate of Rule, 25 Cal.2d 1, 11, 152 P.2d 1003, 1008, 155 A.L.R. 1319: "The rule is that an 'appellate court will accept or adhere to the interpretation (of a contract) adopted by the trial court—and not substitute another of its own— * * * where parol evidence was introduced in aid of its interpretation, and such evidence * * * is such that conflicting inferences may be drawn therefrom.' (4 Cal.Jur. 10-Yr.Supp. (1943 Rev.) 146–147, § 192; see also 2 Cal.Jur. 934–939, § 549.)" Moreover, the interpretation given by the court is, under all the facts and circumstances of this case, the most reasonable one.

In Haigler v. Donnelly, 18 Cal.2d 674, 117 P.2d 331, cited by defendant, the owners of a furnished apartment house listed it with a licensed real estate broker for lease at $250 per month, the furniture to be sold for $3,000, "such amounts to be net to" the owners (page 676 of 18 Cal.2d page 333 of 117 P.2d), nothing being said about a commission. The broker found a woman who agreed to lease at the specified rental but who would pay only $2,500 for the furniture, which amount the seller accepted. There was no evidence that at any time either the seller or the broker intended to deviate from the fact that the listing was a *net* one. The trial court held it to be such and refused to allow a commission. On appeal the Supreme Court held that the finding of the trial court was supported by substantial evidence. It is apparent from an examination of that case that the broker was not to get a percentage commission but was to retain all that the furniture might bring over and above the net price of $3,000—a far different situation from one where, as here, the seller promises to pay a percentage commission.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

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82 Cal.App.2d 213

## RINALDO v. BOARD OF MEDICAL EXAMINERS et al.

Civ. 15764.

District Court of Appeal, Second District, Division 1, California.

Nov. 3, 1947.

**1. Mandamus 🔑87**

**Physicians and surgeons 🔑11(3)**

Physician, whose reciprocal license was revoked by Board of Medical Examiners as allegedly procured by fraud, was not denied a full and fair hearing before board so as to be entitled to writ of mandate to compel board to grant him a new hearing, because physician was not present at hearing at which license was revoked but was in court in another city at a prohibition proceeding by physician against the board, since conflict in hearing dates did not excuse physician from taking necessary steps to protect his rights. Business and Professions Code, § 2376.5.

**2. Physicians and surgeons ⚿11(3)**

Provision of Business and Professions Code, that one whose medical certificate has been revoked or suspended may petition Board of Medical Examiners to reinstate certificate, did not authorize board to reinstate physician's reciprocal license that had been revoked because allegedly obtained by fraud, since statute applies to a license that has been properly granted in first instance but, because of some professional misconduct, has been revoked or suspended. Business and Professions Code, § 2376.5.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Mandamus proceeding by Eugene J. Rinaldo against the Board of Medical Examiners of the State of California and others to compel the board to grant the plaintiff a full and fair hearing on his petition for reinstatement of license as physician and surgeon. From a judgment granting a peremptory writ of mandate, the defendants appeal.

Judgment reversed and writ discharged.

Fred N. Howser, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for appellants.

Culbert L. Olson and John W. Olson, both of Los Angeles, for respondent.

DORAN, Justice.

The peremptory writ of mandate issued by the Superior Court, directed the appellant, Board of Medical Examiners, hereinafter called the Board, to grant the respondent Eugene J. Rinaldo, "a full and fair hearing upon his petition (for reinstatement of license) presented to the defendant Board on August 13, 1945, and to enter a decision thereon after such full and fair hearing thereof."

Respondent's petition for the writ of mandate sets forth that on June 12, 1922, Rinaldo, alleged to be a "practicing physician and surgeon in good standing in the State of Missouri," applied to the Board for a reciprocal license to practice such profession in California, which license was granted September 6, 1922; that on April 28, 1924, respondent was "charged by said board with having procured said reciprocity certificate by fraud and misrepresentation, in that he falsely stated in his application that he was the possessor of a medical diploma from the St. Louis College of Physicians and Surgeons dated and issued in the year 1908, and that he had fulfilled all the preliminary education required." Said license was thereafter revoked, but in 93 Cal.App. 72, 268 P. 1076 the revocation was annulled on the ground that the Board was without jurisdiction to make the order for the reason that "all the evidence introduced * * * was hearsay."

The petition further recites that on October 18, 1932, the Board again charged respondent with having procured the license by false representations; that acting upon the depositions of three witnesses the Board again revoked the license, although the respondent was not present at the hearing. Respondent now claims that this evidence was forged and perjured, and seeks a new hearing. Following the second revocation, the respondent sought the aid of the Superior Court by way of certiorari and secured an annulment thereof on the ground of insufficiency of evidence, which decision was, however, reversed on March 19, 1935, in 5 Cal.App.2d 345, 352, 42 P.2d 724, 727, where the appellate court said: "A review of the evidence * * * shows that the board had sufficient competent evidence before it to warrant the exercise of its power to revoke respondent's license. Its decision and order is therefore final and conclusive, and it was error for the trial court to annul the order of revocation." Respondent's petition to have the cause heard in the Supreme Court was denied.

The controversy between Mr. Rinaldo and the Board reached the appellate court for the sixth time in 1936, and in Rinaldo v. Superior Court of Los Angeles County, 15 Cal.App.2d 585, 594, 59 P.2d 868, 872, this court refused to sanction amendment of respondent's original petition for certiorari which had been before the court in 5 Cal.App.2d 345, 42 P.2d 724; holding that: "On the unqualified reversal of the judgment herein (5 Cal.App.2d 345, 42 P.2d 724), and the receipt by the lower court of the remittitur from this court, everything of a factual nature was before the former court which was either necessary or proper for its consideration." A hearing before the Supreme Court was again denied.

On August 13, 1945, more than twelve years after the license had been revoked, respondent presented to the Board an application for reinstatement of the license to practice medicine in California, and, according to the petition for mandamus, "then and there offered to prove that the finding of the Board upon which plaintiff's license had been revoked was based upon said perjured testimony and forged documentary evidence presented to said Board." The Board denied this application and refused to consider the offer of proof because, as stated in respondent's petition, Section 2376.5 of the Business & Professional Code relating to reinstatement, could not be invoked "for the reason that it was the earlier determination of the Board that plaintiff's certificate was issued on improper information resulting from fraudulent misrepresentation, and * * * such procedure (under Sec. 2376.5) is designed only to secure the reinstatement of a license properly issued and thereafter revoked upon showing of reformation justifying such reinstatement"; that Rinaldo's license was not properly issued and therefore never valid.

Following this action respondent secured the peremptory writ of mandate directing the Board to grant "a full and fair hearing upon his petition for reinstatement," from which judgment the Board now appeals. In this connection the Board contends that "The issues herein are res judicata adverse to respondent," and that "the principles of res judicata apply to administrative fact finding." It is also claimed that "A void, fraudulently induced certificate (permitting respondent to practice medicine) cannot be reinstated." Appellant also argues that "The petition does not state a cause of action" and "contains statements which preclude relief," showing "respondent's failure to exhaust his administrative remedy."

The respondent's brief avers that "One would naturally reason that an administrative board would not hesitate to accord an applicant, whose professional license it has revoked as having been fraudulently obtained, an opportunity to prove in a full and fair hearing that its order of revocation was induced by and based upon perjured depositions and forged documents," but that "this appeal emphasizes a determination of the Appellant Board to deny Respondent such a hearing if it is legally possible to do so."

The contention that "Opportunity has never been given Respondent to have a fair hearing before the Board," presents what is perhaps the basic controversy on this appeal, as it is, in fact, on most if not all proceedings for review. As hereinbefore mentioned, the respondent Rinaldo was not present when the revocation of license was ordered although it appears that due notice of the hearing had been given. In view of this notice the Board claims that due opportunity was thus accorded the respondent to present proof in respect to the present claim of perjured evidence; that not having done so, respondent's "refusal or failure to appear or present evidence thus precludes judicial relief." The respondent's brief answers this as follows: "It is not enough to say that Respondent had notice of the Board's meeting in Sacramento on October 18, 1932, when it revoked his license. On that same day he was in court in Los Angeles in connection with the hearing of a case between Respondent and Appellants" concerning a writ of prohibition.

In the case of Dare v. Board of Medical Examiners, 21 Cal.2d 790, 799, 136 P.2d 304, 309, occurs the following statement of a rule of judicial review, clearly applicable to the present controversy. The court there said: "There is nothing in any of the cases to justify the conclusion that one charged with violating the conditions of his professional license may remain silent before the board or present a so-called 'skeleton' showing and thereafter secure in court a trial de novo in an unlimited sense." And in Tennant v. Civil Service Commission, 77 Cal.App.2d 489, 175 P.2d 568, involving mandamus proceedings to compel the commission to accord a discharged employee a full and fair hearing, it was held that the employee could not then assert certain objections to evidence which had not been raised at the hearing. This proposition is, indeed, fundamental.

[1] The respondent's attempted explanation of absence at the Sacramento hearing of October 18, 1932 (a conflict in dates between that hearing and a court hearing in Los Angeles), neither improves nor alters the legal situation here presented. It is a matter of general knowledge that a conflict in hearing dates is not uncommon. Such a conflict, however, can hardly excuse an interested party from taking whatever steps may be necessary for the protection of alleged rights. It cannot be supposed that Rinaldo was ignorant of the serious nature of the charges preferred; even then the matter had been before the courts several times. As early as 1924 respondent had been charged with "having procured said reciprocity certificate by fraud," and the license revoked, which revocation was later set aside in 93 Cal.App. 72, 268 P. 1076, on the ground that it was based on hearsay evidence. Notice of the later hearing on similar charges was given to respondent, and the present claim presented many years later, that respondent was not accorded a "full and fair hearing," is without merit.

Section 2376.5 of the Business & Professional Code, under which respondent's petition for reinstatement was made, reads in part as follows: "A person whose certificate has been revoked or suspended for more than one year, may petition the board to reinstate the certificate after a period of not less than one year has elapsed from the date of the revocation or suspension. * * * The petition shall be accompanied by two or more verified recommendations from physicians and surgeons licensed by the board * * * and by two or more recommendations from citizens each having personal knowledge of the activities of the petitioner since the disciplinary penalty was imposed. * * * In determining whether the disciplinary penalty should be set aside and the terms and conditions, if any, * * * the board may investigate and consider all activities of the petitioner since the disciplinary action was taken against him, the offense for which he was disciplined, his activity during the time his certificate was in good standing, and his general reputation for truth, professional ability and good character."

It is impossible to read the above statute without concluding that what the legislators had in mind was the reinstatement of a license which in the first instance had been duly and properly granted to a physician from another state; and which later, because of some professional misconduct, had been revoked or suspended. This, for example, is evident from the statutory references to rehabilitation, such as the requiring of character recommendations and evidence of petitioner's activities since revocation of the license; provisions obviously inapplicable to the revocation of a license obtained by fraud.

[2] Section 14 of the act in effect prior to 1937, and operative at the time respondent's license was revoked, provided that "whenever a certificate has been procured by fraud or misrepresentation * * * it shall be the duty of the board and the board shall have power to * * * revoke his certificate." St.1929, p. 626, § 14. These words can evidence nothing less than a legislative intent that in such cases the Board shall, by its order, effect a complete and final eradication of a license which has illegally come into apparent being by reason of the applicant's fraud. To believe otherwise is to entertain the absurd proposition that although it is the "duty of the board" to revoke a license fraudulently obtained, nevertheless, by some magic not clearly understood, an applicant can later become rehabilitated and cause the license to be reinstated. As said in appellant's brief, "the provisions of the Code authorizing reinstatement of licentiates, whose former licenses had been revoked for misconduct after the lawful receipt of such licenses, was not intended and cannot be construed as a grant of power to the Board to conduct proceedings for a retrial of the merits of the revocation proceedings."

The sum and substance of the respondent's claim is, in effect, that all the various hearings and decisions therein, before the Board and before the courts, both trial and appellate, shall, in so far as the same are unfavorable, be disregarded, and the entire controversy again opened up and continued ad infinitum. Such cannot be and is not the law.

In place of pursuing the rational procedure, and presenting the claim of forged and perjured evidence at the hearing in the revocation proceedings, respondent waited some twelve years and then, by way of a reinstatement petition, sought a rehearing of the entire matter. In the meantime, as appellants point out, and this is not denied by respondent, all witnesses to respondent's alleged fraud, "have either died or removed to places unknown," and are consequently unavailable. Under all the circumstances disclosed by the record, and particularly in view of the opportunity afforded to present the present claims to the Board at the hearing of October 18, 1932, it cannot be deemed that the respondent has suffered any injury which is now subject to judicial correction.

The judgment is therefore reversed and the peremptory writ of mandate discharged.

YORK, P. J., and WHITE, J., concur.

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82 Cal.App.2d 254

## MacKENZIE v. ANGLE.

Civ. 7405.

District Court of Appeal, Third District, California.

Nov. 4, 1947.

Rehearing Denied Nov. 25, 1947.

Hearing Denied Dec. 30, 1947.

**1. Appeal and error 🔑977(1)**
**New trial 🔑6**

A motion for a new trial is, to a large extent, addressed to trial court's sound legal discretion, and court's action will not be disturbed on appeal in absence of a clear and affirmative showing of a gross, manifest, or unmistakable abuse of discretion.

**2. Appeal and error 🔑977(3)**

Where there appears to be reasonable or even fairly debatable justification for granting of a new trial, order will not be set aside, though contrary order might not be disapproved or appellate court might be inclined to take a different view.

**3. New trial 🔑102(8)**

In action for injuries sustained when plaintiff was struck by plank falling from building under construction, wherein defendant obtained judgment on ground that plaintiff was a trespasser because inside building when injured, trial court did not abuse discretion in granting plaintiff a new trial for newly discovered evidence of workman on building that plaintiff was standing in alley when injured, though plaintiff had not sought a continuance of trial to continue his search for workman who was then missing, where materiality of workman's testimony was not known to plaintiff at the time.

**4. Appeal and error 🔑174**

Surviving defendant's contention that action abated with death of deceased defendant, and that no recovery could be had against surviving defendant, could not be considered on appeal, where question was not raised in lower court, there was no demurrer to complaint as amended, no motion for nonsuit or directed verdict, and no such contention was made by surviving defendant in her answer.

**5. Appeal and error 🔑169**

Questions not raised in a lower court will not be considered on appeal.

Appeal from Superior Court, Merced County; R. R. Sischo, Judge.

Action by Alexander MacKenzie against Elmer K. Angle, an individual doing business under the name or style of Dos Palos Theater, and Ella M. Angle, sued as Doe One, to recover for injuries. From an order granting the plaintiff a new trial after judgment for Ella M. Angle, Ella M. Angle appeals.

Order affirmed.

Chester O. Hansen, of Fresno, and Linneman & Burgess, of Dos Palso, for appellant.

C. Ray Robinson, of Merced, for respondent.

ADAMS, Presiding Justice.

Plaintiff sued defendants for damages for personal injuries sustained by him when he was struck by a plank which fell from a theater building under construction by defendants in the city of Dos Palos, it being alleged that the falling of such plank was due to the negligence of defendants. Defendant Elmer K. Angle and his wife, Ella M. Angle (the latter having been substituted for one of the fictitious defendants), answered the complaint, denying negligence and further alleging that at the time plaintiff was injured he was a trespasser upon defendants' property and that he was, himself, guilty of contributory negligence.

Prior to the trial of the action Elmer Angle was killed, and it was stipulated that the complaint be amended to allege that during the times referred to therein Elmer Angle was the agent, servant and representative of defendant Ella M. Angle, such allegation to be deemed denied. Trial of the action was had on December 30, 1946, before a jury and resulted in a verdict for defendant Ella M. Angle, on December 31, 1946, and the entry of a judgment accordingly on January 2, 1947. Plaintiff then made a motion for a new trial, upon all statutory grounds, urging particularly the ground of newly discovered evidence. The court entered an order granting a new trial and this appeal was taken therefrom.

The evidence shows that at the time plaintiff was injured appellant and her husband were engaged in the reconstruction of a theater building, which they owned. That plaintiff was severely injured by being struck by a plank which fell from near the top of the building is not denied; but it was and is contended by appellant that at the time of the accident plaintiff was a trespasser. He had gone to the theater building to see Mr. Angle on a matter of business. As to where he was when the plank fell upon him, there is a conflict of evidence, plaintiff testifying that he was in the alley adjoining the theater building, and appellant contending that he was not in the alley but was just on the threshold of a rear entrance to the building, and that he was a trespasser because he had no permission to be at that place when he was injured.

The particular issue presented on this appeal is whether the trial court abused its discretion in granting the new trial, it being the contention of appellant that a new trial should have been denied because plaintiff had not requested a continuance of the trial.

The newly discovered evidence upon which respondent relies is the testimony of one Charles Van Diver. In support of his motion for a new trial plaintiff filed six affidavits, one of which was made by Van Diver who stated that at the time of the accident he was in the employ of Elmer Angle, working on the theater building; that he saw MacKenzie standing in the alley about four feet west of the west wall thereof, looking through the doorway into the building; that he saw him pitch forward, and that with others he scrambled down to the ground and found MacKenzie badly hurt; that he was sure that he was at least four feet from the door when he was struck, and was not moving toward the building but was obviously waiting for Elmer Angle to come out of the building; that no part of MacKenzie's body fell into the doorway when he was struck. This affiant also stated that just prior to the accident he saw Raymond Angle, who was working on the job with affiant, carry a piece of lumber to the northwest edge of the scaffolding, the board being balanced rather precariously on the corner so that both ends hung over the wall about two feet over the alley; that the wind was very strong that day. He also stated that after plaintiff had been taken to a hospital by Elmer Angle, and as affiant was returning to his work in the car with Raymond Angle, the latter stated that he thought it was his fault that the accident happened because he had laid the board down where he did; that he had intended to move it but had forgotten to do so.

An affidavit was filed by Crawford C. Mottram in which he stated that on November 31, 1946, he went to Dos Palos at the request of plaintiff's attorney, in an endeavor to ascertain the whereabouts of Van

Diver; that he questioned Shelton Angle, Sr., William Holt and Raymond Angle, all of whom denied any knowledge of Van Diver's whereabouts; that he also made inquiry at the Post Office, at the constable's office and of numerous merchants and people in the town, but without avail. But that on or about January 2, 1947, he and R. A. McCormick contacted Van Diver who then made a statement as to the facts with respect to the action.

McCormick also made an affidavit alleging therein that he was an attorney associated with plaintiff's attorney, C. Ray Robinson, and that on January 2, 1947, on instructions of attorney Robinson, he and Mottram contacted Van Diver and secured a statement from him.

Russell F. King, who also made one of the affidavits in support of plaintiff's motion, stated that on or before November 30, 1946, he made extensive and protracted efforts to locate Van Diver, even telephoning to the police officers of Kelso, Washington, where he had heard Van Diver might be found; that he had also made extensive inquiry in and about Modesto, in the belief that Van Diver was residing there; but that his efforts had been without avail.

Attorney Robinson also filed his affidavit in which he deposed that ever since he had been retained by plaintiff he had endeavored to locate Van Diver and had instructed three of his associates in his office to make inquiry regarding Van Diver's whereabouts; that he personally went to the Merced County draft board for that purpose, and made inquiry of other named persons; that during the course of the trial he asked various witnesses produced by defendants and who had been present during the construction of the theater building, and that he had done everything possible to secure the presence of Van Diver at the trial; that on January 2, 1947, he was informed of his whereabouts and then sent McCormick and Mottram to interview him; that from information secured he was satisfied that the evidence of Van Diver would establish that plaintiff was not in the building when he was struck by the plank, and that his testimony would demonstrate gross negligence in the placing of the plank in the manner in which it was placed and show that much of the testimony offered by defendant's witnesses was untrue; and that Van Diver had agreed to appear and testify in the event of a new trial.

Willard Treadwell, one of the attorneys for plaintiff, also deposed as to inquiries which he had made in an effort to ascertain the whereabouts of the witness, and his failure to locate him.

In opposition to plaintiff's motion defendant filed affidavits contradicting the allegations of Van Diver's affidavit. Also at the hearing of the motion it was stipulated by plaintiff's attorney that at the time of the trial he knew that Van Diver was an important witness and that he could give testimony that was material to the issues. However, none of the affiants who filed affidavits for appellant contradicted the allegations of plaintiff's affidavits as to the efforts made by his counsel to find Van Diver, nor was any showing made that the witness' whereabouts were known to them or where he was, or that more diligent efforts on plaintiff's part would have resulted in locating him prior to the trial. Nor is it contended that plaintiff's counsel knew at the time of the trial what testimony Van Diver would give.

In view of the conflict of evidence on the hearing of the motion, and the fact that plaintiff's attorney did not ask for a continuance of the trial, appellant contends on this appeal that the trial court abused its discretion in granting plaintiff's motion.

[1, 2] It is settled that a motion for a new trial is, to a large extent, addressed to the sound legal discretion of the court to which the application is made; and it has often been said that its action will not be disturbed on appeal in the absence of a clear and affirmative showing of a gross, manifest or unmistakable abuse of discretion. See Fennessey v. Pacific Gas & Electric Co., 10 Cal.2d 538, 544, 76 P.2d 104; Mazzotta v. Los Angeles Railway Corporation, 25 Cal.2d 165, 169, 153 P.2d 338; Prescott v. City of Orange, 56 Cal.App.2d 144, 150, 132 P.2d 523; Whitfield v. Debrincat, 18 Cal.App.2d 730, 733, 64 P.2d 960. In the latter case the court said that where there appears to be reasonable or even fairly de-

batable justification therefor, an order granting a new trial will not be set aside although a contrary order might not be disapproved or the appellate court might be inclined to take a different view.

Appellant urges particularly that it was error to grant a new trial because plaintiff did not ask a continuance of the trial in order to secure the attendance of the witness; and she cites Turner v. Morrison, 11 Cal. 21; Ferrer v. Home Mutual Ins. Co., 47 Cal. 416; Scanlon v. San Francisco, etc., Ry. Co., 128 Cal. 586, 61 P. 271; Putnam v. Pickwick Stages, 98 Cal.App. 268, 276 P. 1055; and Baker v. Berreman, 61 Cal.App. 2d 235, 142 P.2d 448. But said cases are distinguishable. In the Turner case the witness had been subpoenaed but failed to appear because of sickness. In reversing an order granting a new trial the court said: "The facts set out in the affidavits in support of the motion for a new trial should have been made the foundation of an application for a continuance, so that the plaintiffs might, if they desired, have avoided the delay by admitting the evidence as stated in the affidavit of defendants." But it also said, quoting from Alexander v. Bryon, 2 John.Cas., N.Y., 318, that it had "been repeatedly held, that the subsequent allegation of a party that he was not prepared, is no reason for granting a new trial, unless it be founded on the discovery of testimony of which the party was not at the time apprised." In Ferrer v. Home Mutual Ins. Co. the motion for a new trial was based upon the ground of surprise, and not upon that of newly discovered evidence. It is distinguishable in other respects. In Scanlan v. San Francisco, etc., Ry. Co., it is true that a motion for a new trial was based upon "newly discovered evidence"; but apparently the newly discovered evidence relied upon was testimony of a surveyor who had previously been in appellant's employ but whose whereabouts had not been discovered until too late to produce him at the trial. The court said, at page 589 of 128 Cal., at page 272 of 61 P.: "A new trial was sought, and Donaldson's testimony was urged as the newly-discovered evidence, but it appears from the affidavits that this evidence was in no sense newly discovered. Defendant's engineers had knowledge through their attorney of the materiality of Donaldson's testimony before the trial, and took certain steps to find him and procure his attendance. At the time of the trial they had not discovered him. Knowing of the importance of his testimony, defendant should have moved for a continuance, and, failing to do so, it must be held that it entered upon the trial at its peril. Berry v. Metzler, 7 Cal. 418."

In the instant case the materiality of Van Diver's testimony was not known to plaintiff or his attorneys. Though it was believed that he would be able to shed light on the true situation, it was not known until after the trial was concluded how he would testify. Also in the Scanlan case it does not appear what steps had been taken to find the witness, and the trial court may have concluded that plaintiff had not shown sufficient diligence.

In Putnam v. Pickwick Stages, where the denial of a motion for a new trial was affirmed, the opinion indicates that the moving party knew at the time of the trial what the alleged "newly discovered evidence" was, and that the affirmation was based upon a lack of due diligence in locating the witnesses whose testimony was desired. Also in that case the court affirmed the rule that the action of a trial court on a motion for a new trial will not be disturbed except upon a clear showing of abuse.

In Baker v. Berreman, an order granting a new trial was reversed, the decision being based upon lack of due diligence in endeavoring to secure the attendance of the witness or to take his deposition, and failure to ask for a continuance. Also it there appeared that plaintiff's counsel had interviewed the witness prior to the trial and knew what his testimony would be, and that it could have been obtained by taking his deposition. That was not a case of newly discovered evidence.

Laverne v. Dold, 17 Cal.App.2d 180, 61 P.2d 497, presents a case more clearly applicable. There this court affirmed an order granting a new trial, saying, at pages 183, 184, of 17 Cal.App.2d, at page 498 of 61 P.2d:

"Likewise the court was justified in granting a new trial upon the further ground of newly discovered evidence. An order upon that ground is also a matter within the discretion of the court and will not be disturbed unless an abuse of discretion is clearly shown (Waer v. Waer, 189 Cal. 178, 207 P. 891), and will rarely be disturbed. Spear v. United Railroads, 16 Cal.App. 637, 117 P. 956. Such evidence must be, (1) newly discovered; (2) more than accumulative; (3) would render a different result probable; (4) diligence to secure same must be shown by the moving party; and (5) it must be the best evidence. Bradbury Estate Co. v. Carroll, 98 Cal.App. 145, 276 P. 394. From the affidavit in support of the motion, the evidence of the missing witness comes within these requirements.

"The accident occurred in May, 1933, but the case did not go to trial until April, 1935. One Lester B. Robinson is claimed to have witnessed the collision from a different angle than that of any of the other witnesses, and it is alleged he would have testified as to the position of the cars and the speed of each. Affidavits in support of the motion to which counteraffidavits were not filed, showed that investigators were employed to locate Robinson in Sacramento and in San Francisco, but they were unsuccessful. Appellant claimed respondent made no effort to obtain a continuance of the trial, but as respondent points out, at that time she would have been unable to make an affidavit that the witness would be produced at a given time, nor did she know as to what he would testify if called, and not knowing his whereabouts, she was then unable to produce a deposition to be used at a subsequent date if the cause were continued."

In Whitfield v. Debrincat, 18 Cal.App.2d 730, 733, 64 P.2d 960, 961, the court, in affirming an order granting a new trial, said:

"It is settled that a motion for a new trial is, to a large extent, addressed to the legal discretion of the court to which the application is made, and that its action is conclusive and will not be disturbed, in the absence of a clear and affirmative showing of a gross, manifest, or unmistakable abuse of discretion. 20 Cal.Jur. 27. Such discretion is very wide and every presumption is indulged in support of the action of the court in passing upon the motion. The discretion must be reasonably exercised to the accomplishment of justice, and, where there appears to be a reasonable or even fairly debatable justification therefor, an order granting a new trial will not be set aside, although a contrary order might not be disapproved or the appellate court might be inclined to take a different view. 20 Cal. Jur. 30."

Also in that case, though the ground for a new trial was surprise rather than newly discovered evidence, the court said that the fact that a continuance was not requested was not necessarily fatal, if it was apparent that the moving party had not been guilty of laches and had acted in good faith in omitting to ask for a continuance.

Regarding the discretion of a trial court in granting a new trial it was said in Provin v. Continental Oil Co., 49 Cal.App.2d 417, 425, 121 P.2d 740, 744:

"There must be a clear showing of abuse of discretion before a reviewing court will reverse an order granting a new trial; this must be manifest abuse of discretion by the trial court. Harrison v. Sutter St. Ry. Co., 116 Cal. 156 47 P. 1019; Kenezleber v. Wahl, 92 Cal. 202, 28 P. 225; Brannock v. Bromley, 30 Cal.App.2d 516, 86 P.2d 1062; Kohlhauer v. Bronstein, 9 Cal.App.2d 166, 48 P.2d 994; Heintz v. Cooper, 104 Cal. 668 38 P. 511."

Also see Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 133, 135, 138 P. 712; Dasso v. Bradbury, 39 Cal.App.2d 712, 717, 718, 104 P.2d 128.

[3] Whether in the instant case plaintiff had exercised due diligence in seeking to find the witness Van Diver, and whether his testimony, if adduced, might have produced a different result, were matters for determination by the trial court; and it stated, when the motion was before it: "I do feel that this man Van Diver is a controlling witness in this action and if he goes through with what he said in this thing, I believe there will be a different result in this case." And as for the failure of plaintiff to ask for a continuance, no one can know better than the trial court whether, if requested, it would have been granted in view of the fact that plaintiff did not then

know what the witness' testimony would be, would have been unable to show that, if a continuance were granted, he would be able to produce him at a subsequent time to which the trial might be continued; and, obviously, could not have offered any statement as to his testimony to which defendant would have stipulated.

We conclude that the trial court did not abuse its discretion in granting a new trial.

[4] Appellant also urges that the trial court erred in granting a new trial because the action abated with the death of Elmer K. Angle, and that no recovery can be had in any event against Ella M. Angle, his widow. But a review of the record in the case shows that this question was not raised in the lower court. There was no demurrer to the complaint as amended, and no motion for a nonsuit or directed verdict. No such contention was made by Ella M. Angle in her answer to plaintiff's complaint, which answer merely relied upon the same defense asserted by her husband, to wit, that plaintiff was a trespasser, that he was guilty of contributory negligence, and that there was no negligence on the part of defendants. There was no motion to abate the action after the death of Mr. Angle, and, on motion for a new trial, no objection thereto was based upon the ground of nonliability of Mrs. Angle. In this state of the case appellant's contention in this regard will not be considered on appeal.

In Preston v. Knapp, 85 Cal. 559, 561, 562, 24 P. 811, it was held that a defense in the nature of abatement of an action will not be considered by an appellate court if not expressly made in the trial court. That case was followed in Smith v. Stuteman, 79 Cal. App.2d 708, at page 710, 181 P.2d 123, at page 125, where the court said:

> "Respondent has raised in her brief the further contention that the order of the trial court should be affirmed, on the ground that one spouse cannot sue the other for damages in tort. This defense was not pleaded and it was not stated as a ground of the motion to dismiss the action. Accordingly, respondent cannot now avail herself of its protection. Royal Consol. Min. Co. v. Royal Consol. Mines Co., 157 Cal. 737, 761, 110 P. 123, 137 Am.St.Rep. 165. A defense in the nature of a defense in abatement is presumed to be waived if not made before the trial court. Preston v. Knapp, 85 Cal 559, 561, 562, 24 P. 811."

[5] A rule, early established and long adhered to in the courts of this state, is that questions not raised in a lower court will not be considered on appeal. See Imperial Valley Land Co. v. Globe Grain & Milling Co., 187 Cal. 352, 359, 202 P. 129; Douglas v. Southern Pac. Co., 203 Cal. 390, 264 P. 237; Sullivan v. Vera, 125 Cal.App. 303, 309, 13 P.2d 770; Greene v. Riordan, 97 Cal.App. 462, 469, 276 P. 141. Also see Boot v. Boyd, 37 Cal.App. 545, 555, 174 P. 352, and Munfrey v. Cleary, 75 Cal.App.2d 779, 784, 785, 171 P.2d 750, decided by this court; and other cases therein cited.

The order appealed from is affirmed.

PEEK and THOMPSON, JJ., concur.

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82 Cal.App.2d 228

**SLAVICH et al. v. WALSH et al.**

**Civ. 13626.**

District Court of Appeal, First District, Division 1, California.

Nov. 4, 1947.

Rehearing Denied Dec. 4, 1947.

Hearing Denied Dec. 22, 1947.

**1. Courts** 🔑42(5)

Neither section 7½ of article 11 of the Constitution referring to power of a chartered city over "inferior" courts, nor section 8½ of article 11 referring to power of a chartered city over "municipal courts" applies to the "municipal courts" provided for in article 6, section 11. Const. art. 6, § 11, as amended in 1924; art. 11, §§ 7½, 8½.

**2. Courts** 🔑42(5)

Under the constitutional provision for the establishment of municipal courts in chartered cities having a population of

40,000 or more, the complete control over municipal courts is placed in the Legislature and not in the city or city and county except for the sole question as to whether a municipal court shall exist in the municipality. Const. art. 6, § 11, as amended in 1924.

**3. Courts ⚷42(5)**

Under constitutional provision for establishment of municipal courts in chartered cities having a population of 40,000 or more, salaries of attachés in such courts may be fixed by Legislature under provision conferring on Legislature power to provide for the "constitution, regulation, government and procedure" of municipal courts, as against contention that the express conferring on Legislature of power to fix compensation of municipal judges, and of other justices and judges of courts of record was by implication a denial of the power to fix any other salaries. Const. art. 6, § 11, as amended in 1924.

**4. Constitutional law ⚷26**

The State Constitution is not a grant of power but is a limitation on the powers of the Legislature and an express enumeration of legislative powers is not exclusive of others not named.

**5. Constitutional law ⚷63(2)**

Where the City of San Francisco was permitted from 1929 to 1947 to fix salaries of clerks and deputy clerks of municipal court by virtue of statute, the delegation of power of Legislature to fix salaries of such attachés was not irrevocable so as to preclude Legislature in 1947 from determining by new enactment the compensation such attachés should receive. Gen. Laws, Act 5238, §§ 6, 6a; Const. art. 6, § 11, as amended in 1924.

**6. Constitutional law ⚷63(2)**
**Courts ⚷42(5)**

Under statute enacted in 1947 adding section 6a to the Municipal Court Act of 1925, attachés of Municipal Court of San Francisco are "municipal employees" of a hybrid nature and under Constitution, the Legislature could specifically provide for salaries of such attachés and could also delegate power to the municipality in regard to civil service, health and retirement. Gen. Laws, Act 5238, §§ 6, 6a; Const. art. 6, § 11, as amended in 1924.

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Mandamus proceeding by Ivan L. Slavich and others against Francis P. Walsh and others, as members of and constituting the Civil Service Commission of the City and County of San Francisco, William L. Henderson, Personnel Director and Secretary of the Civil Service Commission, and Harry D. Ross, as Controller of the City and County of San Francisco, to compel members of Civil Service Commission and its secretary to approve for transmittal to controller the payrolls for the clerk and deputy clerks of the municipal court covering period subsequent to 18th of September, 1947.

Peremptory writ of mandate issued.

John J. Dailey, of San Francisco, for petitioners.

John J. O'Toole, City Atty., and Norman Sanford Wolff, Dep. City Atty., both of San Francisco, for respondent.

PETERS, Presiding Justice.

The three petitioners, who are the clerk and two deputy clerks of the Municipal Court of San Francisco, on their own behalf and in behalf of some eighty-three other deputy clerks, seek by this proceeding in mandamus to compel respondents, the members of the Civil Service Commission of San Francisco and its secretary, to approve for transmittal to respondent controller the payrolls for the clerk and deputy clerks of the Municipal Court covering the period subsequent to the 18th of September, 1947. Such submission and approval are required under the provisions of the city charter before the controller may issue pay warrants.

The respondents' refusal to act is based on the fact that the proposed payrolls for the period subsequent to September 18, 1947, are predicated upon salaries fixed by the state legislature in 1947 by statute, which salaries are in excess of those fixed in the annual salary ordinance of the city. It is the contention of respondents that the attempt by the legislature to fix these salaries by statute in 1947 was and is void.

At its 1947 session the legislature enacted Chap. 1113, Stats. of 1947, which added § 6a to the Municipal Court Act of 1925. (Deering's Gen. Laws, Act. No. 5238.) That statute is entitled: "An act authorizing the establishment of municipal courts, prescribing their constitution, regulation, government, procedure and jurisdiction, and providing for the election and appointment of the judges, clerks and other attaches of such courts, their terms of office, qualification and compensation and for the selection of jurors therein." By that statute chartered cities with a designated population are permitted to create such courts under certain conditions. San Francisco availed itself of this permission in 1929, and the Municipal Court of the City and County of San Francisco was created in 1930. Prior to the legislative enactment of 1947, § 6 of the Municipal Court Act applicable to cities of the first class, that being the classification of San Francisco, prescribed the salaries to be paid the judges, the clerk and the jury commissioner. Prior to 1947, § 6 also provided that the clerk might appoint "such other deputies and attaches as may be provided for by the board of supervisors in the annual salary ordinance." As to the Los Angeles Municipal Court, §§ 7, 7a, 7b and 7c of the Municipal Court Act for many years has fixed the salaries of the judges, clerk, marshal, referees, deputy clerks, assistant and deputy marshals and commissioners. In 1947, by Chap. 1113, the state legislature provided that the clerk might appoint some eighty-five deputy clerks, specifying in some instances the particular duties to be performed by certain of these deputies, and fixing the pay rates for the clerk and all of his deputies.

Prior to the enactment of Chap. 1113, the respondent commission, acting pursuant to the quoted portion of § 6 which was superseded by Chap. 1113, submitted to the board of supervisors a proposed salary ordinance for the fiscal year 1947–1948 which included salary rates for all positions paid out of city and county funds, including the clerk and deputy clerks of the Municipal Court. In all cases these proposed salaries were lower than those subsequently fixed by Chap. 1113. The board of supervisors passed this ordinance and it became effective for the fiscal year in question. After the legislature had passed, and the Governor had signed, Chap. 1113, but before it became effective, the board of supervisors amended the appropriation ordinance to include the raises for these clerks as fixed by the state legislature. Nevertheless, the secretary of the civil service commission has refused to approve the timerolls of the clerk and deputy clerks insofar as they are based on the state statute, and the controller refuses to draw a payroll or issue warrants based thereon.

An examination of the constitutional provision providing for the creation of Municipal Courts (Art. VI, § 11, as amended in 1924), of the Municipal Court Act, and of the cases interpreting them, demonstrates to a certainty that the state legislature has the power to fix the salaries of all officers and attaches of all municipal courts of the type provided in Art. VI, § 11, and that where the state has acted, the governing body of the city or city and county has no power at all over such salaries. It should be here mentioned that attached to the present petition are two opinions of the attorney general, two of the legislative counsel and two of the San Francisco city attorney (the latter now opposing the granting of the writ), all concluding that the state's power is paramount over the salaries of the clerk and deputy clerks of the Municipal Court of San Francisco.

[1] There is not here involved the proper interpretation of the so-called "home rule" provisions of the Constitution. While it is true that Art. XI, § 7½, of the Constitution refers to the power of a chartered city over "inferior" courts, and that § 8½ of Art. XI, refers to the power of a chartered city over "municipal" courts, it is settled that neither section applies to the "municipal courts" provided for by Art. VI, § 11. Kenyon v. Johnson, 97 Cal.App. 552, 276 P. 110; Simpson v. Payne, 79 Cal.App. 780, 251 P. 324; see discussion 6 Cal.Jur. 10 Yr. Supp. p. 732 et seq. The courts referred to in Art. VI, § 11, are courts of record inferior to the

Superior Courts but superior to the "inferior" or "municipal" courts referred to in §§ 7½ and 8½ of Art. XI.

Art. VI, § 11, provides for the establishment of municipal courts in chartered cities having a population of 40,000 or more, provides how such courts might be created in such cities, and then provides: "The legislature shall provide by general law for the constitution, regulation, government and procedure of municipal courts. * * * The manner in which, the time at which, the term for which the judges, clerks and other attaches of municipal courts shall be elected or appointed, the number and qualifications of said judges and of the clerks and other attaches, except as such matters are otherwise provided in this article, shall be prescribed by the legislature. The compensation of the justices or judges of all courts of record, shall be fixed and the payment thereof prescribed by the legislature."

[2] Under this section it is quite apparent that, except for the sole question as to whether a municipal court shall exist in the municipality, the complete control over municipal courts is placed by the Constitution in the legislature and not in the city or city and county. The available case law clearly so holds. In Simpson v. Payne, 79 Cal.App. 780, 251 P. 324, a clerk of the Municipal Court of Los Angeles brought mandamus to compel the county to issue a warrant on the basis of § 7 of the Municipal Court Act fixing his salary. The county maintained that he was only entitled to a lesser salary as fixed by the board of supervisors. The court pointedly held that the legislature and not the chartered municipality had the constitutional power to fix the salaries to be paid clerks and attaches of the municipal court.

In Chambers v. Terry, 40 Cal.App.2d 153, 104 P.2d 663, the court considered the extent of the control of the legislature over municipal courts. At page 158 of 40 Cal.App.2d, at page 667 of 104 P.2d, it is stated:

"In this regard, we adopt portions of the opinion filed by the five judges of the trial court, which are as follows:

"'It is still our view that the Constitution of municipal courts from every viewpoint, except only that of the bare question whether they shall exist at all or not in [a] given locality, is a state, rather than a municipal affair. This seems to us necessarily to follow from the requirement of section 11 of article VI of the State Constitution that "the legislature shall provide by general law for the constitution, regulation, government and procedure of municipal courts, and for the jurisdiction thereof except in particulars otherwise specified in this section, and for the establishment of municipal courts in cities or cities and counties governed under charters framed and adopted under the authority of this Constitution, and having the population hereinbefore in this section specified," i. e., more than 40,000 inhabitants. The only "particulars otherwise specified" in section 11, that is particulars in which the subjects mentioned are excepted from the requirement that they be governed by "general law" have to do with the right of the voters of the municipality to decide whether they wish such courts or do not wish them. They can, if they choose, have courts of the sort prescribed by general law under authority of article VI of the Constitution. But they must choose whether they want those courts or do not want them. They must either take them as the general law constitutes them or not take them at all. The circumstance that such courts are not in their functions or jurisdiction treated as falling within the category of municipal affairs is patent. * * *'"

The Supreme Court in Wilson v. Walters, 19 Cal.2d 111, 119, 119 P.2d 340, 344, has the following to say on this subject: "It has been declared that the constitution of municipal courts, from every viewpoint, except only that of the bare question of whether there shall or shall not be one in any given locality, is a state rather than a municipal affair."

While it is true that Art. VI, § 11, does not expressly provide that the legislature shall fix the compensation of clerks and deputy clerks, it does provide that the legislature shall prescribe for the "constitution, regulation, government and procedure" of such courts. By such language the legislature has provided that the entire municipal court set-up, including salaries of attaches, is to be controlled by general state law. It may be that by general state law the legislature may delegate a portion of this power to local bodies, as it did by old § 6 of the Municipal Court Act in reference to deputy clerks, but it is quite clear that upon the passage of a general law on the same subject the delegated authority to the local body terminates.

[3, 4] These conclusions are not seriously attacked by respondents. They do, however, make several contentions that require further comment. They first point out that § 11 of Art. VI expressly confers on the legislature the power to fix the compensation of municipal judges, and of other justices and judges of courts of record. They interpret that provision as being a grant of power to the legislature to fix only the salaries of the judges, and by implication a denial of the power to fix any other salaries. To state the proposition is to refute it. The power to fix the salaries of the attaches springs from that portion of Art. VI, § 11, conferring on the legislature the power to provide for the "constitution, regulation, government and procedure" of the municipal courts. That was the express holding of the Simpson case, supra. It is, of course, elementary law that, unlike the federal constitution, the state constitution is not a grant of power to the legislature but rather a limitation upon the powers of that body. An express enumeration of legislative powers is not exclusive of others not named, unless accompanied by negative terms. See cases collected 5 Cal.Jur. p. 666 et seq., § 87 et seq. There is nothing in § 11 of Art. VI to negate the legislature's power to fix the salaries of attaches, in fact, the blanket authority granted includes that power. The proper interpretation of the clause of Art. VI, § 11, conferring the power on the legislature to fix the judges' salaries is that by that clause the legislature itself must fix the salaries, while as to other matters relating to the "constitution, regulation, government", etc., of the municipal courts it is implied that the legislature can delegate to the respective municipalities control over certain phases of such regulation, including the fixing of attaches' salaries as long as such delegation is effected by the "general law."

[5] Respondents next point out that from 1929 to 1947 the legislature has consistently recognized the power of the local board of supervisors to fix the salaries of some of the attaches of the San Francisco Municipal Court under § 6 of the Municipal Court Act. It is urged that this constituted some sort of a waiver and a recognition that such employees were municipal employees subject to municipal control. The argument overlooks the fact that San Francisco has been permitted to fix the salaries in question not by reason of any charter provision, but solely by virtue of the provisions of § 6 of the state act, repealed in 1947, conferring that power on the municipality. The question is not what the state legislature has heretofore done in delegating this authority to the city, but whether the legislature has constitutional power to withdraw a delegation of power once granted. Respondents' argument amounts to the contention that, although the Constitution confers the power to fix the salaries of attaches on the state legislature, if the state legislature once delegates that power, such delegation is irrevocable. It needs no citation of authority to establish the principle that the legislature may not thus divest itself of its constitutionally granted powers.

The principal argument of respondents is that the 1947 legislation itself recognizes that these employees, except as to salaries, are "municipal employees" and it is contended that such recognition compels the conclusion that all matters relating to such employees, including salaries, are within the sole control of the chartered municipality The statute involved—Stats. of 1947, Chap. 1113—first provides that the judges shall appoint a clerk and then the statute fixes his salary. It is then provided that the clerk shall appoint various deputies and attaches, and in some cases defines their duties, and then the statute fixes their salaries. It is then provided that the appointing power, when vacancies occur, shall secure from the civil service commission of cities of the first class (San Francisco) the name of the highest person on the list of eligibles for such position, and that all such positions shall be promotive. It is next provided that "All attaches [of the municipal court] heretofore or hereafter appointed * * * shall be entitled to the benefits of the civil service provisions of the charter * * * and said attaches shall be entitled to and shall be subject to any retirement and health service provisions in the charter * * * to the same extent and in the same manner as heretofore provided for said attaches of the said municipal court and in accordance with any changes hereafter made in said charter provisions affecting employees" of the city. It is argued that these provisions recognize that these employees are municipal employees and it is argued once that is recognized, since San Francisco is a chartered city, it must have complete control over such employees, including the power to fix their salaries and prescribe their duties. It is argued that, if the salary provisions of Chap. 1113 are inconsistent with the provisions just quoted, the latter must control under the claimed rule of construction that provisions appearing later in a statute control preceding provisions. Respondents point out that under the city charter only municipal employees are entitled to civil service, health and retirement benefits. They also point out that by § 22 of the Municipal Court Act all salaries of the judges and attaches of the court are paid by the county, and contend that that also indicates the local nature of their employment.

[6] These arguments are all unsound. There can be no doubt that these employees are municipal employees, but they are municipal employees of a hybrid nature. By constitutional provision the state legislature is the body that is given the power to regulate such employees, including the power to fix their salaries. But in many other respects they are municipal employees. Thus it was held in the County of Los Angeles v. Industrial Acc. Comm., 123 Cal.App. 12, 11 P.2d 434, that an attache of the Municipal Court of Los Angeles was an employee of the city so far as the compensation act is concerned. It is quite apparent that such attaches are municipal employees, but unlike other municipal employees, they are subject to the control of the state legislature operating under the constitutional power contained in Art. VI, § 11. If that is inconsistent with the powers of chartered cities contained in §§ 7½ and 8½ of Art. XI, the provisions of § 11 of Art. VI, being later in time, must control. The employees are municipal employees, but the legislature, by the express terms of Art. VI, § 11, is granted the power to determine when, how, and under what conditions such employees are to be taken into the employ of the municipality. Whatever authority the city may have over such employees is inferior and subordinate to that of the legislature under its constitutional powers. The legislature has seen fit to fix the number, salaries, and in some cases to fix the duties, of such employees. Where it has acted its powers are supreme. But as to other matters—civil service, health and retirement—the legislature has seen fit to delegate power to the municipality under general law. There is no irreconcilable conflict between these two positions. The legislature has simply seen fit to exercise its constitutional powers by specifically providing for salaries, while in these other respects it has seen fit to exercise its powers by delegating power to the municipality. This it had constitutional power to do.

None of the other arguments made requires discussion. It is quite apparent that petitioners are entitled to have their salaries paid in accordance with the state law. Let a peremptory writ of mandate issue ordering respondents to approve the payrolls as submitted and to issue pay warrants accordingly.

WARD and BRAY, JJ., concur.

Hearing denied; EDMONDS and CARTER, JJ., dissenting.

### DANDINI v. DANDINI et al.

### Civ. 13366.

District Court of Appeal, First District, Division 1, California.

Nov. 5, 1947.

Rehearing Denied Dec. 5, 1947.

Hearing Denied Dec. 30, 1947.

**1. Appeal and error** ⚿1010(1)

The function of an appellate court is not to invade the jury box or usurp a prerogative of the trial judge and, if a finding made is supported by competent and substantial evidence, it must stand and it is not enough to say that equally competent and substantial evidence in the record would just as adequately, or from a consideration of mere lifeless words, even more adequately, support a contrary finding.

**2. Appeal and error** ⚿994(3)

Before reviewing court can reject testimony of a witness who is believed by trial court sitting without a jury, testimony must be inherently improbable and it is not sufficient that testimony disclose circumstances which are unusual.

**3. Appeal and error** ⚿994(3)

Reviewing court could not reject testimony of witness believed by trial court sitting without jury where the testimony did not involve a physical impossibility nor was its falsity apparent without resort to inference or deduction.

**4. Witnesses** ⚿316

Trial court sitting without jury could believe the rest of testimony of witnesses even though some was shown to be incredible.

**5. Husband and wife** ⚿270(8)

Evidence sustained finding that transfers of shares of stock by husband against whom plaintiff had secured a judgment of support and maintenance was made for consideration and not with intent to defraud plaintiff of her community interest in the transferred stock and that the transfer did not constitute an unlawful preference which plaintiff could set aside. Civ.Code, §§ 3431, 3432.

**6. Contracts** ⚿67

The extinguishment of security or a pre-existing debt constitutes a valuable consideration for the sale or assignment of property.

**7. Usury** ⚿76

Where debtor borrowed money from defendants for 7% interest per annum and assigned an interest in an invention to defendants and all income from the interest, in the invention that the concession for loan was usurious would not render entire transaction void. Gen.Laws, Act 3757, § 1.

**8. Limitation of actions** ⚿39(7)

Complaint by wife to set aside transfers by husband of shares of stock to secure loans on ground that concession therefor exceeded the lawful interest rate rendering the transactions usurious, filed two years and 11 months after the stock was transferred, was barred by the two-year statute of limitations. Gen.Laws, Act 3757, § 1.

◆

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by Lillian R. Dandini against A. O. Dandini and others for permanent support and maintenance and for judgment setting aside and annulling an assignment of shares of stock. From part of judgment predicated upon finding that defendant A. O. Dandini had no interest in the shares of stock, plaintiff appeals.

Judgment affirmed.

Johnson, Harmon & Stirrat and William H. Henderson, all of San Francisco, for appellant.

Leo R. Friedman, of San Francisco, for respondents.

FINLEY, Justice pro tem.

At the time of the filing of this action plaintiff Lillian Remillard Dandini and defendant A. O. Dandini were husband and wife. Plaintiff sought and was awarded judgment against said defendant for permanent support and maintenance. She also sought but was denied judgment setting aside and annulling the assignment and transfer by said A. O. Dandini of 253 shares of stock of defendant Remillard–Dandini Company, a corporation, to the defendants Sesenna.

The trial court found said stock to be the property of Oreste Sesenna and Rose Cungi Sesenna, husband and wife (also known as O. Mario Sesenna and Rose Cungi), as trustees for their son Manlio Sesenna and their daughter Julianna Sesenna, and that A. O. Dandini has no right, title, claim or interest therein. From this finding and that part of the judgment predicated thereon plaintiff appeals.

Appellant's maiden name was Lillian Remillard. In 1860 her father and a partner established the Remillard Brick Company which was turned into a California corporation in 1879. It will be referred to herein as the Remillard company. The stock of this corporation all came to be owned by the Remillard family. Appellant's father died first and subsequently upon the death of her mother in 1934 the stock all became vested in appellant, partly in her own right and the balance in trust for Emma Remillard, her sister.

Appellant married respondent A. O. Dandini on August 23, 1932. They separated June 1, 1938. In the summer of 1934 just after the death of appellant's mother the Remillard–Dandini Company, also a California corporation, was organized. It will hereafter be referred to as the Dandini company. To this newly formed corporation the Remillard company conveyed sixty acres of land including two factories, which constituted all of its operating business, together with its accounts receivable. In exchange it received 300 shares of stock in the Dandini company, 150 shares of which were transferred by the Remillard company to respondent A. O. Dandini and the remaining 150 shares retained.

The 150 shares of stock were transferred to respondent A. O. Dandini pursuant to a tri-party pre-organization agreement entered into by the Remillard company, the Dandini company and A. O. Dandini. This agreement provided among other things that A. O. Dandini was to be president and manager of the Dandini company for a period of five years at a compensation of $300 per month plus a commission of 75¢ per thousand bricks manufactured, the payment of this commission to be contingent upon the company being out of debt to outside parties and having the necessary funds available with which to pay the bonus.

On August 18, 1939, the Remillard company individually and in the name and on behalf of the Dandini company filed action No. 154,456 in the superior court of Alameda County against A. O. Dandini and the four other directors of the Dandini company, other than appellant Lillian Dandini. An accounting and other relief were sought. An injunction was issued therein on September 11, 1939, restraining A. O. Dandini from disposing of all property coming into his hands through use of funds or property of the Dandini company. The matter came to trial and on October 14, 1943, the court ruled that respondent A. O. Dandini had misappropriated from the Dandini company the sum of $51,404.04 and gave judgment for $43,399.55. The remaining $8,044.89 was found to be barred by the four year statute of limitations. The findings also show that late in 1938 and early in 1939 the then directors of the Dandini company passed a resolution and took all steps necessary to have issued to respondent A. O. Dandini 100 shares of stock in the Dandini company valued at $10,000 in return for cancellation of his accrued commissions on the sale of brick in the sum of $38,000. The court found the transaction to be fraudulent; that respondent Dandini was, on account of the financial condition of the Dandini company, not then entitled to receive payment although his accrued commission actually amounted to $38,000. It was adjudged that respondent Dandini should return the 100 shares of stock to the Dandini company within 30 days or in lieu thereof the company was to recover $10,000.

As above stated the action in the Alameda County court was commenced August 18, 1939, the injunction was issued on September 11, 1939, and the court made its ruling on October 14, 1943. On October 19, 1939, the block of 100 shares just referred to above, together with an additional 151 shares standing in the name of respondent A. O. Dandini were transferred by him to the respondents Sesenna. This was followed on May 18, 1942, by transfer of two additional shares for $100 each, making 253 shares in all. Appellant in her brief treated these two latter shares separately explaining that "the evidence of fraud primarily concerns the transfer of the 251 shares." The trial court's finding that Dandini paid $100 each for the two shares and that said sum was their fair and reasonable value is supported by the evidence.

At the trial of the present action the transferees admitted knowledge that Dandini was having trouble with his wife and was involved in litigation, but denied that they knew that this trouble or litigation had anything to do with any of the stock. The trial court found that it was not true that the Sesennas "accepted and received said conveyance and transfers of all or any part of said stock with knowledge of any fraudulent intent on the part of A. O. Dandini and/or with knowledge that *104* or any other part of said shares had been fraudulently issued to A. O. Dandini and/or with full or any knowledge of the facts alleged in the complaint against A. O. Dandini filed in said action No. 154,456 in the superior court of the State of California in and for the County of Alameda." (Emphasis added)

In her opening brief appellant outlines the main point raised on appeal as follows: "Was there substantial evidence supporting the decision of the lower court holding that the transfer by A. O. Dandini to the Sesennas of the Remillard–Dandini company stock was made for consideration and not with intent to defraud his wife, Lillian R. Dandini?"

In order to resolve the appeal in favor of appellant on the point as stated, it would be necessary for this court after appraising all evidence favorable to respondents in any degree to hold as a matter of law that it is so inherently improbable or so devoid of substantiality that the trial judge could not have believed it, or within the realm of reason could not have found therein any substantial support for its finding that the transfer of stock was made without any guilty knowledge on the part of the Sesennas and for consideration and not with intent to defraud.

Disregarding all conflicts, evidence favorable to the finding that there was consideration for the transfer of the 251 shares may be summarized as follows: Respondent Dandini owned patent rights on a marine device referred to as a hydrosphere. He wanted to display this device at the World's Fair on Treasure Island in 1939. He lacked the funds with which to construct the hydrosphere and a suitable building in which to display it on the Fair Grounds. Some effort had been made by him to enlist financial backing but without avail until he interested respondent Oreste Sesenna and his wife Rose Cungi Sesenna whom he had known since 1932. In December, 1938, the Sesennas turned over to Dandini $17,500 in cash and took in return a promissory note dated December 23, 1938, bearing interest at 7% per annum, due June 23, 1939, and payable to Rose Cungi (actually Rose Cungi Sesenna). There was also an agreement executed before a notary public on December 23, 1938, whereby A. O. Dandini as "inventor" assigned to O. Mario Sesenna a one-half interest in the hydrosphere and all income therefrom.

On January 25, 1939, the Sesennas delivered to Dandini an additional $3,200 in cash and took another promissory note bearing interest at 7% per annum, due July 25, 1939, and payable to Oreste Sesenna (O. Mario Sesenna).

The building was erected and the hydrosphere constructed and displayed at the Fair. The venture was not a financial success. In August, 1939, both notes being past due, the Sesennas began to press Dandini for payment. Oral and written requests were made without avail. Finally the Sesennas consulted an attorney and after a letter written by the attorney to Dandini was unavailing three separate actions were filed by the Sesennas against Dandini, a separate action on each note and one on the agreement. The purpose of the latter was to recover one-half of the income obtained from display of the hydrosphere.

In negotiations following the filing of these actions Dandini was represented by an attorney. Being without funds he offered the Sesennas 251 shares of the stock in the Dandini company standing in his name. The offer was accepted and on or about October 19, 1939, the stock was transferred to the Sesennas. The actions were thereupon dismissed and the notes and agreement relating to the hydrosphere were returned to Dandini.

The transfer of the stock was accompanied by an agreement reserving unto Dandini an option to buy it back at any time within seven years for the sum of $25,000. The agreement further provided for payments of $83.33 per month to be made by Dandini as a condition to keeping the option alive during the seven year period. These monthly payments were not to apply on the purchase price. If Dandini missed three consecutive monthly payments his option was subject to cancellation. He was entitled to vote the stock so long as his option was in good standing. All dividends were payable to the Sesennas and were to apply on the purchase price of $25,000 in the event Dandini repurchased the stock.

Subsequent to the execution of this agreement four monthly payments of $83.33 each were made followed by default for three consecutive months. Notice of default and election to terminate the option was served on July 19, 1940, and thereupon Dandini's interest in the stock ended.

Appellant contends that the course of dealing just outlined was not bona fide but followed a scheme or design calculated by respondents to fraudulently deprive appellant of her community interest in the stock so transferred. She stresses evidence of the friendly relationship existing between Dandini and the Sesennas which it is claimed culminated in marriage between Dandini and Julianna Sesenna after the judgment was entered herein. She calls attention to eight so-called "badges of fraud" which she claims to be reflected by the evidence and urges that thereby the entire transaction is plainly tabulated as fraudulent. She also calls attention to discrepancies and conflicts in the testimony and points to claimed improbabilities which she urges must surely brand all of the testimony of respondents as false. For the first time she urges in this appeal that even assuming the loans were made as claimed the anticipated and contemplated concession for the loan would exceed the lawful interest rate and would therefore constitute an illegal transaction void as to her.

[1] The function of an appellate court is not to invade the jury box or usurp a prerogative of the trial judge. If a finding made is supported by competent and substantial evidence it must stand. It is not enough to say that equally competent and substantial evidence in the record would just as adequately, or from a consideration of mere lifeless words even more adequately, support a contrary finding. It has always been recognized by reviewing courts that the position of vantage from the standpoint of accurately weighing evidence rests with the judge or jury before whom the witnesses personally appear. Their words are recorded but not the appraisal of their testimony induced by personal observation. It is true that the character of the testimony itself may supply some index, but seldom with sufficient accuracy or completeness to be reliable in those instances where there could arise any reasonable doubt as to adequacy of the proof.

[2–4] From our appraisal of all the evidence and a consideration of the persuasive arguments made by appellant we cannot say that we would not have arrived at a different conclusion had we sat in judgment in the trial court. But neither can we say that the evidence appearing in support of the assailed finding is not adequate or that as a matter of law it is so inherently improbable, even considering the relationships and history of the parties, as to warrant our intervention. "It is not sufficient that the testimony may disclose circumstances which are unusual." Kidroski v. Anderson, 39 Cal. App.2d 602, 605, 103 P.2d 1000, 1001, it does not involve a "physical impossibility" nor is "its falsity * * * apparent without resort to inference or deduction." Therefore it cannot be disregarded. Tobola v. Wholey, 75 Cal.App.2d 351, 170 P.2d 952, 955; Hales v. Snowden, 19 Cal.App.2d 366, 372, 373, 65 P.2d 847. Moreover, even if it be assumed that some of respondents' testimony was shown to be incredible, it was still the privilege of the trial court to believe the rest of their testimony which supports the finding. Hansen v. Bear Film Co., Inc., 28 Cal.2d 154, 184, 168 P.2d 946.

In Washko v. Stewart, 20 Cal.App.2d 347, 348, 67 P.2d 144, 145, the rule applicable here is stated as follows: "While the question of the sufficiency of the evidence to support a finding may be presented for review, the duty of the appellate court stops when it has determined that there is some substantial evidence to support it. Ordinarily, on appeal the court does not and should not pass upon the weight or preponderance of evidence, and it will uphold the finding of the trial court if there is some substantial evidence to support it, even though it would have decided otherwise if it had been the trier of the facts. 2 Cal.Jur. 912, 913. No rule of appellate procedure is more firmly settled than this. In such cases the court is concerned only with the single inquiry, Does the record contain any substantial evidence tending to support the finding assailed? and if there is such evidence, which is not inherently improbable, the answer must always be that the trial court has conclusively decided the question." See also, DeTray v. Higgins, 31 Cal.App.2d 482, 491, 88 P.2d 241; Stevens v. Dillon, 74 Cal.App.2d 178, 168 P.2d 492; Burnsed v. Murray, 70 Cal.App.2d 589, 161 P.2d 413; Pierce v. Pierce, 61 Cal.App.2d 694, 143 P.2d 948; McCarthy v. Security Trust, etc., Bank, 188 Cal. 229, 204 P. 818; Temple v. Corporation of America, 71 Cal.App.2d 599, 163 P.2d 67; Bruce v. Bruce, 71 Cal.App.2d 641, 163 P.2d 95; Hansen v. Bear Film Company, Inc., supra.

[5, 6] The trial court having found that the transfer of stock was made for consideration and was not fraudulent, and it being the judgment of this court that said finding is not without sufficiently substantial support in the evidence, we must further find that the transfer, aside from consideration of actual fraud, did not constitute an unlawful preference which could be set aside at the behest of appellant. This is not a proceeding in bankruptcy and the extinguishment of the antecedent indebtedness which the trial court found to have existed constituted sufficient consideration for the transfer. In United States Fidelity & Guaranty Co. v. Postel, 64 Cal.App.2d 567, 571, 572, 149 P.2d 183, 185, the court stated the rule as follows: "'It is well settled in this state that the extinguishment of security or a preexisting debt constitutes a valuable consideration for the sale or assignment of property. Hart v. Church, 126 Cal. 471, 480, 58 P. 910, 59 P. 296, 77 Am.St.Rep. 195. It is also a well-settled law of this state that in the absence of fraud a debtor may prefer one creditor in preference to another. Section 3431 of the Civil Code provides: "In the absence of fraud every contract of a debtor is valid against all his creditors, existing or subsequent, who have not acquired a lien on the property affected by such contract." Section 3432 of the same Code provided: "A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another." * * * nor does the fact that such preference hinders or delays other creditors in the collection of their claims render it void, nor the fact that the preferred creditor had knowledge that such consequence would follow the preference. 12 Cal.Jur. 1010, 1011; In the Matter of Muller & Kennedy, 118 Cal. 432, 50 P. 660; Priest v. Brown, 100 Cal. 626, 35 P. 323.'"

[7] The remaining issue suggested in appellant's brief but not mentioned in her complaint nor contained in her initial outline of the "question involved" is predicated upon her claim that the concession for the loans of $17,500 and $3,200 exceeded the lawful interest rate which would render the transaction usurious and void as to her. She quotes section 1 of the Usury Law, Act 3757, 2 Deering's Gen.Laws 1944, p. 1349, and cites Jameson v. Warren, 91 Cal.App. 590, 267 P. 372. Concerning the point therein similar to the one involved here that case merely holds that by the terms of a contract between the parties to the action it was sufficiently shown that it was their *intention* to violate the Usury Law and that the stipulation for the payment of *interest* was unenforceable. The case is not au-

thority for the proposition that the entire transaction was void but on the contrary holds that the fact that the interest charged was usurious and uncollectible did not deprive the lender of the right to possession of certain stocks pledged as security for repayment of the loan.

Appellant also cites Scales v. Scott, 13 Cal. 76, and McKenty v. Gladwin, Hugg & Co., 10 Cal. 227. These cases were authority at the time they were decided for the proposition that provision for payment of illegal interest on a note must defraud creditors if enforced and that therefore the entire note was void as against creditors. The holding in Scales v. Scott was squarely founded upon the decision in McKenty v. Gladwin, Hugg & Co., which in turn was predicated by specific reference on the so-called Statute of Frauds then in effect, Compiled Laws of the State of California, 1850-1853, chapter 3, section 20, p. 202, which reads as follows: "Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods (1) in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents and profits thereof, made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands, and every bond or other evidence of debt given, suits commenced, decree or judgment suffered, with the like intent as against the persons hindered, delayed, or defrauded, shall be void." "(1) The word 'goods' is in the enrolled copy, but 'things' or 'choses' was evidently intended."

This statutory provision has long since been repealed and the decisions founded thereon are no longer the law. The Usury Act provides its own remedy and penalties which in no case deprives a lender of the right to receive his principal. In Haines v. Commercial Mortgage Co., 200 Cal. 609, 622, 254 P. 956, 255 P. 805, 806, 53 A.L.R. 725, the opinion reads in part as follows: "Respondents, and also one set of amici curiæ assert that in this case respondents should have had a sweeping provision in the judgment declaring not only forfeiture of the right to interest with penalties thereto, but also declaring forfeited and uncollectible the entire principal debt. There is not a semblance of merit in this contention. * * *

"Moreover, even a casual reading of the statute itself shows that the legislative intent was not to declare the whole contract void, but only the portion thereof relating to interest. The language in this connection is as follows: 'Any agreement or contract of any nature in conflict with the provisions of this section shall be null and void as to any agreement or stipulation therein contained to pay interest and no action at law to recover interest in any sum shall be maintained and the debt cannot be declared due until the full period of time it was contracted for has elapsed.' * * * The contention that the principal debt is forfeited is wholly inconsistent with merely deferring the collection of the debt until the full period of time it was contracted for has elapsed. No authority has been cited, and none can be found, holding the principal debt forfeited under such provision of a statute. The authorities cited by counsel, in so far as applicable to all, are in direct opposition to this contention, for in Jackson v. Shawl, 29 Cal. 267, 272, the court said:

"'The plaintiff's promise was to repay to the defendant the sum borrowed in one month, and also to pay him seven per cent. per month on the principal sum for its use. Here the contract between the parties was legal as to the principal sum, but illegal as to the interest. The two things were not inseparable. "When the transaction is of such a nature that the good part of the consideration can be separated from that which is bad, the courts will make the distinction, for the common law doth divide according to common reason; and having made that void that is against law, lets the rest stand. The general and more liberal principle now is, that when any matter, void even by statute, be mixed up with good matter, which is entirely independent of it, the good part shall stand and the rest be held void." 2 Kent's Com., 467, and cases cited; DeGroot v. Van Duzer, 20 Wend., [N.Y.], [390], 412; Leavitt v. Palmer, 3 N.Y. [19], 37 [51 Am.Dec. 333] 1 Parsons Cont., 380.'

"In Innes v. Goldwater, 30 Cal.App. 101, 105, 157 P. 18, 19, the court again said: 'In the light of this express approval of the principle declared in the case of Jackson v. Shawl, we are constrained to give application to that principle in the case at bar to the extent of holding that the agreements of the plaintiff with the defendant for these several loans and pledges were legal in so far as the principle sum of such loans and the security therefor were concerned, and only illegal as to the interest to be charged, and hence that the plaintiff was not entitled to recover the personal property so pledged and made the subject of this action without first tendering and offering to repay to the defendant the amount of his original loans.'

"Of course, if it were impossible to ascertain how much of the sum contained in the note of $34,000 was principal, and how much thereof was imputable to interest, there might well be made the contention that, inasmuch as some of the transaction was void because prohibited by the statute, all should be so declared, but such is not the fact. The evidence shows without conflict that the item of $1,020 was a three per cent. commission, and that the remainder of the sum, to wit, $32,980, was actually delivered to, and received by, the respondents as principal. The interest is therefore clearly severable from the principal. The fact that they are contained in the same instrument is no argument against such a construction, and, as above noted, the statute declares only the obligation to pay interest void, but nowhere assails the integrity of the obligation to repay the principal."

The Usury Act prescribes a one year period within which recovery of the penalty may be had for violation of its provisions. In Kurzman v. Commercial Credit Co., 33 F.2d 358, the District Court, N.D. California, Second Division, referred to the act as a special law, unknown to the common law and a statute creating a right rather than limiting one. It held that such a statute is not affected by the general rules relating to tolling of statutes of limitation and that failure to discover the usury could not prolong the life of the course of action created.

In Taylor v. Budd, 217 Cal. 262, 266, 18 P.2d 333, 334, the Supreme Court expressed a somewhat different theory. Referring to the remedies available to plaintiffs therein, the opinion reads as follows: "They are clearly entitled to recover treble the amount of interest paid under the note during the year preceding the action. Usury Law, § 3, 2 Deering's Gen.Laws, 1931, Act 3757, p. 1908. They are also entitled to recover the actual usurious interest paid prior to the year preceding the action, and within two years of the suit. The penalty of treble interest specified in the act has been held in this state to be cumulative, and not to abrogate the common-law remedy to recover money paid under illegal provisions of a contract."

[8] The complaint in this action was filed two years and approximately eleven months after the stock was transferred. Assuming, but without holding, that appellant herein would be a proper party to raise the usury issue where the alleged usurious contract was between her husband and the Sesennas, any cause of action predicated on the act itself would, viewing the matter most favorably to appellant, be barred by the two year statute.

Inasmuch as we must hold that under the rules referred to above there is sufficient legally competent and substantial evidence to sustain the findings and that portion of the judgment attacked, the judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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## MILLER v. McLAGLEN.

Civ. 15835.

District Court of Appeal, Second District,
Division 3, California.
Nov. 3, 1947.

**1. Money received 🔑17(1)**
**Sales 🔑353(1)**

Common counts for money received by defendant for use of plaintiff, and for money on account of goods sold and delivered by plaintiff to defendant, were sufficient as against demurrer.

**2. Trial 🔑158**

An objection to the introduction of any evidence, on ground that complaint fails to state a cause of action, is in nature of a general demurrer or a motion by defendant for judgment on the pleadings.

**3. Trial 🔑158**

An objection by defendant to the introduction of any evidence may only be sustained where complaint fails to state a cause of action, and that is the sole question presented to the court.

**4. Trial 🔑158**

On an objection to the introduction of any evidence on the ground that a complaint fails to state a cause of action, the allegations of the complaint must be accepted as true.

**5. Trial 🔑158**

An objection by a defendant to introduction of any evidence on ground that complaint fails to state a cause of action will lie only where admitted averments justify a judgment for defendant, and where no material issue is joined which it is necessary to prove.

**6. Trial 🔑158**

On objection by defendant to introduction of any evidence on ground that complaint fails to state a cause of action, nothing dehors complaint and no defense set up in answer may be considered.

**7. Trial 🔑158**

Where plaintiff pleaded a good cause of action in common count for money received by defendant for use of plaintiff, and a good cause of action in common count for money on account of goods sold and delivered, and defendant objected to introduction of any evidence on ground that complaint failed to state a cause of action, in passing on objection court should not have gone outside complaint, and erred in sustaining defendant's objection on ground that plaintiff's affidavit by which he denied due execution and validity of a rescission agreement was insufficient. Code Civ.Proc. § 448.

**8. Pleading 🔑290(3)**

Failure of plaintiff to file an affidavit denying due execution and genuineness of instruments annexed to answer merely means that plaintiff admits the due execution and genuineness of instruments, and does not preclude plaintiff from making a defense to affirmative allegations of answer on any and all grounds except due execution and genuineness. Code Civ.Proc. § 448.

**9. Payment 🔑89(2)**

An offer to restore is not a prerequisite to the maintenance of an action to recover money paid unless the plaintiff has received something to restore.

**10. Money received 🔑11**

In case an offer by plaintiff to restore something received from defendant would have been fruitless, an offer to restore is not essential to the maintenance of an action for money received.

**11. Money received 🔑15**

Where a plaintiff merely asks for a return of consideration parted with by reason of fraud, mistake, failure of consideration, or any other set of facts authorizing rescission, he is entitled to maintain the action of assumpsit.

**12. Money received 🔑17(1)**

A common count in action for money received is sufficient where the contract is executory, or the action is merely to procure the return of the consideration paid and plaintiff has received nothing of value, and the action is not on the fraud, or failure of consideration, or duress, but on quasi contract imposed by law.

**13. Pleading ⚷354(1)**

A complaint should never be dismissed unless it appears to a certainty that no basic right of action can possibly exist or no relief can possibly be granted.

◆

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by William Molan Miller against Victor Andrew McLaglen to recover on a common count for money allegedly received by defendant for the use of the plaintiff, and on a common count for money on account of goods sold and delivered by plaintiff to defendant. From a judgment for defendant, the plaintiff appeals.

Judgment reversed.

A. Brigham Rose, of Los Angeles, for appellant.

Chase, Rotchford, Downen & Chase, all of Los Angeles, for respondent.

VALLEE, Justice pro tem.

Appeal by plaintiff from a judgment for defendant rendered upon the sustaining of an objection by defendant to the introduction of any evidence.

The complaint is in two counts: The first, a common count for money alleged to have been received by the defendant for the use of plaintiff; the second, a common count for money on account of goods sold and delivered by plaintiff to defendant. The answer to the first count admits the receipt of the money by defendant and denies the other allegations. The answer to the second count is a general denial. Defendant then pleads as a separate defense the making and execution by plaintiff and defendant of a number of written instruments. The purport of these instruments is that plaintiff offered to purchase from defendant real and personal property for a consideration of $32,250; the opening of two escrows, one with a title company with respect to the real property, and one with defendant's attorneys for the sale of the personal property and a liquor license, and an escrow agreement with respect thereto; a bill of sale of the personal property; the cancellation of the escrows and an agreement between the parties by which, in consideration of a cash payment and the transfer of a truck by plaintiff to defendant, defendant released plaintiff from all obligations to purchase. Plaintiff filed an affidavit in which he said, "That pursuant to Section 448 of the Code of Civil Procedure, he submits this affidavit denying the due execution and validity" of the instruments alleged in the answer. In the affidavit plaintiff went on to say that the documents were procured by fraud, misrepresentation and duress on the part of defendant.

The case came on for trial. After a jury was empaneled, the trial judge and counsel repaired to the judge's chambers, whereupon it was agreed that it could be assumed that the first witness had been called. Counsel for defendant then objected to the introduction of any evidence upon the grounds that "there is no allegation (a) of a rescission; or (b) of restoration of consideration, and, therefore, there is no cause of action stated." After argument, which is not in the record, the motion was denied. Further argument and discussion, the nature of which does not appear, followed. Counsel for plaintiff then moved to amend the complaint to allege that plaintiff offered to restore anything he had received from the defendant. This motion was denied. Plaintiff then moved to amend the complaint to incorporate an allegation that plaintiff offered to do equity and to restore anything that he had received or could receive from the defendant. This motion was denied. Plaintiff then moved to amend the complaint to allege that prior to the commencement of the action plaintiff rescinded the transaction. This motion was denied. Proceedings were then resumed in open court and the court stated that he had indicated informally what he was going to do out of the presence of the jury and that he was now ready to proceed with the trial. Counsel for defendant then objected to the introduction of any evidence upon the ground that there was no allegation of a rescission either in the complaint or in any portion of the pleadings or of restoration or offer to restore the consideration and that, therefore, the complaint and all the pleadings failed to state a cause of action in behalf of plaintiff. Counsel for plaintiff then stated that the trial judge had indicated that the motion (objection) be made upon entering open court by counsel for defendant and that he, the trial judge, would grant the motion. The trial judge then stated, "The motion is granted; the case is dismissed." Thereafter, the court rendered judgment that plaintiff take nothing against the defendant and dismissed the action. The judgment recites that "the defendant having made an objection to the introduction of any evidence on the part of the plaintiff in support of his complaint on file herein on the ground that it appeared from the pleadings that said action was based upon a claimed act of fraud on the part of the defendant in procuring the contract under which the plaintiff parted with the property which is a subject matter of said action, and that prior to the bringing of said action the said plaintiff had never rescinded the said transaction, and had never offered to restore to defendant the matters obtained from him thereunder and it nowhere appeared from any of the pleadings or papers on file herein that any such rescission or offer to restore had been alleged or claimed, and after argument thereon the Court sustained said objection."

[1-6] Each count of the complaint states a cause of action. Common counts are proper and well established forms of pleading in this state. Pike v. Zadig, 171 Cal. 273, 276, 152 P. 923; Smith v. Randall, 51 Cal.App.2d 195, 197, 124 P.2d 334. A pleading which is sufficient as a common count is not subject to a general demurrer. Pike v. Zadig, supra; Auckland v. Conlin, 203 Cal. 776, 778, 265 P. 946. This statement may not be true when a common count is joined with another count wherein all the facts upon which the plaintiff's demand is based are specifically pleaded. Orloff v. Metropolitan Trust Co., 17 Cal.2d 484, 489, 110 P.2d 396; Rose v. Ames, 53 Cal.App.2d 583, 589, 128 P.2d 65. Contra: American-LaFrance F. E. Co. v. Bagge, 98 Cal.App. 291, 296, 276 P. 1066. It may not apply where a public corporation is a defendant and the law requires the presentation of a claim to the governing body of the corporation prior to the institution of suit. See, Union Bank & Trust Co. v. Los Angeles County, 2 Cal.App.2d 600, 606, 38 P.2d 442. An objection to the introduction of any evidence on the ground that a complaint fails to state a cause of action is in the nature of a general demurrer to the complaint or a motion by a defendant for judgment on the pleadings. Redondo Improvement Co. v. Redondo Beach, 3 Cal. App.2d 299, 302, 39 P.2d 438; Osborne v. Abels, 30 Cal.App.2d 729, 730, 87 P.2d 404; Smith v. Randall, supra, 51 Cal.App. 2d 195, 197, 124 P.2d 334; Smith v. Beauchamp, 71 Cal.App.2d 250, 251, 162 P.2d 662. An objection by a defendant to the introduction of any evidence may only be sustained where the complaint fails to state a cause of action, and that is the sole question presented to the court. Hibernia S. & L. Soc. v. Thornton, 117 Cal. 481, 482, 49 P. 573; Union Flower Market, Ltd., v. Southern California Flower Market, Inc., 10 Cal.2d 671, 673, 76 P.2d 503; Rannard v. Lockheed Aircraft Corp., 26 Cal.2d 149, 151, 157 P.2d 1; Weisz v. McKee, 31 Cal.App.2d 144, 147, 87 P.2d 379, 88 P.2d 200. Upon such an objection the allegations of the complaint must be accepted as true for the purposes of the objection. Seeger v. Odell, 18 Cal.2d 409, 412, 115 P.2d 977, 136 A.L.R. 1291; Williams v. San Francisco, 24 Cal.App.2d 630, 633, 76 P.2d 182. Such an objection by a defendant will only lie where the admitted averments of the complaint justify a judgment for the defendant, i. e., where no material issue is joined which it is necessary to prove. 21 Cal.Jur. 234, sec. 163. Nothing dehors the complaint may be considered. No defense set up in the answer may be considered. The truth of the allegations of the complaint must be assumed. If the complaint states a cause of action the objection must be overruled. Elmore v. Tingley, 78 Cal.App. 460, 464, 248 P. 706; North Side etc. Ass'n, v. Hillside

etc. Park, 70 Cal.App.2d 609, 613, 161 P.2d 618.

[7] The foregoing would seem conclusive that the trial court erred in sustaining the objection of defendant to the introduction of any evidence. The complaint stated two good causes of action. The court could not go outside of the complaint. The objection should have been overruled.

[8-12] Respondent's contention in support of the judgment is that by reason of the insufficiency of the affidavit, appellant admitted the due execution and genuineness of the documents; that the trial court, therefore, had before it an agreement by which the parties rescinded and cancelled all prior obligations in consideration of the payment of $5,000 and the delivery of a truck by appellant to respondent; that the agreement was executed; that by reason of the execution of this agreement appellant had received something of value; that an action on a common count can only be maintained where the contract is executory or the action is merely to procure the return of the consideration paid and the plaintiff has received nothing of value, relying upon McCall v. Superior Court, 1 Cal.2d 527, 36 P.2d 642, 95 A.L.R. 1019. We assume, without deciding, that a denial of "due execution and validity" is not a denial of "genuineness and due execution." If respondent's premise is sound and the situation before the trial court was an answer, with copies of written instruments annexed thereto, and no affidavit denying the genuineness and due execution of the instruments, his conclusion does not follow. Failure to file the affidavit merely means that a plaintiff admits the due execution and genuineness of the instruments. He admits that the instruments were signed and delivered and that they are not spurious, nothing more. Failure to file an affidavit does not preclude a plaintiff from making any defense whatever to the affirmative allegations of the answer. He could, by evidence, controvert the instruments upon any and all grounds except that he could not controvert their due execution or their genuineness. He could controvert the instruments by evidence of fraud, mistake, undue influence, mental incapacity, want of consideration, failure of consideration, compromise, estoppel, that they were void because not fairly made or fully comprehended; he could question their legal effect; he could attack them by any other defense that would be open if the instruments were the basis of an action. Moore v. Coop, 119 Cal. 429, 432, 51 P. 630 (mistake); Cordano v. Wright, 159 Cal. 610, 616, 115 P. 227, Ann.Cas. 1912C, 1044 (legal effect of instruments); Walsh v. Jacobson, 3 Cal. App. 2d 477, 480, 39 P.2d 455 (fraud); Wilson v. McCormick Steamship Co., 38 Cal. App.2d 726, 729, 102 P.2d 412 (instruments not fully comprehended and, therefore, void); Boyd v. Bargagliotti, 12 Cal. App. 228, 107 P. 150 (contract varied by oral agreement); Fatta v. Catalano, 41 Cal.App. 630, 632, 183 P. 224 (contract repudiated); Bridges v. Fisk, 53 Cal.App. 117, 121, 200 P. 71 (failure of defendant to perform); Lubeck's Investment Co. v. Voris, 68 Cal.App. 652, 656, 229 P. 1025 (contract mutually rescinded); Kimes v. Davidson Inv. Co., 101 Cal.App. 382, 281 P. 639 (prevention of performance); Newsom v. Woollacott, 5 Cal.App. 722, 91 P. 347 (instrument had no connection with cause of action sued on); Stoneman v. Fritz, 34 Cal.App.2d 26, 30, 92 P.2d 1035 (legal effect of instrument); Camp v. Boyd, 41 Cal.App. 83, 182 P. 60 (undue influence); Lowrey v. Rego, 65 Cal.App.2d 16, 21, 149 P.2d 706 (fraud); Maxwell v. Jimeno, 89 Cal.App. 612, 265 P. 885 (contract repudiated, cancelled and rescinded by plaintiff); Long v. Harrison, 113 Cal.App. 321, 324, 298 P. 148 (false representations). Baird v. Pacific Electric Ry. Co., 39 Cal.App. 512, 179 P. 449, is squarely in point. The action was for damages for wrongful ejectment from a streetcar. The defendant pleaded a written release signed by the plaintiff. The plaintiff did not file an affidavit denying the genuineness or due execution of the release. Upon the trial the defendant objected to the introduction of any evidence on the ground that it appeared from the pleadings that the plaintiff had no cause of action against the defend-

ant. Time was given to the plaintiff to make a tender of sums which he admitted in open court to have received from the defendant at the time of the execution and delivery of the release. When tender was not made within the time, the trial court sustained defendant's objection and rendered judgment for the defendant. In reversing the judgment, it was held that the plaintiff had a right to introduce evidence, that he was not estopped from attacking the release upon any ground other than such as involved the genuineness or due execution thereof, that he could do so "by evidence of fraud, mistake, undue influence, compromise, payment, estoppel, mental incompetency, and the like defenses," that there was nothing in the pleadings to indicate what, if any, defense the plaintiff might have interposed to the admitted execution of the release, that under our system of pleading no such showing is required (Code Civ.Proc., sec. 462), that the trial court seemed to have assumed that the plaintiff was relying upon some defense which he could not be permitted to maintain without first tendering back to the defendant the money he had received in consideration of the release, that there was nothing in the record to justify such assumption, that the plaintiff was entitled to the presumption that he had evidence to offer in attacking the release consistent with its due execution and genuineness. See, of like tenor, Meyer v. Haas, 126 Cal. 560, 563, 58 P. 1042; Maxwell v. Jimeno, supra, 89 Cal.App. 612, 265 P. 885; Raynale v. Yellow Cab Co., 115 Cal.App. 90, 92, 300 P. 991. There is nothing in the pleadings here to indicate what, if any, defense appellant might have interposed to the instruments. Respondent makes two assumptions not borne out by the record. First, that appellant received something of value from respondent. There is nothing in the instrument by which respondent released appellant which bears out this assumption. For aught that appears respondent may have refused to perform the obligations of the release to be performed by him. Nowhere in respondent's answer is there any allegation that appellant received anything from respondent that he failed to return. In any event, appellant had the right to prove that he did not receive anything. Second, that appellant had not tendered back to respondent everything he received. The record is silent on this subject. Here, as in the Baird case, appellant was, and is, entitled to the presumption that he had evidence to offer in attacking the instruments consistent with their genuineness and due execution. There is no support in the record for the recitation in the judgment that "it appeared" from the pleadings that prior to the bringing of the action appellant had never rescinded and had never offered to restore. As stated, there is nothing to indicate that there was anything to restore. An offer to restore is not a prerequisite to the maintenance of an action to recover money paid unless the plaintiff received something to restore. McNeese v. McNeese, 190 Cal. 402, 405, 213 P. 36; Hellman Commercial Trust and Savings Bank v. Alden, 206 Cal. 592, 605, 275 P. 794. Whether or not appellant received anything of value could be determined only from evidence. The evidence might have shown that an offer to restore would have been fruitless. In that case an offer to restore is not essential. McDonald v. Pacific Debenture Co., 146 Cal. 667, 672, 80 P. 1090; Schlake v. McConnell, 83 Cal. App. 725, 734, 257 P. 175. "But where the plaintiff himself has pursued the method provided by sections 1688–1691 of the Civil Code to effect a rescission of the contract he may come into a court of law for all the relief that court is competent to give, and in the instance where he merely asks for a return of the consideration parted with by reason of the fraud, mistake, failure of consideration, or any other such set of facts authorizing rescission, he is entitled to the action of assumpsit." Philpott v. Superior Court, 1 Cal.2d 512, 524, 36 P.2d 635, 641, 95 A.L.R. 990. "The action in assumpsit in such cases is not upon the failure of consideration or upon the fraud practiced, but upon the promise or obligation set up by the law to afford to the injured party additional relief. Failure of consideration, duress, fraud, or mistake, are elements only in the sense that they furnish a foundation upon which to rest the rescission from which flows the promise or obligation." McCall v. Superior Court, 1 Cal.2d 527, 533, 36 P.2d 642, 95 A.L.R. 1019. Rescission here means only legal rescission, termination of the contract by act of the plaintiff, and where there is nothing to restore, assumpsit lies. A common count is sufficient where the contract is executory, or the action is merely to procure a return of the consideration paid and the party rescinding has received nothing of value. "The action is not on the fraud, or failure of consideration, or duress, but upon quasi contract imposed by law." McCall v. Superior Court, supra, 1 Cal.2d 527, 538, 36 P.2d 642, 648, 95 A.L.R. 1019. The principle stated in the McCall case, which was dictum in that opinion, relied upon by respondent, in which the court quoted the following with approval from Swanston v. Clark, 153 Cal. 300, 303, 95 P. 1117, "One seeking to rescind a contract, or to enforce a rescission, which he claims he has effected in the manner provided in section 1691 of the Civil Code, must allege facts showing that he had a good right to rescind, and for what cause a rescission had taken place, or that a rescission had been made by consent," has no application here. The Swanston case did not pass upon the propriety of a common count in an action to recover back money obtained by fraud, mistake, or the like. To say, in the instant case, that appellant is seeking to rescind a contract, or to enforce a rescission which he claims to have effected in a manner provided in section 1691 of the Civil Code, is to assume something which may not be supposed from the record before us.

[13] A complaint should never be dismissed unless it appears to a certainty that no basic right of action can possibly exist or no relief can possibly be granted. It is a rare case when a litigant may be denied his day in court without a hearing. Appellant should be permitted to amend his complaint should he be so advised.

Judgment reversed.

SHINN, Acting P. J., and WOOD, J., concur.

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82 Cal.App.2d 282

## HIRSCHBERG et al. v. OSER et al.

No. 13456.

District Court of Appeal, First District, Division 1, California.

Nov. 6, 1947.

**1. Courts ⚷85(1)**

The purpose of rule making the minute order final unless it shows by its own terms that it is to be followed by a formal order was intended to do away with the old rule to the effect that whether a minute entry was final frequently depended upon whether the judge, who ordered it made, intended to follow it with a formal order. Rules on Appeal, rule 2(b)(2).

**2. Appeal and error ⚷347(1)**

Under statute requiring that, on confirmation of sale, court must enter an order directing referees to execute conveyances, etc., an order that referee's petition to confirm sale in partition proceedings be approved was an order that was not to be entered in the minutes with rule providing that date of entry of order which was not to be entered in the minutes shall be the date of filing of the order signed by court, and hence an appeal from the subsequent formal order or decree was timely. Code Civ.Proc. § 785; Rules on Appeal, rule 2(b)(2, 3).

**3. Appeal and error ⚷877(2)**

That court at time an order was entered that referee's petition to confirm sale in partition proceedings also fixed attorneys' and referee's fees was a matter of which purchaser at sale could not complain. Code Civ.Proc. § 785.

**4. Partition ⚷106**

The better practice is to make a formal order confirming sale in partition proceedings an order separate in itself rather than to incorporate it in another order or decree, but there is nothing inherently wrong in including the order confirming the sale in so-called final decree in partition.

**5. Partition ⚷111(4)**

Where there is no partition in kind but real property has been sold and there is only money to be divided, relating to division of property in kind does not apply, and in such a case the court may order the moneys, expected to be received from the sale, finally divided. Code Civ.Proc. §§ 765, 766, 785.

**6. Partition** ⚷106

In partition proceedings where purchaser was given notice of referee's motion that sale be confirmed and purchaser was present and made no objections to order confirming sale, the fact that no notice was given to purchaser of application for a final decree in partition which incorporated formal written order of confirmation of sale was something of which purchaser could not complain.

**7. Partition** ⚷104(2)

Where sale of premises to purchaser in partition proceedings was validily confirmed and purchaser wrongfully refused to carry out her contract, an order of resale which also directed the referee to retain the purchaser's deposit and institute suit to collect from her, any loss from the resale did not constitute a rejection of original purchaser's bid.

◆

Appeal from Superior Court, City and County of San Francisco; Edw. F. Murphy, Judge.

Action for partition by A. Hirschberg and Leonard David against W. L. Oser, also known as William L. Oser, also known as Will Oser, individually and as administrator with the will annexed of Amelia Waterland, deceased, and others, wherein a sale was had and Zerefa Maloof became a purchaser of the property. From the final decree in partition, order denying motion to vacate or modify the order of sale, order denying objections to confirmations of the resale, and order confirming the resale, Zerefa Maloof appeals.

Order in accordance with opinion.

Frank J. Baumgarten and John F. O'Sullivan, both of San Francisco, for appellant.

Knight, Boland & Riordan, John H. Riordan, F. J. Kilmartin, Oswald A. Hunt, and Samuel M. Samter, all of San Francisco, for respondent.

BRAY, Justice.

Appellant was the successful bidder at the referee's sale of certain real property in the above entitled partition action. After the property had been sold to her, she refused to pay the purchase price, claiming misrepresentations to her by her own attorney. The validity of the sale is in nowise attacked. She contends that the proceedings for confirmation and subsequent proceedings are invalid.

The sale took place July 3, 1946. On July 10 a "Return and Account of Sale of Referee in Partition" was filed. After reciting the notices given of the sale, the proceedings at the time of sale, the fact that the bid of appellant in the sum of $75,000 was the highest and best bid, that appellant deposited with the referee the sum of $8000 of such bid, the fact that the property which is therein described was sold to appellant as the highest and best bidder, the return prays that after hearing the court, "if it so determines, approve said sale and order said Referee to make a deed conveying said property upon the payment of the balance of the purchase price."

The hearing of the return was set for July 20 and due notice thereof given. The minute entry of that day, headed "Clark's Minute Entry on Approval of Referee's Account and Confirmation of Sale," after reciting the appearance of attorneys for all the parties, including appellant, and reciting that the referee was sworn and examined as a witness, states "Thereupon the Court ordered the Petition to Confirm the Sale approved and ordered the following fees paid: * * *"—certain fees to the attorneys for the plaintiffs and the defendants, and fees to the referee.

Up to this point, the appellant was apparently satisfied with the sale and proceedings, and made no objections thereto. In fact, her attorney was present at the hearing, evidently for the purpose of making certain that the sale was confirmed to her. On August 29 appellant filed a "Petition to Vacate Sale and Relieve Bidder and

Return Money" in which she asked that the sale be vacated because of alleged misrepresentations by her own attorney. The hearing of this petition was had on September 11 and denied by the court. The same day appellant filed a "Dismissal Without Prejudice" of that petition.

Up to this time no formal written and signed order confirming sale had been made by the court. On October 1, after notice to all parties except appellant that such a decree would be presented to the Judge for signing, a "Final Decree in Partition" was signed by the court, and filed on October 8.

This decree is really a combination of an order confirming sale and a final decree in partition. It first recites the fact that the return and account of sale of the referee came on for hearing on July 20 and that due notice of that hearing was given. It then states "and, the Court having duly examined said return and evidence having been introduced in support thereof, the Court now finds" that the referee sold the real property to appellant for $75,000; that the sale was legally made and conducted, etc.; that no objections were made by anyone either to the sale or the report of the referee; that all of the allegations in the report of the referee are true. It then sets forth disbursements made by the referee and approves them. It finds that certain defendants have no interest in the property and that certain defendants have the interests therein as set forth in the complaint.

It thereupon provides: "Wherefore, it is hereby ordered, adjudged and decreed that said Report of said Referee and the sale for Seventy-five Thousand Dollars ($75,000.00) to Zerefa Maloof be and the same are hearby confirmed and approved; that said Referee make, execute and deliver a conveyance of the said real property to Zerefa Maloof, upon receiving the balance of said purchase price * * *."

It then proceeds to provide for the distribution of the proceeds of the sale to certain parties in certain proportions, and finally it describes the real property.

On October 25 there was filed a "Supplemental Report of Referee and Petition for Instructions." Notice of its filing and the date set for hearing was given to all parties, including appellant. This report set forth the fact that the referee on October 11 had tendered to appellant a properly executed deed of the property purchased by her at the sale and that she had refused to accept it and had notified him that she did not intend to complete the sale. It asked the court to order a resale, and to authorize the referee to recover from appellant any loss that might be occasioned by the resale, and asked for further instructions.

At the hearing of this petition the court instructed the referee to resell and to retain appellant's deposit, and institute suit to collect from her any loss from the resale. On November 18, after notice given, appellant moved the court to "Vacate and/or Modify Order of Resale." This motion was denied by minute order on November 27.

After reselling there was filed a "Report and Return of Referee in Partition on Resale of Premises," in which the referee set forth the proceedings by which he resold the property for $55,000. Notice of motion to confirm this report was given to appellant and all the parties. On December 18 appellant filed "Objections to Confirmation of Resale of Real Estate." On December 20 the court made and entered its order overruling appellant's objections and confirming the resale of the real estate. On December 27 the court signed and on December 28 filed an "Order Denying Objections to Confirmation of Resale of Real Estate."

Appellant has appealed from (1) the final decree in partition; (2) the order denying the motion to vacate and/or modify the order of sale; (3) the order denying the objections to confirmation of the resale; and (4) the order confirming the resale.

No notice of appeal was filed as to the minute order of July 20. As to this minute order, appellant contends that it was an attempted confirmation of sale under section 785 of the Code of Civil Procedure, but void because it did not fully comply with that section, in that, among other things, it did not direct the referee to execute a conveyance of the property. She also contends that it belongs to the class of judgment set forth in Rule 2(b)(1), Rules on Appeal, which states: "The date of entry of a judgment shall be the date of its entry in the judgment book." But if this minute order was a final order as contended, appellant would be out of court on this appeal as she failed to appeal from that order. To meet this situation she then contends that the inclusion in the final decree in partition of an order confirming sale is reached by her appeal from that decree, and if held to be void, leaves the record with no order for the execution by the referee of a conveyance to her and hence she was never in default. At first respondents took the position that this was merely a skeleton minute order to be followed by a formal written order, and that the formal written order is in the final decree in partition. Respondents now take the position that this minute order constitutes a final order, and was sufficient in itself because it approved the referee's petition in which the referee had requested the court to approve the sale and order him to make a deed to appellant of the property.

[1] As pointed out in our decision in Pessarra v. Pessarra, 80 Cal.App.2d 965, 183 P.2d 279, Rule 2(b) (2), Rules on Appeal, was adopted to do away with the old rule, which was to the effect that whether a minute entry was final or not frequently depended upon whether the judge who ordered it made intended to follow it with a formal order. If he did, the minute entry was not final; if he did not, it was. As this intention did not have to be expressed in the minutes, a litigant was always in a quandary to determine whether to appeal from the minute entry or to wait and see if a formal order were filed, and then to appeal from the latter. Rule 2(b) (2) now makes the minute order final, unless it shows by its own terms that it is to be followed by a formal order. Although the rule is silent on the point the courts have held that it does not apply to cases in which written findings of fact must be made. In such cases, obviously the formal written order or judgment is to follow, because without it there is no rendition of judgment. Trubowitch v. Riverbank Canning Co., 30 Cal.2d 335, 182 P.2d 182.

[2] Some confusion undoubtedly exists as to the exact meaning and application of Rule 2(b) (2). It may well be that in view of the more than four years' experience since that rule was adopted, and the cases decided under it, the Judicial Council should redraft or amend it. In the instant case, however, in view of the provisions of section 785 of the Code of Civil Procedure, we are convinced that Rule 2(b) (2) has no application but that Rule 2(b) (3) is the applicable rule. That rule reads: "The date of entry of an order which is not entered in the minutes shall be the date of filing of the order signed by the court." Section 785 of the Code of Civil Procedure provides: "If the sale is confirmed by the court, an order must be entered, directing the referees to execute conveyances," etc. "Such order may also give directions to them respecting the disposition of the proceeds of the sale." It is apparent from this section that it requires a detailed formal order confirming the sale, for the order must contain matters such as a description of the property which never appear in a minute order. To give effect to the wording of section 785, we must hold that this is the type of order referred to in Rule 2(b) (3) which is not entered in the minutes. Hence it is the formal order which is the final and appealable order, and not the minute entry, which merely indicated the court's intention to confirm the sale, but did not constitute the order or decree required by section 785. Appellant appealed from the formal order and such appeal is therefore in time.

[3] Appellant also attacks the right of the trial court to fix attorneys' and referee's fees at the time of confirmation of sale. The matter of award of fees is no concern of appellant's. (See Canvin v. General Brewing Corp., 20 Cal.App.2d 49, 66 P.2d 691, where the court held that it was immaterial to the defendants that the trial court ordered the plaintiff to pay the surety company certain sums out of the judgment awarded plaintiff against the defendants.) Moreover, the case of Broome v. Broome, 179 Cal. 638, 178 P. 525, cited by appellant, which holds that an allowance of attorney's fees has no proper place in an interlocutory decree of partition, does not hold that the

inclusion of such an allowance makes the decree void. On the contrary, the court merely struck the allowance of fees from the decree and then affirmed the decree. Again, here the order was not an interlocutory decree of partition, but an order provided for by section 785, Code of Civil Procedure, which states that "Such order may also give directions to them [the referees] respecting the disposition of the proceeds of the sale."

[4] Appellant contends that the final decree in partition is void, and, therefore, that there is no formal order confirming sale. While the better practice, no doubt, is to make the formal order confirming sale an order separate in itself, rather than to incorporate it in another order or decree, there is nothing inherently wrong in including the order confirming sale in the so-called final decree in partition. This decree set forth all the matters required in an order confirming sale, such as the sale proceedings, the fairness of the sale, the fact that the confirmee was the highest bidder, a description of the property, and an order to the referee to make the necessary conveyance to the purchaser.

It shows on its face that it is an order based on the proceedings had on July 20 on the hearing of the report on the return of sale of the referee, and after confirming the sale directs the referee to execute a conveyance to the purchaser on receipt of the purchase price.

[5] In her attack on the final decree in partition, appellant takes the position that under the provisions of sections 765 and 766 of the Code of Civil Procedure the court was not in a position to make a final decree of partition. However, section 765 applies to proceedings in partition where the real property is divided in kind, and not to proceedings where the real property has been sold and there is only money to be divided. Section 766 merely provides for the final decree in partition, and where there is no partition in kind, does not require compliance with section 765. Section 785 of the Code of Civil Procedure provides that the court in the order confirming sale and directing the referee to execute conveyance may give directions to the referee respecting the proceeds of the sale, as it did here. The court ordered the moneys expected to be received from the sale finally divided. This it had the right to do.

One of appellant's objections to the decree is that it was presented to the court for signing without notice to appellant. However, there is no requirement that when a court hears a return of sale, notice must be given to the purchaser of the fact that the referee is presenting the formal order to the court for signature. A hearing of the return was had in court, of which hearing appellant had due notice. In fact, she appeared at the hearing. She made no objection to the confirmation of the sale by the court. The customary procedure is for the attorney for the referee to present the formal order to the court without notice to anyone. The only reason notice was given here to the other parties in the case was because the attorney contemplated including an order for the distribution of the proceeds to be received from the sale to the parties interested.

[6] As long as the portion of the decree which constituted an order confirming sale was full and complete, appellant is not in a position to complain about the insertion therein of additional matter which did not concern her. Her only right is to have an order confirming sale entered, which, together with the deed, will pass a valid title to her when she completes the payment of the purchase price. The decree here did that. What final disposition the court might make of the money she pays to the referee does not concern her in the slightest degree.

### Other Appeals.

Appellant in addition to appealing from the final decree in partition, also appealed from the order denying the motion to vacate and/or modify the order of resale, the order denying objections to confirmation of resale, and the order confirming the resale. She has now abandoned these appeals. She relies upon the order of resale, and the confirmation of the resale thereunder, as basis for her contention that as, under her construction of the proceedings, there was no confirmation of the sale to her, the new sale and its confirmation operated as a rejection of her bid, citing 31 Am.Jur. 512, section 207. In her supplemental brief, appellant asks that "The court find that the second sale is the only valid sale of the property, which relieved the appellant of her bid and entitled her to the return of her money." But as herein pointed out, the sale to her was validly confirmed. Therefore, she was in default when she refused to carry out her contract and pay the purchase price. Under those circumstances, the resale was not a rejection of her bid.

The orders appealed from are affirmed.

PETERS, P. J., and FINLEY, Justice pro tem., concur.

82 Cal.App.2d 310

## PEOPLE v. HOLLAND.

Cr. 4154.

District Court of Appeal, Second District, Division 2, California.

Nov. 6, 1947.

**1. Automobiles 🔑355(10)**

Evidence that defendant was found in possession of automobile which had disappeared from parking lot and that he had in his possession a recently stolen license plate belonging to another automobile sustained conviction of driving automobile without consent of owner. Vehicle Code, § 503.

**2. Automobiles 🔑355(10)**

In prosecution for driving an automobile without owner's consent, removal of accessories from another automobile is a circumstance bearing upon defendant's intent. Vehicle Code, § 503.

**3. Receiving stolen goods 🔑8(3)**

Proof of possession of stolen property under suspicious circumstances is sufficient to sustain verdict of receiving stolen property.

**4. Receiving stolen goods 🔑8(3)**

Where a person is found in possession of recently stolen property, only slight corroborative evidence of other inculpatory circumstances is necessary to sustain a conviction.

**5. Automobiles 🔑355(10)**

In prosecution for driving automobile without consent of owner, where defendant was found in possession of automobile, he was bound to explain such possession and his failure to do so was a circumstance to show his guilt. Vehicle Code, § 503.

**6. Criminal law 🔑814(10)**

In prosecution for driving automobile without owner's consent, refusal of instruction requiring consideration of defendant's intoxication in determining intent was proper, in absence of evidence that defendant was intoxicated or that his acts were result of intoxication. Vehicle Code, § 503.

**7. Criminal law 🔑1186(4)**

In prosecution for driving automobile without owner's consent, where defendant offered no explanation of fact that he was found in possession of automobile, refusal of instruction that possession of stolen property is not of itself sufficient evidence of guilt was not prejudicial in view of instruction given on intent. Vehicle Code, § 503; Const. art. 6, § 4½.

**8. Receiving stolen goods 🔑9(2)**

When stolen property is found in possession of a person under suspicious circumstances and no explanation of possession is given and no evidence is offered in his behalf it is unnecessary to give instruction that possession of stolen property is not of itself sufficient evidence of guilt.

◆

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Albert Holland was convicted of driving an automobile without the consent of the owner and with intent to deprive the owner of title and possession, and he appealed from the judgment and from an order denying his motion for new trial.

Judgment and order affirmed.

William B. Neeley, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

WILSON, Justice.

Appellant was charged with the crime of grand theft and with the violation of section 503 of the Vehicle Code, taking and driving an automobile without the consent of the owner and with intent to deprive the owners of its title and possession. He was also charged with having been convicted of two prior felonies, both of which he admitted—one being a violation of the Dyer Act, 18 U.S.C.A. § 408, the other conspiracy to violate the Mann Act, 18 U.S.C.A. § 397 et seq. He was acquitted of the crime of grand theft and convicted of violating section 503 of the Vehicle Code.

He has appealed from the judgment and from the order denying his motion for a new trial stating as grounds thereof (1) that the verdict is unsupported by the evidence and is contrary to law, and (2) that the trial court erred in refusing to give instructions requested by appellant.

1. Sufficiency of the evidence. The undisputed evidence is that the automobile in question was assigned by its owners to one of their employees for his use. He parked the car in a parking lot and when he returned for it at 8:00 o'clock in the same evening the car was not there. He had not given permission to any one to move the car and he did not know appellant.

About 10:30 on the evening of the disappearance of the car two police officers observed it being driven in an irregular manner about a mile from the parking station. They stopped the car, at which time appellant was driving it. The officers found on the floor of the car, between the front and back seats, a license plate and a wine bottle. The license plate had been stolen from another automobile a short distance from the parking lot between 7:00 and 10:00 o'clock on the same evening. The license plate and the wine bottle were not in the car at the time it had been left in the parking station earlier in the day.

Appellant did not testify or offer any evidence in his own behalf.

Appellant urges that the only evidence of his guilt was that of his mere possession of the car, that there was no evidence of his intent to deprive the owner of possession of the automobile, and that the evidence is therefore insufficient to sustain the conviction. He contends that in order to establish intent the evidence must affirmatively show that he had knowledge of the fact that his driving of the car was not authorized by the owner. He analogizes his case to those wherein it has been held that mere possession of stolen property is not sufficient to sustain a conviction of burglary. See People v. Tempomgko, 134 Cal.App. 209, 210, 25 P.2d 245; People v. Boxer, 137 Cal. 562, 563, 70 P. 671.

[1-5] In addition to appellant's possession of the car there is the fact that in it was a license plate that had been removed from another automobile about the time of the alleged crime and in the same vicinity from which the car in question had been taken. From this fact the jury had a right to infer it was the purpose of appellant to place the stolen license plate on the automobile he was then driving in order to make its identification more difficult, intending thereby to deprive the owners of its possession as long as possible. The automobile having been found in the possession of appellant with the added circumstance of his possession of the stolen license plate belonging to another car, a verdict of guilty was justified. People v. Beck, 71 Cal.App.2d 637, 640, 163 P.2d 41. The removal of accessories from an automobile is a circumstance bearing upon the element of defendant's intent. People v. Neal, 40 Cal.App.2d 115, 118, 104 P.2d 555. People v. Deininger, 36 Cal.App.2d 649, 652, 98 P.2d 526. Proof of possession of stolen property under suspicious circumstances is sufficient to sustain a verdict of receiving stolen property. People v. Jacobs, 73 Cal.App. 334, 341, 238 P. 770. Where a person is found in possession of recently stolen property, only slight corroborative evidence of other inculpatory circumstances is necessary to support a conviction. People v. Wiley, 8 Cal.App.2d 135, 136, 46 P.2d

817; People v. Cataline, 54 Cal.App. 36, 38, 200 P. 1060; People v. Moreno, 111 Cal. App. 52, 59, 295 P. 50. Appellant's failure to explain possession of the automobile is a circumstance tending to show his guilt. He is bound to explain such possession in order to remove the effect thereof as a circumstance. People v. King, 8 Cal.App. 329, 331, 332, 96 P. 916; People v. Wilson, 135 Cal. 331, 332, 67 P. 322; People v. Abbott, 101 Cal. 645, 647, 36 P. 129. He made no explanation.

[6] 2. The failure to give instructions as to the effect of intoxication on appellant's intent. Appellant assigns as error the failure of the court to give an instruction requested by him reading as follows: "Whenever the actual existence of any particular intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the intent with which he committed the act, if he did commit it, and in determining whether or not he had, at all, the specific intent, necessary to constitute the crime.

"In the prosecution of such inquiry his condition at the time of the alleged offense, as drunk or sober, is proper to be considered. The weight to be given to evidence of drunkenness is matter for the jury to determine, in connection with all the other evidence and circumstances in proof in the case."

The court properly refused to give the instruction for the reason that there was no proof that appellant was intoxicated. The only evidence on the subject is that given by the arresting officer who stated that appellant had been drinking but he was not under the influence of liquor. In the absence of evidence that appellant was intoxicated, or that his acts were to any extent the result of the drinking of intoxicating liquor, there was no basis for the instruction.

[7] 3. The refusal of an instruction relating to the sufficiency of the evidence. Appellant further complains of error in that the court refused to give the following instruction: "The possession of stolen property is not of itself sufficient evidence of the guilt of the party in whose possession it is found and if you find no evidence of the guilt of the defendant other than the possession of stolen property, it is your duty to render a verdict of not guilty."

In People v. Davis, 14 Cal.App. 117, 120, 111 P. 268, the court said it was a mistake not to have given a similar instruction but not sufficient to warrant a reversal. In People v. Enriquez, 39 Cal.App.2d 168, 172, 102 P.2d 770, the refusal to give an identical instruction was held to be prejudicial error. The latter decision is not applicable on the present appeal for the reason that in that case the only evidence against the defendant was that the stolen property was found in his room. He gave explanatory testimony that he permitted another man to use the room on several occasions, and in addition there was evidence that would have accounted for his presence elsewhere at the time the theft was committed. There are no such favorable circumstances in the present case. Appellant offered no evidence whatever.

[8] When stolen property is found in possession of a person under suspicious circumstances and no explanation of its possession is given by him and no evidence offered on his behalf it is not necessary to give an instruction such as that offered by appellant, although no reason appears why it should have been refused. However, no prejudice resulted since the court gave the following instruction on the question of intent requested by appellant: "The rule of law that an act, if knowingly done, is done with criminal intent, has no application to cases where a specific intent is required. Such specific intent is a necessary ingredient or element of the offense and it must be proved to a moral certainty and beyond a reasonable doubt."

By so instructing the jury the court expressly differentiated between the two classes of cases and informed the jury that in such a case as this intent must be proved to a moral certainty and beyond a reasonable doubt. Such instruction, together with other instructions given that the jury must be governed solely by the evidence and that to constitute a violation of section 503 of the Vehicle Code the taking of the automobile must have been with the intent to deprive the owner of possession thereof, sufficiently informed the jury of the law governing the verdict that they should return.

Appellant was in possession of the automobile, the stolen license plate and the wine bottle; the latter articles were not in the car when it was left in the parking station; the automobile and license plate had been taken at approximately the same time and in the same vicinity; appellant gave no explanation of his possession of any of the property. Since he had been drinking the inference may be drawn that he placed the wine bottle in the car. The inference justified by his possession of the license plate has been discussed. From an examination of the entire record we find no miscarriage of justice. (Const., art. VI, sec. 4½.)

The judgment and the order denying appellant's motion for a new trial are affirmed.

MOORE, P. J., and McCOMB, J., concur.

82 Cal.App.2d 203

## DUFFY v. DUFFY et al.

No. 13428.

District Court of Appeal, First District,
Division 1, California.
Nov. 3, 1947.

As Corrected Nov. 14, 1947.

**1. Judgment** ⇨443(1)

The final judgment of court having jurisdiction over persons and subject matter can be attacked in equity after the time for appeal or other direct attack has expired only if alleged fraud or mistake is extrinsic rather than intrinsic.

**2. Judgment** ⇨443(1)

Fraud is "extrinsic fraud", within meaning of rule that final judgment can be attacked in equity after time for appeal or other direct attack has expired for extrinsic fraud, when it deprives unsuccessful party of an opportunity to present his case.

**See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Fraud".**

**3. Executors and administrators** ⇨516(6)

Cross-complaint which alleged that plaintiff was uncle of cross-complainants, who were minors, and was executor of estate of a deceased brother, who devised whole estate to plaintiff in trust for cross-complainants, that cross-complainants did not appear in the estate proceedings because of plaintiff's representation that he would take care of their interests, and that plaintiff wrongfully retained property belonging to estate, charged "extrinsic fraud", as against general demurrer, authorizing attack upon decree settling plaintiff's account as executor.

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Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Milton P. Duffy against Lester Clarence Duffy and another, minors, to quiet title to realty, wherein the defendants filed a cross-complaint. From judgment for plaintiff after sustaining without leave to amend plaintiff's demurrer to defendants' second amended cross-complaint and granting motion to strike it, the defendants appeal.

Reversed.

Manny C. Gomez and Robert E. Hayes, both of San Jose, for appellants.

Harold F. Reide, Thomas P. Boyd, and Freitas, Duffy & Keating, all of San Rafael, for respondent.

BRAY, Justice.

The principal question to be determined is the validity of the court's action in sustaining without leave to amend plaintiff's demurrer to defendants' second amended cross-complaint (erroneously denominated third amended cross-complaint) and granting the motion to strike the same.

The case involves certain real property and two garage businesses in Marin County. Plaintiff filed a quiet title action against his nephew and niece. The complaint was in the usual form and alleged that plaintiff was the owner of the real property and businesses and that defendants claimed interests therein which were without right. Defendants answered, denying plaintiff's ownership, and asserting their interests as set forth in their cross-complaint. Demurrers to the cross-complaint, the first amended cross-complaint and the second amended cross-complaint, were sustained, the latter without leave to amend. A motion to strike this amended cross-complaint was likewise granted.

The second amended cross-complaint alleges that cross-complainant Lester Clarence Duffy is eleven years of age, and cross-complainant Dorothy Julia Duffy twelve; that their mother was appointed their guardian ad litem. It alleges that plaintiff is the uncle of cross-complainants and stood in a relationship of trust, confidence and advisor to them and their mother; that Stuart Henry Duffy, the brother of plaintiff and uncle of cross-complainants, died on February 20, 1940, leaving a will in which Stuart devised the whole of his estate to plaintiff in trust for cross-complainants; that the estate of Stuart consisted of a half interest in the real property and garage businesses described in plaintiff's complaint; also certain moneys in the bank and other moneys and personal property unknown to cross-complainants; that the will was admitted to probate March 15, 1940, and plaintiff appointed executor thereof; that on September 17, 1940, plaintiff returned and filed an inventory in which the estate was appraised at $6,486.06, consisting of the following: cash, $1379.81; an interest in said garage businesses appraised at $100; a record 13/48th interest in one parcel of the real property appraised at $4,306.25, and a record interest in the other parcel appraised at $700; that plaintiff as such executor presented his first and final account and petition for distribution to the court, which on November 29, 1940, entered its order settling the account; that at the time of presentation and hearing of said account plaintiff failed to disclose and concealed the true facts from the court and cross-complainants and wilfully and in bad faith suppressed the facts and falsely and fraudulently and with intent to appropriate to his own use the estate of cross-complainants under the will of Stuart Duffy, represented to the court that the interest of Stuart was only nominal when in fact it was substantial and valuable far in excess of its appraised value; that the estate had no assets other than as inventoried and that all of the title to the real property and the businesses had been conveyed by Stuart to plaintiff on or about October 10, 1927; that the court, relying on these representations, settled the account and decreed that all of the assets of Stuart's estate except cash in the sum of $1,379.81 was the property of plaintiff free from any trust; and that plaintiff was wrongfully retaining and claiming said property and businesses.

In a second cause of action, after incorporating all the matters set forth in the first cause of action, it is alleged that on September 1, 1940, at the State Building in San Francisco, plaintiff represented to the mother of said cross-complainants that he would protect their interests in the Stuart estate, and "take care of everything in connection therewith"; that because of the relationship between plaintiff and cross-complainants, and by virtue of the position of trust and confidence in which he stood towards them, cross-complainants and their mother were lulled into a sense of security until January 25, 1945, when they first learned that the whole of the Stuart estate, except the cash above mentioned, had been distributed to plaintiff.

In a third cause of action, after incorporating all the allegations of the first cause of action, it is alleged that on September 1, 1940, at the State Building in San Francisco, plaintiff falsely, fraudulently, with intent to deprive cross-complainants of their rightful inheritance, represented to their mother that he would hold all property received by him from the Stuart estate in trust for them and that relying upon these representations neither cross-complainants nor their mother appeared in opposition to plaintiff's final account and petition for distribution.

In a fourth cause of action, after incorporating all the allegations of all preceding causes of action, it is alleged that by reason of the fraud and deceit and his violation of trust, plaintiff had wrongfully obtained possession of the property and businesses and other property, the exact nature of which is unknown to cross-complainants, and is therefore, and has been since February 20, 1940, a voluntary trustee for the benefit of cross-complainants.

A fifth cause of action incorporates certain allegations of the first cause of action and alleges that cross-complainant jointly own and have a right to the possession of half of the real property and businesses and that plaintiff is unlawfully and without right withholding the same.

A sixth cause of action incorporates certain allegations of the first cause of action and alleges that cross-complainants are jointly the owners of half of the property and businesses and that the claim of plaintiff to a sole ownership therein is without right and he has no interest therein.

The sustaining of the demurrer and the granting of the motion to strike was upon the theory that if any fraud was alleged in the cross-complaint it was intrinsic fraud and not extrinsic, and therefore, the cross-complainants could not in this proceeding attack the validity of the decree of distribution.

[1] "The final judgment of a court having jurisdiction over persons and subject matter can be attacked in equity after the time for appeal or other direct attack has expired only if the alleged fraud or mistake is extrinsic rather than intrinsic. [Citing cases.]" Westphal v. Westphal, 20 Cal.2d 393, 397, 126 P.2d 105, 106. What is extrinsic as distinguished from intrinsic fraud is clearly set forth in Bacon v. Bacon, 150 Cal. 477, at page 490, 89 P. 317, at page 322: "The general rule as to what constitutes extrinsic fraud or mistake is clearly stated by the United States supreme court in U. S. v. Throckmorton, 98 U.S. [61], 65, 25 L.Ed. 93. After stating the general rule that a bill in equity will not lie to set aside a judgment obtained by means of perjured testimony, or forged documents, introduced in evidence in support of a contested issue of fact, that court says: 'But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to the suit, there was, in fact, *no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced upon him by his opponent, as by keeping him away from court;* a false promise of a compromise; or where the defendant had never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interests to the other side—these, and *similar cases which show that there never has been a real contest at the trial or hearing of the case,* are reasons for which a new suit may be sustained to set aside the former judgment or decree and open the case for a new and fair hearing.' (The italics are ours.)" (Additional italics added.)

The test then is whether it appears from the allegations of the cross-complaint that the cross-complainants were prevented from appearing in the estate proceeding by fraud or deception practiced upon them cross-complaint is not a model of pleading, by plaintiff. While the second amended it does allege these very matters. It sets forth in effect that plaintiff bore three relationships to cross-complainants; that he was their uncle, the trustee appointed for them by their Uncle Stuart, and the executor of Stuart's estate of which they were the sole beneficiaries; that he represented to cross-complainants' mother "that he would protect the interest of cross-complainants in the estate of said Stuart Henry Duffy and that he would take care of everything in connection therewith," and that because of his relationship to them and their trust and confidence in him, they were lulled into a sense of security. Again, it is alleged that he represented to them that he would hold in trust for them all property received by him from the estate, and that relying upon his representations they did not appear in the estate proceedings. Certainly, the nephew and niece, by reason of the blood and other confidential relationships, had the right to rely upon their uncle's representation that he would take care of their interests in the estate. It was those representations that kept them from appearing in the estate, and if, as alleged, they were false, it constitutes extrinsic fraud.

Bacon v. Bacon, supra, 150 Cal. 477, 89 P. 317, cited by plaintiff, is well in point. There a woman was left a legacy of $10,000. Due to the handwriting of the testator, the $10,000 was mistaken for $2,000 and she was informed by the executors that her legacy was in the latter amount. In the decree of distribution she was distributed $2,000. After she discovered the mistake, in a suit against the residuary legatees, to whom the residue of the estate had been distributed, for the payment to her of the $8,000, the court, after stating, "Executors occupy trust relations towards the legatees, and are bound to the utmost good faith in their transactions with the beneficiary" (at page 489 of 150 Cal., at page 322 of 89 P.), held that she was prevented by these false representations from appearing in the estate, and that such representations constituted extrinsic fraud.

[2] Westphal v. Westphal, supra, 20 Cal.2d 393, 126 P.2d 105, approves the principle of the Bacon case that fraud is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court, such as where he has been prevented from fully participating in the court proceeding. It then points out that there was no showing that the plaintiffs there had not received all notices of the probate proceedings, and "that plaintiffs were in any way prevented from appearing in the proceedings and calling the attention of the court to their interest in the estate" (at page 398 of 20 Cal.2d, at page 107 of 126 P.2d). Therein lies the difference from our case. Here, even though the cross-complainants probably received the usual probate notices, they had a right to rely upon the representations of their uncle, trustee and executor of their other uncle's estate, that their interests were being taken care of by him. Likewise, the case of Ringwalt v. Bank of America, etc., Ass'n, 3 Cal.2d 680, 45 P.2d 967, is easily distinguishable from the case at bar. There the plaintiffs who were minors were attempting to attack a decree of distribution in an estate. It was conceded that the minors had received statutory notices of all proceedings. After disposing adversely of the contention that the decrees of distribution were not conclusive as against minors, the court then examined the complaint to see if facts were alleged constituting extrinsic fraud, and held that there was no allegation of anything done by the executor to prevent or hinder the minors and their mother from appearing in the estate. The court expressly endorsed the test of extrinsic fraud in the quotation from United States v. Throckmorton, which appears in the above excerpt from Bacon v. Bacon, supra. Carr v. Bank of America, etc., Ass'n, 11 Cal.2d 366, 79 P.2d 1096, 116 A.L.R. 1282, is somewhat analogous to the Ringwalt case, holding that a decree settling the final account in an estate is binding upon minors and that no extrinsic fraud was alleged or proved. Quoting (at page 374 of 11 Cal.2d, at page 1101 of 79 P.2d) from Caldwell v. Taylor, 218 Cal. 471, 23 P.2d 758, 88 A.L.R. 1194, the court held, in effect, that extrinsic fraud is not the fraud upon which the original decree was based but a fraud which prevented the one defrauded from setting up his claim in the original proceeding. In both of these cases the court stated that there was a duty upon the mother of the minors, as their natural guardian, to see that their rights were protected, and that nothing was shown which excused her from not doing so. But in our case she was "lulled into security" by the promises and representations of one in whom she had the right to place faith, and who himself was in a fiduciary relationship toward her children.

Plaintiff contends that the issue of plaintiff's claim to the properties now claimed to belong to the Stuart estate and any fraud in connection with the deed from Stuart by which plaintiff claimed to have acquired the properties was litigated at the hearing of the final account and petition for distribution. This is true, but is was litigated in the absence of the cross-complainants, due to their being prevented from presenting their side of the question because they relied upon plaintiff's representations. As said in Bacon v. Bacon, supra, at page 491 of 150 Cal., at page 323 of 89 P.: "The gravamen of the rule thus expressed lies in the fact that 'the unsuccessful party has been prevented from exhibiting fully his case,' and, consequently, that there has been 'no adversary trial or decision of the issue,' no 'real contest at the trial,' or, as stated in Pico v. Cohn [91 Cal. 129, 25 P. 970, 27 P. 537, 13 L.R.A. 336, 25 Am.St. Rep. 159], no 'fair submission of the controversy.' Where the unsuccessful party has been thus hindered, he is not to be refused relief on the ground that the fact on which his defense or claim in the original action depended, and by which he expects to bring about a different result in the new suit for equitable relief, was technically in issue in the original action or proceeding, or was necessarily decided by the court in that action and concluded by the original judgment beyond reach on collateral inquiry. It is because such judgment does conclude all parties so long as it stands unrevoked and unaffected by any direct attack, not only as to the facts actually in issue, but also as to all facts not in issue, but which might constitute a possible defense, and is therefore injurious, that there is ground for the interposition of equity to give this form of relief. To deny relief where the fact is technically in issue, though, by reason of the mistake or fraud, not controverted or contested at the trial or hearing, would be to destroy the equitable remedy in a large class of cases in which it has been hitherto administered."

[3] It would be unconscionable because of insufficiency in pleading which can be cured by amendment, to deny an opportunity to be heard in court to minors who, relying, as they had a right to do, on the representations of their uncle, trustee, and executor of an estate in which they were the sole legatees, were thereby kept out of court while that uncle convinced the court, in their absence, that the property claimed by the decedent in his will and by the minors, belonged to him and not to the estate of which he was the executor. Such a situation required a fair and full disclosure to the minors of the uncle's adverse claims and a fair and full opportunity to them to be represented in court and to contest the uncle's claims. According to the allegations of the cross-complaint, they were prevented from so doing because of the representations to them and their mother on which they relied. If that is not extrinsic fraud there can be no such thing as extrinsic fraud unless a person were kept away from court by physical violence.

While the first cause of action might be vulnerable to special demurrer, it is sufficient as against general demurrer, for it does, although rather weakly, set up extrinsic fraud in that it alleges that plaintiff concealed the true facts from the cross-complainants, namely, the fact that although plaintiff bore a confidential relationship to cross-complainants, he did not disclose that he was claiming interests adverse to them. The very confidential relationship and failure to disclose his adverse interests would justify the minors in not appearing in the proceeding. For general demurrer purposes this fact appears sufficiently by inference from the allegations of the cause of action. Perhaps under special demurrer it should be more definitely alleged.

The second cause of action definitely sets up that the cross-complainants were lulled into a sense of security by plaintiff's alleged representations, and for that reason did not appear in the proceedings. Under special demurrer these allegations probably should be amplified.

The third cause of action alleges that the cross-complainants and their mother did not appear in the estate proceeding because of plaintiff's representation that he would hold all property received from the estate in trust for them. This cause of action is evidently framed upon the holding in Apablasa v. Sepulveda, 91 Cal.App. 232, 267 P. 105.

The fourth cause of action sets up an alleged trust for cross-complainants in plaintiff. The fifth and sixth causes of action set up claims of ownership in cross-complainants in the real property and business and allege that plaintiff has no right therein. Just why it is claimed they do not state a cause of action does not appear. The fourth and fifth causes of action are apparently based on the holding in Calkins v. Calkins, 63 Cal.App. 292, 218 P. 611, and the sixth on the holding in Maguire v. Cunningham, 64 Cal.App. 536, 222 P. 838.

As said in Hancock Oil Co. of California v. Hopkins, 24 Cal.2d 497, at page 510, 150 P.2d 463, at page 470: "The complaint therefore states a cause of action against a general demurrer and denial of leave to amend was an abuse of discretion even if the special demurrer was well taken. However, upon a reconsideration of the special demurrer the court may require the clarification of any uncertainties in the statement of the essential elements of the right to interplead. Washer v. Bank of America, 21 Cal.2d 822, 136 P.2d 297 [155 A.L.R. 1338]." See also Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358.

In view of our holding that the court erred in sustaining the demurrer without leave to amend and in striking out the cross-complaint, the judgment procured without the defendants being given an opportunity to attack the validity of plaintiff's title and to prove their own, will have to be reversed. Therefore, it becomes unnecessary to consider cross-complainants' specifications of error at the trial and the questions raised on the motion for new trial.

We have not discussed the evidence in the case, as primarily the question involved here is one of pleading. The record shows not only was the demurrer to the cross-complaint sustained without leave to amend, but at the trial cross-complainants were precluded from proving the facts therein alleged. As pointed out, cross-complainants alleged facts constituting extrinsic fraud under which the court should have permitted them to make their showing of those facts, and of the facts of the fraud which they claimed was committed on the court in the estate proceeding. In any event, the court should not have denied the cross-complainants the right to amend their cross-complaint. We are not deciding, however, that the cross-complaint was not subject to special demurrer, and the trial court may, in its discretion, require the clarification of uncertainties or ambiguities in the cross-complaint.

The judgment is reversed, the order sustaining the demurrer to the second amended cross-complaint (erroneously designated the third amended cross-complaint) without leave to amend, and the order striking said amended cross-complaint from the files, are also reversed.

PETERS, P. J., and FINLEY, Justice pro tem., concur.

30 Cal.2d 832

## HARTFORD ACCIDENT & INDEMNITY CO. v. CITY OF TULARE et al.

L. A. 19641.

Supreme Court of California, in Bank.

Nov. 10, 1947.

**1. Municipal corporations 🔑8**

The rules of statutory construction apply to city charter provisions.

**2. Statutes 🔑207**

A specific or special provision in statute controls over a general one.

**3. Statutes 🔑207**

If conflict in statutory provisions is irreconcilable, as a last resort the later provision in point of position controls the earlier provision although both are in same statute and passed at the same time.

**4. Municipal corporations 🔑145**

Where sixth section of Tulare city charter gave council power to fix bond of both auditor and treasurer, but 33d section specified $50,000 bond for treasurer only, the later provision in point of position controlled and treasurer's bond could not be less than $50,000. St.1923, pp. 1510, 1518, §§ 6–8, 33.

**5. Municipal corporations 🔑145**

Where Tulare charter required treasurer's bond of $50,000, ordinance purporting to authorize $10,000 bond was invalid, and treasurer who filed only $10,000 bond for term to which she was elected to succeed herself had not qualified as successor to herself. St.1923, pp. 1510, 1518, §§ 4–9, 33.

**6. Municipal corporations 🔑149(4)**

Treasurer appointed for city of Tulare holds office until successor is chosen and qualifies. St.1923, pp. 1510, 1518, §§ 4-9, 33.

**7. Officers 🔑55(1)**

Public policy is against vacancy in public office or gap between successive office holders.

**8. Municipal corporations 🔑79, 149(4)**

The general statute providing that officer whose term has expired shall continue to discharge duties of office until successor has qualified is not inconsistent with Tulare city charter, and hence controlled and caused treasurer, whose bond given for subsequent term was insufficient because of invalidity of ordinance authorizing it, to be a hold-over from her prior appointment. St.1923, p. 1526, § 72; Government Code, §§ 1302, 1504.

**9. Officers 🔑130**

An officer's bond continues until successor qualifies, hold-over ceased to occupy office, or some other event breaks the holding over. St.1923, p. 1526, § 72; Government Code, §§ 1302, 1504.

**10. Officers 🔑123**

The terms of a statute dealing with official bonds, fixing obligation of surety within penal sum specified, are read into the bond and become part of it. St.1923, p. 1526, § 72; Government Code, §§ 1302, 1504.

**11. Municipal corporations 🔑173(4)**

Where bond given by Tulare city treasurer for second term was invalid because in an amount permitted by ordinance but smaller than charter required, liability of surety on her original bond continued, since she was a hold-over from her own first term, and she remained liable for premium on original bond. St.1923, pp. 1510, 1518, 1526, §§ 4–9, 33, 72; Government Code, §§ 1302, 1504.

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Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Hartford Accident & Indemnity Company against the City of Tulare and another for declaratory judgment as to rights and obligations under city treasurer's bond. From an adverse judgment, plaintiff appeals.

Reversed.

Prior opinion, 177 P.2d 338.

Maddox & Abercrombie and James K. Abercrombie, all of Visalia, for appellant.

I. H. Ham, of Tulare, for respondents.

CARTER, Justice.

Plaintiff appeals from a declaratory judgment rendered in an action involving a dispute between it and defendant, City of Tulare, concerning the rights and obligations under an official bond furnished by defendant Besse, holding the office of city treasurer, in which plaintiff is the surety.

There being a vacancy in the office of city treasurer, in June, 1942, by reason of the death of the incumbent, Besse was appointed to fill that vacancy until the next general municipal election. Under the Chapter of Tulare (Stats.1923, p. 1508, as amended) the term of the deceased treasurer would expire at the time of the next municipal election in 1943. Besse qualified for the office by taking oath and filing an official bond (hereafter referred to as first bond) in the sum of $50,000, in which plaintiff was surety. The bond after stating the amount for which the surety was bound, recites: "Whereas, the above bounden [Besse] was heretofore elected or appointed City Treasurer in and for the City of Tulare * * * and is required to furnish bond.

"Now, Therefore, if the said Principal shall for the period commencing June 2nd, A.D.1942 and ending April 18th A.D.1943 well, truly and faithfully perform all official duties now required of him by any law of the State of California, then the above obligation shall be null and void; otherwise to remain in full force and effect."

On April 13, 1943, Besse was duly elected treasurer for a four year term commencing on April 13, 1943. After the election she took her oath of office. On May 18, 1943, the City Council of Tulare duly adopted an ordinance fixing the treasurer's official bond at $10,000. On August 19, 1943, Besse filed with the city and obtained approval of an official bond (hereafter referred to as second bond) in the sum of $10,000 effective as of April 19, 1943, in which Maryland Casualty Company (a surety different than on the first mentioned bond) was the surety. No other than the above mentioned bonds have been furnished by Besse.

In this action plaintiff asserts that the first bond was effective and in force and binding upon it at all times that Besse continued in the office as city treasurer and until a new $50,000 bond was furnished by her; that the ordinance fixing the bond at $10,000 is invalid as conflicting with the city Charter making the second bond void; and that Besse is liable for the annual premium on the first bond. Defendants assert that the first bond expired on April 18, 1943, and that plaintiff's liability as surety for Besse thereupon ceased.

The court found and determined that the ordinance of May 18, 1943, was valid and hence the second bond was proper; that while the first bond expired on April 18, 1943, it remained binding on plaintiff until August 19, 1943, when the second bond was filed, but no premiums were payable for the period from April 13, to August 19, 1943.

The Charter of Tulare (Stats.1923, p. 1508) provides for the elective office of city treasurer. Charter, sec. 4. "The term of office of each of said elective officers shall be Four (4) years, and until his successor is elected and qualified." Charter, sec. 5. A vacancy is filled by appointment by the City Council. The "appointee to hold office until the next general municipal election" when a successor shall be elected for the unexpired term. Charter, sec. 9. If an officer fails "to qualify" his office "shall thereupon become vacant." Charter, sec. 9.

With regard to the official bond to be furnished by the treasurer the provisions of the Charter are conflicting. Dealing generally with official bonds it is provided in section 6 thereof that: "The Auditor and the Treasurer, before entering upon the duties of their respective offices, shall each give and execute to the city a bond with a responsible surety company in such penal sum as the City Council may by ordinance direct, conditioned upon the true, honest and faithful performance of the duties of such offices." Charter, sec. 6. Then the bond of the Police Judge is fixed. Section 7. Next "The bond of the Auditor, the Treasurer and the Police Judge shall be approved by the Council and filed with the City Clerk." Charter, sec. 8. Treating specifically with the duties and obligations of the treasurer and naming him as custodian of the public funds it is provided in section 33 of the Charter that: "Before assuming the duties of his office he shall file with the City Clerk a surety company bond in the penal sum of Fifty Thousand Dollars ($50,000.00) conditioned for the true, faithful and honest performance of his duty. The premium on this bond shall be paid by the city." There is a square conflict between these provisions. In one the amount of the official bond is to be fixed by the City Council and in the other the Charter fixes the amount of the bond.

[1-3] In the construction of city charter provisions the rules of statutory construction apply. Braun, Bryant & Austin v. McGuire, 201 Cal. 134, 255 P. 808. Where there is a conflict between two provisions in a statute a specific or special provision controls over a general one (City of San Jose v. Lynch, 4 Cal.2d 760, 766, 52 P.2d 919; Division of Labor Law Enforcement v. Moroney, 28 Cal.2d 344, 170 P.2d 3; People v. Moroney, 24 Cal.2d 638, 150 P.2d 888; 23 Cal.Jur. 762); and if there is an irreconcilable conflict, "as a last resort it would be appropriate to apply the rule that the later provision in point of position controls the earlier provision although both are in the same statute and passed at the same time." People v. Moroney, 24 Cal.2d 638, 645, 150 P.2d 888, 891.

[4, 5] In the instant case the provision in the first part of the Charter (section 6) refers to both the auditor and treasurer in conferring upon the Council the power to fix their respective bonds. The later provision in point of position (Charter, sec. 33) embraces the treasurer only. Thus the latter controls and the official bond of the treasurer cannot be less than $50,000. It follows that the ordinance purporting to authorize a $10,000 bond cannot stand, at least to the extent that it limits the amount of the bond required to qualify for that office. Likewise the ensuing result is that Besse has as yet failed to qualify for the term of office as a successor to herself.

[6-8] Referring to the term of office of the treasurer it will be recalled that the Charter first provides when dealing with the several elective officers (including the treasurer) that their term of office is four years and until their successor is elected and qualified. Secondly, when speaking of the appointment to fill a vacancy he is said to hold office until the next general election. Nothing is said about serving until his successor is chosen and qualifies. It is doubtful that a proper construction of the Charter would lead to the conclusion that the first mentioned phrase does not also apply where the officer is appointed to fill a vacancy as distinguished from the situation where he is elected. However that may be, adequate reason exists to compel the result that when the treasurer is appointed he holds office until his successor is chosen and qualifies. First, it is the general rule, with possibly certain exceptions (People v. Campbell, 138 Cal. 11, 70 P. 918) not here pertinent, that when there is no expression in the statute to the contrary, a public officer who continues to perform the duties of the office and holds office beyond the term for which he was elected or appointed, holds office until his successor is selected and qualifies. The basis for that rule is the policy against having a vacancy in public office—having a gap between successive office holders. People ex rel. Stratton v. Oulton, 28 Cal. 44; 46 Corpus Juris 968; 43 Am.Jur., Public Officers, sec. 162; In re Advisory Opinion to Governor, 65 Fla. 434, 62 So. 363, 50 L.R.A.,N.S., 365, 366. There being nothing in the Charter to the contrary this rule would apply, thus making Besse a hold-over from her prior appointment. Second, the Charter declares: "All general laws of the state applicable to municipal corporations, now or hereafter enacted, and which are not in conflict with the provisions of this charter or with ordinances or resolutions hereafter enacted, shall be applicable to the city." Charter, sec. 72. The general law provides: "Every officer whose term has expired shall continue to discharge the duties of his office until his successor has qualified." Government Code, sec. 1302, formerly Pol.Code, sec. 879. There being no inconsistency between section 1302 and the Charter, it controls and Besse held over.

[9-11] This brings us to the question of the duration of the obligation of a surety

on an official bond furnished by the officer where he is elected as his own successor, but fails to qualify for the successive term, yet continues in the duties of the office. That the obligation continues until the successor qualifies, or the hold over ceases to occupy the office, or some other event breaks the holding over, is made clear by the statute. "Every official bond executed by any officer pursuant to law is in force and obligatory upon the principal and sureties therein for: (a) * * * Any and all breaches of the conditions thereof committed *during the time such officer continues to discharge any of the duties of or hold the office*, and whether such breaches are committed or suffered by the principal officer, his deputy, or clerk. * * *." [Emphasis added.] Government Code, sec. 1504, formerly Pol.Code, secs. 959, 960. By virtue of the provision of the Charter above discussed (sec. 72) the foregoing applies to the treasurer's bond. The terms of a statute dealing with official bonds fixing the obligation of the surety within the penal sum specified are read into the bond and become a part of it. See, City of Oakland v. Snow, 145 Cal. 419, 78 P. 1060; Mill Valley v. Massachusetts Bonding & Ins. Co., 68 Cal.App. 372, 229 P. 891; Bridges v. Price, 95 Cal.App. 394, 273 P. 72; Anthony v. Van, 96 Cal. App. 523, 274 P. 563; San Luis Obispo County v. Farnum, 108 Cal. 562, 566, 41 P. 445; Fresno Enterprise Co. v. Allen, 67 Cal. 505, 508, 8 P. 59; 23 Cal.Jur. 1017-18; Jones v. Hadfield, 192 Ark. 224, 96 S.W.2d 959, 109 A.L.R. 488, 501. The authorities generally hold that the obligation of a surety on an official bond continues as long as the hold over officer remains in office and until his successor has qualified. See, Placer County v. Dickerson, 45 Cal. 12; Rest., Security, sec. 180(a); 43 Am. Jur., Public Officers, sec. 431; 81 A.L.R. 10, 36. A contrary result was reached in The People v. Aikenhead & Others, 5 Cal. 106. However, the court there either failed to give consideration to the statutory provisions such as sections 1302 and 1504 of the Government Code or did not have the benefit of them. In Fresno Enterprise Co. v. Allen, 67 Cal. 505, 8 P. 59, and Wood v. Lowden, 117 Cal. 232, 49 P. 132, the officer had qualified and commenced to serve during the succeeding term. He was not a hold over. Brown v. Lattimore, 17 Cal. 93, involved an extension by the Legislature of the term of office after the bond was given, and Hubert v. Mendheim, 64 Cal. 213, 30 P. 633, dealt with a deputy who it considered was reappointed by implication by his principal when he stayed for the second term of his principal. None of these cases are analogous to the situations here involved.

For the foregoing reasons the judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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30 Cal.2d 817

## SAN DIEGO COUNTY v. CALIFORNIA WATER & TELEPHONE CO.

L. A. 19546.

Supreme Court of California, in Bank.
Nov. 10, 1947.

**1. Appeal and error 🔑931(1)**

On defendant's appeal from adverse judgment, all permissible inferences are to be drawn in favor of plaintiff and in support of judgment.

**2. Estoppel 🔑62(3)**
**Highways 🔑70, 75(2), 79(1), 120(4)**

A county's acceptance of highway easements from public utility company providing that company would not be liable to county for damages resulting from building of dam or inundating the easements did not create binding contractual obligation to relocate highway or to abandon or waive damages to highway, since any such agreement was unauthorized by law and void. Streets and Highways Code, §§ 954–960.4.

**3. Highways 🔑79(1)**

Under statutes, county can abandon highway which has not remained impassable for five years and which has not been superseded by a new permanent road, only after notice and public hearing. Streets and Highways Code, §§ 954–960.4.

**4. Highways 🔑77(1), 79(1)**

A method provided by legislature for abandonment or vacation of highways by county or city is exclusive. Streets and Highways Code, §§ 954–960.4.

**5. Highways 🔑75(2), 79(1)**

An agreement by local officials to abandon, vacate or sell highway is void, as unauthorized by legislation, and as permitting evasion of statutory mode of procedure and safeguards, and as constituting improper attempt by local officials to bind themselves in advance as to exercise of their judgment in the future, and because receipt of agreed consideration might influence their future decision which should be made primarily upon considerations of public necessity for highway purposes. Streets and Highways Code §§ 954–960.4.

**6. Counties 🔑50**

An agreement between county and public utility company which would delegate authority to company to determine when, if at all, abandonment and relocation of highways should take place was invalid as improper delegation of public authority and discretion to private individual.

**7. Estoppel 🔑62(3)**

Acts of county officials indicating their apparent favor that public utility company should construct dam on river across which county maintained bridge and highway approaches thereto was not a representation that county would waive damages to bridge and highway approaches.

**8. Estoppel 🔑62(4)**

Estoppel cannot be invoked against municipality, where procedure specified in statute, such as mode of contracting, is measure of municipality's power to act.

**9. Estoppel 🔑62(1)**

Neither the doctrine of estoppel nor any other equitable principle can be invoked against governmental body where such doctrine or principle would operate to defeat effective operation of policy adopted to protect public.

**10. Estoppel 🔑62(3)**

A county's acceptance from public utility company of easements for highway approaches to bridge purporting to waive damages arising out of building of dam by company and flooding of highway approaches, did not estop county seeking to enjoin flooding of bridges and approaches, in view of public policy against abandonment of highway without notice, hearing and finding that highway is unnecessary for public use. Streets and Highways Code, §§ 954–960.4.

**11. Municipal corporations 🔑62**

A public body cannot contract to exercise its discretionary governmental powers in a particular manner.

**12. Estoppel 🔑62(1)**

The receipt of benefits by governmental body is insufficient to raise estoppel where transaction is unauthorized by law and contrary to public policy.

**13. Highways 🔑75(2), 79(1)**

The building of dam across river by public utility company and ability of county to tax dam, are not adequate consideration for county's alleged agreement to abandon highway approaches to bridge across river, in absence of provision in agreement to devote water or electric power to benefit of county or residents of county or to continue dam in operation for reasonable time after destruction of highway approaches by flooding.

**14. Eminent domain 🔑277**

A county could seek to enjoin public utility company constructing dam across river from flooding bridge and highway approaches, the easements for which had been furnished county by company, without offering to surrender the easements which were the consideration received for company's void agreement purporting to abandon highway approaches, where on final settlement of entire controversy, the equities could be adjusted between the parties.

**15. Eminent domain 🔑308**

A decree enjoining public utility company constructing dam from flooding bridges or road "without first making just and adequate compensation" to county was not too indefinite to be enforceable, where decree contemplated that compensation should be ascertained in subsequent proceedings if parties were not able to agree upon satisfactory settlement.

◆

Appeal from Superior Court, San Diego County; Joe L. Shell, Judge.

Action by the County of San Diego against California Water & Telephone Company to restrain the defendant from flooding a certain county road because of the impounding of water in a reservoir to be formed by means of a dam under construction by defendants. From a judgment for plaintiff, the defendant appeals.

Affirmed.

Prior opinion, 171 P.2d 926.

Claude N. Rosenberg and Bacigalupi, Elkus & Salinger, all of San Francisco, and P. S. Thacher, of San Diego, for appellant.

James Don Keller and Thomas Whelan, Dist. Attys., Frank T. Dunn, Asst. Dist. Atty., and Caroll H. Smith, Chief Trial Deputy, all of San Diego, for respondent.

GIBSON, Chief Justice.

Defendant, a public utility company, is engaged in the construction of a dam which, when completed and full, will flood a portion of a county highway. Plaintiff brought this action to enjoin the flooding. Defendant has appealed from an adverse judgment, contending, principally, that under the stipulated facts the county has waived damages to its property and is estopped by its conduct to obtain the relief sought.

For a number of years the county has maintained a public highway which, approaching from the west, crosses Sweetwater River over the Sacatara Bridge and then, a short distance to the east, crosses Peterson Canyon Creek over another bridge. In 1931 the board of supervisors adopted a resolution to the effect that the Sacatara Bridge was unsafe and that if a proposed dam on the Sweetwater River was constructed, it would be necessary to change the location of the bridge, rendering it not advisable then to repair or rebuild it. Several years later, after the county had appropriated funds to construct a new bridge, the county surveyor and ex-officio road commissioner wrote to defendant company stating that the county intended to make certain road improvements, including a new bridge over Sweetwater River and a reduction of the curvature. The letter stated that the county was applying to defendant for "a temporary right of way" across its property "to serve until * * * it becomes necessary to build a permanent line higher up to follow the high water contour of the proposed new dam." The county forwarded with its letter a map showing both the temporary right of way and the proposed "future permanent road," the latter located considerably to the north of the old route.

In the latter part of 1938 the company granted a "temporary right of way" over its land. This easement did not cover the area near the Sacatara Bridge but only a portion of the highway east of the Peterson Creek Bridge, and it was located almost exactly along the line of the original highway. The deed provided that the right of way should revert to the grantor company upon completion of the permanent highway or 90 days after notice to the county of the owner's intention to construct a dam on the Sweetwater River. It also provided that by acceptance of the easement the county agreed that the owner should not be liable to the county for "any claim or damages of any kind or nature whatsoever arising out of or in any manner connected with the building of said dam and/or the inundation of the property hereinabove described." The deed was accepted by the county and ordered recorded.

Shortly thereafter the defendant company wrote the county that two plans for the proposed dam with different spillway elevations, one at 1,355 feet and the other at 1,375 feet, had been considered; that an additional 10 foot allowance should be made for flood crests; that "there is no definite information as to the time when construction of either of these will begin"; and that the county should consider constructing its highway and bridge at an elevation of 1,400 feet, leaving room for any change in plans of the company.

Pursuant to a request by the county, the company tendered a second temporary easement containing identical provisions relating to reversion and waiver of damages. The record indicates that this was to be an extension of the temporary easement of 1938, covering approximately the area between the two bridges but located considerably to the north of the old road. With respect to this tendered easement, the board of supervisors was informed by a deputy district attorney that, although the original plan had been to construct the new bridge at an elevation of 1,365 feet, the county had been notified that the bridge should be built at the higher elevation of 1,400 feet; that the county road department believed the cost of building at that elevation would be prohibitive; and that in any event the tendered easement (containing the reversion and waiver provisions) should not be accepted in its present form. The company was notified that the easement was not accepted "in view of the provisions contained therein."

Plans for a new Sacatara Bridge at the old location were approved, and a particular design was adopted "because of the high salvage value of the superstructure in the event the * * * company elects to construct a dam. * * *" The bridge was finished in 1941.

Thereafter, a third easement, dated December 19, 1941, for a new westerly approach to the Sacatara Bridge was tendered by the company and accepted by the county. It apparently followed the old road to a point about 2,400 feet from the bridge and then continued to the bridge on a line more or less parallel to the old road but a few feet to the north thereof. This easement, unlike the one accepted in 1938, was not designated as "temporary," but it was made subject to reversion to the grantor in the event of six months' non-user or if the grantor "should at any time" construct a dam resulting in the flooding of any portion of the right of way. There was also a waiver of any claim for damages for the flooding of "said lands, or any portion thereof."

In 1943, the company requested that a certain part of a road connecting with the highway in question be altered so that equipment to be used in the construction of a dam could be moved over it, and subsequently a letter was sent thanking the county for speedy action on the request.

The company began building its dam without instituting proceedings in eminent domain to condemn the road and bridges or to determine that the proposed use of the land was more necessary to the public than its use as a highway. In September, 1943, defendant wrote to the county stating that construction of a dam had been started and might result in a flooding of a portion of the third easement granted in December, 1941, for the new westerly approach to the Sacatara Bridge; that the grant provided for reversion to the grantor in the event of flooding; and that the company would "be glad to cooperate in any way that we may in the granting of a new easement, that will not be flooded by the construction of our dam." In October, 1943, a letter to the effect that the matter had been referred to the county counsel by the board of supervisors was sent to the district attorney with the notation: "cc California Water & Telephone Co.," indicating that a copy was sent to the company. There were no further communications until September, 1944, at which time the defendant had spent over $800,000 in the construction of the dam. The present action was filed about a month and a half later.

When the dam is finished and the reservoir full, the water will flood both bridges, a portion of the highway immediately west of the Sacatara Bridge, and all of the highway between that bridge and a point beyond the Peterson Bridge, but the record does not disclose whether the maximum elevation of the dam will require that the new road and bridge be constructed as high as the 1,400 foot level suggested by the company. The company is still willing to grant to the county, without charge, an easement for "the permanent road as surveyed by the plaintiff."

The trial court found that the company had "not been misled to its prejudice or injury by any act, conduct or declaration" of the county in connection with either of the temporary easements which the county accepted "or in any of the transactions of the parties relative to the construction and erection of said dam." It concluded that the acceptance by the county of the "forfeiture, reverter, and waiver of damages clauses" in the two easements was an ultra vires act; that the county had no power to abandon a county highway in such a manner or to "bind said Board by written contract to a particular line of official action toward a predetermined result," or to make a gift of county property; that the clauses were null and void; that the county was not estopped to deny the validity of the clauses or assert its rights in the highway and bridges; and that the flooding of the highway would constitute a taking and damaging of the county's property without compensation. Defendant was enjoined from flooding or interfering with the road and bridges "without first making just and adequate compensation to the plaintiff therefor."

[1] It is clear that plaintiff has established a prima facie case for an injunction against the threatened destruction of its property by flooding. In view of the findings of the trial court, defendant, in order to prevail upon this appeal, must show that the stipulated facts compel the conclusion that the county either made a binding agreement to waive damages to its property or is estopped by its conduct to claim damages. All permissible inferences, of course, are to be drawn in favor of the county and in support of the judgment.

[2] Neither the acceptance of the easements containing provisions for waiver of damages nor any other conduct of the county created a binding contractual obligation[1] to relocate the road or to abandon or waive damages to it, since any such agreement was unauthorized by law and void. The methods by which county boards of supervisors may abandon public highways are set forth in sections 954 to 960.4 of the Streets and Highways Code. Public hearings, after proper notification, are required in most situations. If a road has remained impassable for five years it may be abandoned simply upon the board's "own motion" (Streets and Highways Code, § 954), or, if it "has been superseded by relocation," the board may summarily vacate and abandon by resolution (Streets and Highways Code, §§ 960.1, 960.2). When the road has not actually been superseded or become impassable, the Streets and Highways Code authorizes only two methods by which a board of supervisors may abandon it, one by "resolution of intention," and the other, by petition of 10 freeholders. Both of these methods require the fixing of a day for hearing, notice to all freeholders in the road district, publication of notice in a newspaper, hearing of evidence by any party interested, and a finding that the road, or portion thereof, "is unnecessary for present or prospective public use." (Streets and Highways Code, §§ 956.8–960.)

No statute authorizes the making of a contract to abandon a road and locate it elsewhere.

[3] In the present case, no portion of the road had been rendered impassable for a period of five years at the time the asserted contract was made, and little, if any, of the road had actually been "superseded" by a new permanent road. Although the old road may have been straightened or temporarily moved, pursuant to the two accepted easements, the principal or central section that will be flooded has not been changed, even on a temporary basis. It is apparent, therefore, that the only authorized methods by which the board of supervisors could abandon the road required both notice and public hearing.

[4, 5] The cases are apparently uniform to the effect that, if the Legislature has provided a method by which a county or city

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[1] It does not appear that the county made an express, or specific, agreement to relocate the highway, and the only claim is that the conduct of the county * * * in main, the acceptance of two easements purporting to waive damages by flooding to county property * * * amounted to an implied in fact agreement to abandon the existing road and to relocate the whole road at its own expense. Although there may be some doubt as to whether the waiver provisions covered all the road or only the two end portions embraced by the accepted easements, the county has not raised the issue and has conceded that if the "forfeiture, reverter and waiver of damage clauses are valid and binding on the County of San Diego then there is an end to the litigation."

may abandon or vacate roads, that method is exclusive. See People v. County of Marin, 103 Cal. 223, 226, 37 P. 203, 26 L.R.A. 659; Hensley v. Lewis, 278 Ky. 510, 128 S.W.2d 917, 920, 921, 123 A.L.R. 537; McHenry v. Foutty, Ind.Sup., 60 N.E.2d 781, 782, 158 A.L.R. 537; Hillsdale v. Zorn, 187 Okl. 38, 100 P.2d 436, 438. An analogous line of decisions holds that a municipality must follow the statutory procedure prescribed for the sale of public property, and an attempt to dispose of the property by contract will not be enforced. Cimpher v. City of Oakland, 162 Cal. 87, 121 P. 374; Hughes v. City of Torrance, Cal.App., 175 P.2d 290; City of Pasadena v. Estrin, 212 Cal. 231, 235, 298 P. 14; San Francisco & O. R. R. Co. v. Oakland, 43 Cal. 502; Grogan v. San Francisco, 18 Cal. 590, 608–612; see 3 McQuillin, Municipal Corporations [2d Ed., 1943], §§ 1243, 1249. As stated in the Hughes case, "the very fact that the legislature provided a method whereby the city might dispose of its utilities is a positive inhibition against such alienation except by a faithful compliance by the city with the statutory provision * * *." 175 P.2d at page 293. Specifically, it has been held that an agreement by local officials to abandon, vacate, or sell a road is void. State v. Castle, 44 Wis. 670; Provo City v. Denver & R. G. W. R. Co., 10 Cir., 156 F.2d 710, certiorari denied 329 U.S. 764, 67 S.Ct. 124; Industrial Co. v. Tompkins, Tex.Civ.App., 27 S.W.2d 343; Frank W. Coy Real Estate Co. v. Pendleton, 45 R.I. 477, 123 A. 562, 565; 39 C.J.S., Highways, § 113, pp. 1047, 1048; cf. American Medicinal Spirits Co. v. Mayor and City Council, 165 Md. 128, 166 A. 407. Such contracts have been disapproved not only because they are unauthorized by legislation and would permit evasion of the statutory mode of procedure and safeguards but also, it is said, because they constitute improper attempts by the local officials to bind themselves in advance as to the exercise of their judgment in the future and, further, because the receipt of the agreed consideration might influence their future decision, which is to be made primarily upon considerations of public necessity for highway purposes. See Breisch v. Locust Mt. Coal Co., 267 Pa. 546, 110 A. 242, 243, 9 A.L.R. 1330; Frank W. Coy Co. v. Pendleton, 45 R.I. 477, 123 A. 562, 565; State v. Castle, 44 Wis. 670, 679; 25 Am.Jur. 415, et seq.; cf. Wills v. City of Los Angeles, 209 Cal. 448, 451, 452, 287 P. 962, 69 A.L.R. 1044; Penley v. City of Auburn, 85 Me. 278, 27 A. 158, 159, 21 L.R.A. 657.

In the present case, since there has been no notice, hearing, finding as to public necessity, or resolution of abandonment, any agreement to relocate was unauthorized by law and, under the authorities, was void.

[6] A further reason for holding the agreement invalid may lie in the fact that, if enforced, it would to some extent result in a delegation of authority to the company to determine when, if at all, the abandonment and relocation should take place. At the time the agreement was made the company had not definitely decided when the dam was to be built, and the clauses of the easements, in effect, provided for reversion and waiver of damages only in the event that the company should decide to flood the road. No time limitation was placed upon the dam project, and no provision was made for any change in circumstances that might render a future relocation contrary to best public advantage and necessity. A contract to delegate public authority and discretion to private individuals is, of course, improper. See 3 McQuillin, Municipal Corporations [2d Ed., 1943], § 1271.

Finally, the company has apparently conceded that a county may not validly contract to waive damages for injury to an existing road.

[7] The company contends, however, that since the county has a general power to abandon and relocate roads, it may be estopped by its promise to relocate even though it could not make a valid contract to do so and even though there was "irregularity" in the procedure by which the general power was exercised. In this connection it argues that the acceptance of the waiver clauses in the easements, although void as a contract, may nevertheless be considered as a part of the course of conduct by which it is claimed that the county led the company to believe that the road would be relocated. It should be noted, however,

that the acceptance of these provisions is the only conduct of the county which might compel an inference that it agreed to bear the expenses of such a relocation. While the other acts of the county officials indicated that they were apparently in favor of having the dam constructed, this did not constitute a representation that the county would waive damages to its property nor compel a finding, contrary to that of the trial court, that the company was misled thereby.

[8] It is true that in some "exceptional cases," or situations where "justice and right require it," a governmental body may be bound by estoppel. Farrell v. County of Placer, 23 Cal.2d 624, 627, 628, 145 P.2d 570, 571, 153 A.L.R. 323; City of Los Angeles v. Cohn, 101 Cal. 373, 376–378, 35 P. 1002; Times-Mirror Co. v. Superior Court, 3 Cal.2d 309, 44 P.2d 547; McGee v. City of Los Angeles, 6 Cal.2d 390, 394, 57 P.2d 925; City of Los Angeles v. County of Los Angeles, 9 Cal.2d 624, 72 P.2d 138, 113 A.L.R. 370. However, as a corollary of the general rule that contracts wholly beyond the powers of a municipality are void, the California decisions have held that estoppel to deny their invalidity may not be invoked against a governmental body and, further, that estoppel may not be invoked where the procedure specified in a statute, such as the mode of contracting, is the measure of the power to act. Miller v. McKinnon, 20 Cal. 2d 83, 124 P.2d 34, 140 A.L.R. 570, and cases there cited; see Farrell v. County of Placer, 23 Cal.2d 624, 630, 631, 145 P.2d 570, 153 A.L.R. 323.

[9] It is sometimes difficult to determine which of these rules is applicable in a particular case. It is clear, however, that neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public. See Miller v. McKinnon, 20 Cal.2d 83, 124 P.2d 34, 140 A.L.R. 570, and cases cited therein; Pan American Petroleum Co. v. United States, 273 U.S. 456, 505, 506, 47 S.Ct. 416, 71 L.Ed. 734; American Surety Co. of N. Y. v. United States, 10 Cir., 112 F.2d 903, 906. In the American Surety Co. case the court stated that the government could not be estopped so as to 'frustrate the purpose of its laws or thwart its public policy." 112 F. 2d at page 906. In 3 McQuillin, Municipal Corporations [2d Ed., 1943], § 1266, it is said that various statutory procedures or steps exist to protect citizens and taxpayers from ill-considered contracts or those showing favoritism and that if recovery is allowed for property or services on the ground of estoppel or implied contract, "then it follows as the night the day that the statute or charter provision can always be evaded and set at naught." The author adds that the rule denying indirect enforcement of such void contracts harmonizes with our governmental system, appears to be supported by reason, and is not unjust, because the other party is charged with notice of the law. See, also, Miller v. McKinnon, 20 Cal.2d 83, 88, 89, 124 P.2d 34, 140 A.L.R. 570.

There is nothing inconsistent with this view in Farrell v. County of Placer, 23 Cal. 2d 624, 145 P.2d 570, 153 A.L.R. 323, and the cases there cited which hold that in some instances a governmental body may be estopped by the conduct of its officers. In those cases the facts clearly established that a grave injustice would be done if estoppel were not applied, and it did not appear that use of the doctrine would defeat any strong public policy or result in the indirect enforcement of an illegal contract.

[10, 11] Here, however, we are directly concerned with strong considerations of policy. The Legislature, for the protection of the public, has declared that a road may not be abandoned without notice, a hearing, and a finding that the road is unnecessary for present or prospective public use. Enforcement of a bare promise to abandon would not only mean a complete disregard of these salutary legislative requirements but would also be inconsistent with the additional policy against the making of contracts by a public body to exercise its discretionary governmental powers in a particular manner. By indirect enforcement of such a "contract" the needs of persons using the highway might be ignored, and a method would be afforded by which officials and persons dealing with the agency could

evade the law. Cf. Miller v. McKinnon, 20 Cal.2d 83, 88–90, 124 P.2d 34, 140 A.L.R. 570.

The argument that the company is not seeking to enforce the waiver provisions as a binding contractual obligation to abandon the road and locate it elsewhere is not helpful. The company's defense of estoppel, as it admits, is based solely upon the theory that the acts of the county constituted an implied in fact promise to relocate, or, in other words, an implied representation that it would do so, upon which the company relied to its detriment. Application of estoppel under these circumstances would obviously be tantamount to specific enforcement of the void promise to abandon, relocate, and waive damages, contrary to both the policy and letter of the law.

Upon similar reasoning, it has been squarely held in other jurisdictions that contracts between public officials and private persons for abandonment, vacation, or sale of streets are not enforceable by estoppel against the government where there has been insufficient compliance with the steps prescribed by law. State v. Castle, 44 Wis. 670; Provo City v. Denver & R. G. W. R. Co., 10 Cir., 156 F.2d 710, certiorari denied 329 U.S. 764, 67 S.Ct. 124; Industrial Co. v. Tompkins, Tex.Civ.App., 27 S.W.2d 343; Beebe's Heirs v. City of Little Rock, 68 Ark. 39, 56 S.W. 791, 798, 800, 801. In the Provo City case the court relied in part upon decisions holding that the statutory requirement of vacation by ordinance was intended to give notice of the acts of the city's commission so that private property holders would have a chance to protect themselves. In addition the court pointed out that the contracting party, knowing that the law required passage of an ordinance, went ahead at its peril, and that it was in no position to urge "in a court of equity that the city be estopped and in that way completely wipe out the statute * * *." 156 F.2d at page 712. Finally, the court stated that it was never contemplated that the city commission could thus "circumvent the statute and deprive the people of their right expressly granted by the statute to approve or reject the proposed abandonment of a portion of the street which was in active use as a public thoroughfare" 156 F.2d at page 712.

In State v. Castle, supra, it was held that there could be no estoppel because "no law * * * authorizes the supervisors * * * to discontinue a highway by contract with the parties interested." (44 Wis., at page 677.) The court suggested that the contract amounted to a surrender of legislative discretion, adding that it was at least questionable whether the making of the contract would not have rendered the closing of the road void even if the procedure had otherwise been regular, on the ground that the supervisors may have been influenced by the performance on defendants' part rather than by a consideration of the public good with respect to the road.

Courts have likewise refused to estop the government in many analogous situations where such questions of policy were present. See, for example, City of San Antonio v. Guadalupe-Blanco River Authority, Tex. Civ.App., 191 S.W.2d 118, 126 [contract to sell public utility]; Kansas City v. Rathford, 353 Mo. 1130, 186 S.W.2d 570, 574, 575 [oral agreement to perform services]; Hoboken Local No. 2, etc., v. City of Hoboken, 44 A.2d 329, 333, 23 N.J.Misc. 334, affirmed 134 N.J.L. 616, 48 A.2d 917 [unauthorized employment of regular policemen for extra day]; City of Amarillo v. Stapf, 129 Tex. 81, 101 S.W.2d 229, 232 [unauthorized issuance of building permit]. No California decision squarely in point has been found, but the language in several opinions shows that matters involving public policy will be given particular attention where estoppel is asserted against an agency of the government. See City of Pasadena v. Estrin, 212 Cal. 231, 235, 298 P. 14, 16 [rejecting estoppel where charter provision "was enacted to protect the city and its taxpayers from unauthorized obligations"]; Fountain v. City of Sacramento, 1 Cal.App. 461, 467, 82 P. 637; County of Shasta v. Moody, 90 Cal.App. 519, 523, 265 P. 1032; Miller v. City of Martinez, 28 Cal.App.2d 364, 370–372, 82 P.2d 519.

Defendant contends that Greene County v. Tennessee Eastern Elec. Co., 6 Cir., 40 F.2d 184, supports its position that the county is estopped. There a county agreed by resolution to elevate a bridge which would be flooded when a utility company raised its dam. The county gave assurance that there would be no claim for damages, and it hired the utility company to do the work on the bridge, promising to pay warrants therefor at a later date. Subsequently the county ordered the work stopped, claiming the resolution was ultra vires and unconstitutional. The court held that the county was estopped to claim damages for flooding or to deny liability for the work done. On its facts this decision may be contrary to the cases cited hereinabove. The reasoning, however, is not necessarily inconsistent with the conclusion we have reached, because the court stated that the county did have power to waive its claim for damages to the bridge. Although the court said that the county had no authority to tax property unequally or to pledge credit to a power company, it did not otherwise discuss the question of whether or not the contract was illegal or void as being contrary to statutory requirement, nor did it mention the possibility that resort to estoppel might defeat public policy. Accordingly, the decision is not persuasive with respect to the problem presented here.

Other cases have held cities and counties estopped to deny abandonment of streets, but here also considerations of public policy were either not involved or not discussed. See Meyer v. Meldrum, 237 Mich. 318, 211 N.W. 658; In re Melon St., 192 Pa. 331, 43 A. 1013, 1015; Borough of Milford v. Burnett, 288 Pa. 434, 136 A. 669; O'Leary v. Metropolitan St. Ry. Co., 87 Kan. 22, 123 P. 746, 749, 750; City of Rochester v. North Side Corp. 211 Minn. 276, 1 N.W.2d 361; Dabney v. City of Portland, 124 Or. 54, 263 P. 386; 31 C.J.S., Estoppel, § 145, p. 430. Moreover, most of these cases involved direct encroachment upon the street, erected at a considerable expense and acquiesced in by the governmental body for a long period of time, whereas in the present case the county's property itself has not as yet been seized or injured, and the county is not in the position of having acquiesced to a direct encroachment. This court has held that a city was estopped to complain that a building encroached on a street where private persons had possession of the land for over 40 years. City of Los Angeles v. Cohn, 101 Cal. 373, 35 P. 1002. In that case, however, after the foundations of the building had been laid, the city attorney investigated the title to the property and reported to the city council that the city had no interest, and the encroachment was allowed to remain for 20 years before the city asserted any rights. The court also stated that the conduct of the city was equivalent to an agreement to locate the true boundary line of the street, and a city may properly make such an agreement where the boundary is uncertain. Muchenberger v. City of Santa Monica, 206 Cal. 635, 275 P. 803. The other California cases cited by the company are also distinguishable upon the ground that they either did not involve or did not discuss the danger that a strong rule of policy, adopted for the benefit of the public, would be nullified by resort to the doctrine of estoppel. Pedro v. County of Humboldt, 217 Cal. 493, 19 P.2d 776; Times-Mirror Co. v. Superior Court, 3 Cal.2d 309, 44 P.2d 547; McGee v. City of Los Angeles, 6 Cal.2d 390, 57 P.2d 925; City of Los Angeles v. County of Los Angeles, 9 Cal.2d 624, 72 P.2d 138, 113 A.L.R. 370.

[12] The company urges as a separate ground for estoppel the fact that the county has retained the benefits of the asserted agreement. All of the California cases hold, however, that receipt of benefits by the governmental body is insufficient to raise an estoppel where, as here, the transaction is unauthorized by law and contrary to public policy. Miller v. McKinnon, 20 Cal.2d 83, 124 P.2d 34, 140 A.L.R. 570, and cases there cited; Mullan v. State, 114 Cal. 578, 46 P. 670, 34 L.R.A. 262; Miller v. City of Martinez, 28 Cal.App.2d 364, 82 P.2d 519; County of Shasta v. Moody, 90 Cal.App. 519, 265 P. 1032. For cases in other jurisdictions, see State v. Castle, 44 Wis. 670; Provo City v. Denver & R. G. W. R. Co., 10 Cir., 156 F.2d 710, certiorari denied 329 U.S. 764, 67 S.Ct. 124; cf. Kansas City v. Rathford, 353 Mo. 1130, 186 S.W.2d 570, 574.

[13] It should be noted, in connection with this contention, that the agreement was one-sided, with the greater part of the benefit running to the company. The county

has maintained its road over the company's property for many years, and the two accepted easements, designed to reduce curvature, were to a considerable extent superimposed upon the old right of way. Further, the easements accepted by the county were temporary only, to cease as soon as the flooding occurred, and covered merely part of the road, not the whole of it. In exchange for this temporary right, the county, according to defendant's version of the effect of the agreement, would be required to abandon its entire road in the locality to be flooded, together with the two bridges and any other county property injured or destroyed. It does not appear from the record that the building of the dam would constitute an adequate consideration for the abandonment of the road. The agreement did not include any proposal to devote water or electric power to the benefit of the county or of its residents, and there is no assurance or guaranty that any water or power would be so used, or that the dam would be operated for the benefit of the public, or that it would continue in operation for a reasonable period after the destruction of the highway by flooding. The mere fact that the county would be able to tax the project would not be an adequate consideration.

[14] Entirely independent of the question of estoppel it is asserted that the county may not come into a court of equity and obtain injunctive relief without first offering to return the consideration it received for the void agreement, that is, without surrendering the benefits it enjoys under the temporary easements. Here, however, the consideration was transferred as a result of the invalid agreement, and clearly the county is not barred by failure to restore anything which it is no longer able to return. Cf. Miller v. McKinnon, 20 Cal.2d 83, 124 P.2d 34, 140 A.L.R. 570. We need not determine how much, if any, of the balance of the property the county must eventually restore, since, under the circumstances of this case, an offer to restore cannot be held a condition precedent to the maintenance of the action. Obviously it would be harmful to the county to require any restoration in advance of settlement of the entire controversy, and the circumstances are such that a final decree may fully adjust the equities between the parties. The present case is analogous to rescission, and, while restoration is ordinarily required, "an offer to restore before action is not essential where the rights of the other party can be fully protected by the decree, and such restoration cannot be made without injuriously affecting the rights of the party seeking recission * * *." California Farm & Fruit Co. v. Schiappa-Pietra, 151 Cal. 732, 740, 91 P. 593, 596.

[15] The company contends, finally, that the decree was too indefinite and uncertain to be valid or enforceable. It argues that it was enjoined from flooding the road or bridges "without first making just and adequate compensation to the plaintiff therefor," but that the court failed to declare what would be just compensation, what factors should be considered in fixing compensation, or when the compensation should be paid. These matters were expressly left open, and it was contemplated by the decree that the compensation should be ascertained in subsequent proceedings if the parties were not able to agree upon a satisfactory settlement. The real issue presented by the county is whether compensation shall be paid for loss of the road, and no question is raised as to the right of the company upon payment to complete the dam and flood the road.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUEI' and SPENCE, JJ., concur.

30 Cal.2d 838

## Ex parte PHYLE.

## MATTHEWS v. DUFFY, Warden.

Cr. 4797.

Supreme Court of California.

Nov. 10, 1947.

Rehearing Denied Dec. 8, 1947.

**1. Criminal law 🔑981(2)**
**Habeas corpus 🔑17**
**Insane persons 🔑86**

Under statutes, where a person has been adjudged insane after conviction, sentence, and delivery to warden of state prison for execution, question of restoration to sanity is for determination of superintendent of state hospital to which he has been committed, and such person does not have right to judicial determination, upon habeas corpus or other judicial proceeding, of his restoration to sanity. Pen.Code, §§ 3700–3704.

**2. Courts 🔑90(4)**
**Statutes 🔑225**

Statutes relating to insanity of an accused are in pari materia, and interpretation of a sentence in one controlled statute, interpretation of virtually the same sentence in the other statute. Pen.Code, §§ 1367–1372, 3700–3704, 10000.

**3. Statutes 🔑225¾**

It would be assumed that when Legislature adopted provision of Penal Code regarding restoration to sanity of a person who has been adjudged insane after conviction, sentence, and delivery to warden of state prison, it was aware of judicial construction that had been given prior similar provision of the Criminal Practice Act. Pen.Code, § 3704.

**4. Insane persons 🔑86**

Provision in Welfare and Institutions Code relating to recovery of a patient committed to a state hospital had no application to a person who had been adjudged insane after conviction, sentence, and delivery to warden of State Prison for execution, and did not modify applicable provision of Penal Code relating to restoration to sanity. Welfare and Institutions Code, § 6760; Pen.Code, § 3704.

**5. Criminal law 🔑981(2)**

The statute prohibiting courts from suspending execution of a judgment of death, except on appeal, provides in effect that the courts are without power, except as provided by statute, to determine sanity of a person who has been sentenced to be executed for a capital offense and is in custody of a warden of a state prison for purpose of execution. Pen.Code, § 3700.

**6. Criminal law 🔑981(2)**

Where procedure for determining sanity of a person who has been sentenced to death is covered by statute, a court has no inherent power to determine that question and such person has no right to judicial determination of the question unless the statutes so provide. Pen.Code, §§ 3700–3704.

**7. Constitutional law 🔑306**
**Insane persons 🔑3**

The statutory procedure for determining the question of restoration to sanity of a person who has been adjudged insane after conviction, sentence, and delivery to warden of State Prison for execution, is not violative of the due process clauses though no provision is made for judicial determination. Pen.Code, §§ 3700–3704; U.S.C.A.Const. Amend. 14; Const.Cal. art. 1, § 13.

**8. Courts 🔑394(3)**

The procedure for determining the sanity of one who has been properly convicted of a capital offense and sentenced to death is for the Legislature and courts of the jurisdiction in which defendant is convicted, and no federal question is presented. Pen.Code, §§ 3700–3704.

**9. Criminal law 🔑981(2)**

Where a person has been adjudged insane after conviction, sentence, and delivery to warden of state prison for execution, effect of the adjudication is to prevent his execution until superintendent of state hospital to which he is sent certifies that he has recovered his reason, and his only right to another judicial determination of that question depends on belief and action of warden of the prison to whose custody he has been returned. Pen.Code, § 3704.

**10. Criminal law ⚷981(1)**

The authority given a warden by statute requiring warden, who believes that a defendant under judgment of death has become insane, to call such fact to attention of the district attorney, constitutes adequate protection to one who has been properly convicted of a capital offense. Pen.Code, § 3700.

**11. Criminal law ⚷981(2)**

The fact that an adjudication of insanity after conviction, sentence, and delivery to warden of state prison for execution has been made by a court of law does not require that determination of restoration to sanity be made only by a court of law. Pen.Code, §§ 1367–1372, 3700–3704.

**12. Constitutional law ⚷80(1)**
**Insane persons ⚷3**

The statutory procedure for determination by superintendent of state hospital of the restoration to sanity of a person who has been adjudged insane after conviction, sentence, and delivery to warden of state prison for execution, does not violate the separation of powers provision of the Constitution, even if the power of the superintendent in that respect is a judicial power. Pen.Code, §§ 3700–3704, 10000; Const. art. 3, § 1; art. 10, § 7.

**13. Constitutional law ⚷80(1)**
**Insane persons ⚷3**

A warden's statutory power with regard to the sanity of a person who has been convicted, sentenced, and delivered to warden for execution is not violative of the separation of powers provision of the Constitution even if the warden's power in that regard is judicial. Pen.Code, §§ 3700–3704, 10000; Const. art. 3, § 1; art 10, § 7.

**14. Criminal law ⚷981(2)**

A person who had been adjudged insane after conviction, sentence, and delivery to warden of state prison for execution was not entitled to a judicial determination of his restoration to sanity on ground that only a judicial determination would prevent circuity of action regarding his sanity. Pen.Code, §§ 3700–3704.

SCHAUER and CARTER, JJ., dissenting.

Original proceeding in the matter of the petition of Al Matthews, on behalf of William Jerome Phyle, for a writ of habeas corpus or, in the alternative, a writ of prohibition against Clinton T. Duffy, Warden of the State Prison at San Quentin, State of California.

Writ discharged and William Jerome Phyle remanded to custody.

A. Matthews, of Los Angeles, and Wallace S. Myers, of San Anselmo, for petitioner.

Fred N. Howser, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

William Jerome Phyle was found guilty of first degree murder and sentenced to be executed. The judgment was affirmed by this court (People v. Phyle, 28 Cal.2d 671, 171 P.2d 428), and the date of execution was set for December 26, 1946. While defendant was awaiting execution at the state prison at San Quentin, the warden of that prison initiated proceedings pursuant to section 3701 of the Penal Code to determine the question of defendant's sanity. After a jury trial defendant was adjudged insane and committed to the Mendocino State Hospital. On January 18, 1947, the superintendent of that hospital certified to the Governor that defendant had recovered his reason. The Governor then issued a warrant to the warden of the state prison at San Quentin appointing May 2, 1947, the day of execution. One of defendant's attorneys filed a petition for a writ of habeas corpus in this court, contending that the Superintendent of the Mendocino State Hospital has no authority under the law of this state to release the defendant to the warden of the state prison at San Quentin without an adjudication of a competent court that defendant has recovered his reason. This court issued the writ for the purpose of giving consideration to this contention.

Section 1367 of the Penal Code provides that "A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane." The question of defendant's sanity at the time of the commission of the offense or at the time of his conviction or sentence is not involved in this proceeding. The only question presented is whether a person who has been adjudged insane after conviction, sentence, and delivery to a warden of a state prison for execution, has the right to a judicial determination of the question of his restoration to sanity.

The procedure for determining the question of the sanity of a prisoner under sentence of death is specified in sections 3700 to 3704 of the Penal Code. Section 3700 provides that, "No judge, court, or officer, other than the Governor, can suspend the execution of a judgment of death, except the warden of the State prison to whom he is delivered for execution, as provided in the six succeeding sections, unless an appeal is taken." Four of the six sections referred to relate to the question of the prisoner's sanity. The other two, which prescribe the procedure for determining the question of the pregnancy of a woman sentenced to death, are not material in this case.

Section 3701 provides for the determination of the question of defendant's sanity after he has been delivered to the state prison: "If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty it is to immediately file in the superior court of such county a petition, stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his sanity be inquired into."

Section 3702 provides the procedure for the hearing held pursuant to section 3701.

Section 3703 provides that "The verdict of the jury must be entered upon the minutes, and thereupon the court must make and cause to be entered an order reciting the fact of such inquiry and the result thereof, and when it is found that the defendant is insane, the order must direct that he be taken to a State hospital for the insane, and there kept in safe confinement until his reason is restored."

Section 3704 provides for the disposition of the defendant after the court's order is entered: "* * * if it is found that the defendant is insane, the warden must suspend the execution and transmit a certified copy of the order mentioned in the last section to the Governor, and deliver the defendant, together with a certified copy of such order, to the medical superintendent of the hospital named in such order. *When the defendant recovers his reason, the superintendent of such hospital must certify that fact* to the Governor, who must thereupon issue to the warden his warrant appointing a day for the execution of the judgment, and the warden shall thereupon return the defendant to the State prison pending the execution of the judgment." (Italics added.)

It is apparent from a reading of sections 3700 to 3704 of the Penal Code that there is no provision for a judicial determination of the question of the sanity of a defendant delivered to the warden of a state prison for execution except as set forth in section 3701. In fact, section 3700 expressly provides that after the defendant has had his appeal to this court, the execution of his sentence lies exclusively within the control of the Governor, and the warden of the prison.

[1] Petitioner contends, however, that the question of restoration to sanity after a judicial determination that defendant is insane is necessarily a judicial question and that the statute must be interpreted as if it provided that, "*when it has been judicially determined that defendant has recovered his reason* the superintendent must certify that fact to the Governor * * *." Petitioner maintains that in view of the cases construing statutory provisions regarding the restoration to sanity of a defendant adjudged insane during the course of his trial (Penal Code, § 1367-1372) defendant has a right to a judicial determination of the question of his restoration to sanity. Petitioner relies on the rule that a person confined in a state hospital pursuant to those provisions has a right to habeas corpus to determine whether his sanity has been re-

stored. Gardner v. Jones, 126 Cal. 614, 618, 59 P.126; In re Buchanan, 129 Cal. 330, 331, 61 P. 1120, 50 L.R.A. 378; see People v. Superior Court, 4 Cal.2d 136, 145, 47 P.2d 724. It is true that a defendant committed to such an institution has a right to his release therefrom, if it is determined on habeas corpus that he is improperly held because he is presently sane. If it is found that he is sane, he is returned to the custody of the sheriff and his trial proceeds. In re Buchanan, supra, 129 Cal. at page 336, 61 P. 1120, 50 L.R.A. 378. In the present case, petitioner does not seek release of defendant from the state hospital, on the ground that he is sane, for if he were found sane he would be delivered to the warden for execution. Instead, petitioner seeks the return of defendant to the state hospital, on the ground that he was improperly discharged therefrom. There is no authority, however, for the proposition that defendant has a right to habeas corpus or other judicial proceeding to determine the question of his sanity after his release from the state hospital. In fact section 3700 of the Penal Code expressly prohibits such a proceeding. Once the superintendent certifies that defendant is sane, he is remanded to the custody of the warden for execution and "No judge, court, or officer other than the Governor" can then suspend the execution of the judgment, "except the warden of the State prison to whom he is delivered * * *."

Nor is there any provision for the superintendent to initiate judicial proceedings to ascertain the fact to which he certifies. The superintendent is not authorized, as the warden is, to call the question to the attention of a district attorney for a judicial determination. Instead, it is his duty to certify the fact to the Governor "who must thereupon issue to the warden his warrant appointing a day for the execution * * *." Since the method of determining the question of the sanity of a person awaiting execution is controlled by the Legislature and since the Legislature has provided in Penal Code section 3700 that the courts cannot suspend the execution of a judgment of death and has provided in section 3701 for a judicial proceeding to determine the question of defendant's sanity only when the warden invokes such a proceeding, it is clear that the question of restoration to sanity under section 3704 is a question for the determination of the superintendent.

[2, 3] This interpretation of section 3704 is in accord with the interpretation by this court of the almost identical language of section 1372, which relates to the question of the restoration to sanity of a person who has been judicially adjudged insane before conviction. Section 1372, which was amended to its present form at the same time as the provisions with respect to the restoration to sanity of a person adjudged insane after conviction and sentence (Stats. 1905, pp. 699, 704),* provides: "If the defendant is received into the state hospital he must be detained there until he becomes sane. *When he becomes sane the superintendent must certify that fact* to the sheriff and district attorney of the county. The sheriff must thereupon * * * place him in proper custody until he is brought to trial or judgment, as the case may be, or is legally discharged." (Italics added.)

In construing section 1372 in People v. Superior Court, 4 Cal.2d 136, 144-147, 47 P.2d 724, this court held that the question of defendant's restoration to sanity is for the superintendent to determine. The court stated that once a person has been committed to a state hospital under section 1372, "'no court in this state is authorized to discharge him therefrom, or to restore him to the capacity of a sane person, under any circumstances, except upon a writ of habeas corpus. The power to discharge him otherwise than upon habeas corpus is vested exclusively in the officers of the asylum' * * * The Penal Code undoubtedly prescribes the exclusive manner by which the proceedings shall be set in motion when the defendant is restored to sanity or is not insane." People v. Superior Court, supra, 4 Cal.2d at page 145, 47 P.2d at page 728. After the superintendent determines that a defendant placed in his custody pursuant to sections 1370 to 1372 of the Penal Code is sane, the defendant is returned to the court in which his trial had begun. It is not necessary for the verdict finding him insane to be vacated before the trial court may proceed. (People v. Rice, 83 Cal.App. 55, 60, 256 P. 450.)

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* In 1905 the provisions of 3704 were contained in section 1224, which was repealed and re-enacted in 1941 as section 3704 with the addition of the last phrase that "the warden shall thereupon return the defendant to the State prison pending the execution of the judgment." Section 10000 adopted at the same time provides that, "The provisions of Part 3 of this code [which includes sections 3700 to 3704], in so far as they are substantially the same as existing provisions relating to the same subject matter, shall be construed as restatements and continuations thereof and not as new enactments." The addition of the last phrase to section 3704 is clearly not material to this case or to the interpretation of that section with respect to the duties of the superintendent.

When the provisions in question of both section 1372 and section 3704 were adopted in 1905, a substantially similar provision of the Criminal Practice Act (§ 591, Stats. 1851, p. 278) relating to the restoration to sanity of a person adjudged insane before judgment had adready been interpreted by this court. Section 589 of that act provided for the delivery of a person found to be insane before judgment to the custody of a "proper person" and for his redelivery by such person to the sheriff upon his becoming sane. Section 591 provided that, "If the defendant be received by the person so appointed he must be detained by him until he becomes sane. *When he becomes sane, such person shall give notice* to the Sheriff and District Attorney of the County *of that fact.*" (Italics added.) In People v. Farrell, 31 Cal. 576, 580, it was held that this provision did not require a judicial determination of the question of restoration to sanity and that the verdict of insanity under which the defendant was committed did not have to be vacated before the defendant could be tried. Accordingly, it was not error for the trial court to proceed with the trial of the defendant without instituting "some sort of judicial inquiry into the present sanity of the defendant." People v. Rice, 83 Cal.App. 55, 60, 256 P. 450, 452, supra; People v. Superior Court, 4 Cal.2d 136, 144-147, 47 P.2d 724, supra.)

Since these statutes are obviously in pari materia, the interpretation of a sentence in one controls the interpretation of virtually the same sentence in the other. It must be assumed also that when the Legislature adopted the present provisions of section 3704, it was aware of the construction that had been given section 591 of the Criminal Practice Act.

[4] Petitioner contends, however, that section 3704 is modified by section 6760 of the Welfare and Institutions Code, which provides: "A patient committed to a State hospital under the provisions of Chapter VI, Title X, Part II, of the Penal Code, shall, upon the certificate of the superintendent that the person has recovered, approved by the superior judge of the county from which the patient was committed, be redelivered to the sheriff of such county, and dealt with in accordance with the provisions of the above-mentioned chapter of the Penal Code." Even if it be assumed that this section requires a judicial determination of the question of the restoration to sanity of one committed pursuant to the chapter of the code referred to (cf. People v. Superior Court, supra, 4 Cal.2d at pages 143–146, 47 P.2d 724), it clearly has no application to the present case, for petitioner was not committed under the provisions of that chapter of the Penal Code, but under the provisions of Chapter 2, Title 3, Part 3 of that code with respect to which there is no provision comparable to section 6760 of the Welfare and Institutions Code requiring approval of the superintendent's certificate by the superior judge of the county from which the patient was committed.

[5, 6] Petitioner contends also that there is an inherent judicial power to determine the question of restoration to sanity, regardless of the statutes. He cites for this proposition the case of People v. Scott, 326 Ill. 327, 338, 157 N.E. 247, wherein it was held, in the absence of a statutory provision regarding restoration to sanity, that a jury trial of the question of sanity was proper. Where there is a

statute that declares that the superintendent of the state hospital where the prisoner is confined may declare the prisoner's sanity restored, a person awaiting execution has no right to a judicial determination of his restoration to sanity. Barrett v. Commonwealth, 202 Ky. 153, 160, 259 S.W. 25. By adopting section 3700 of the Penal Code prohibiting the courts from suspending the execution of a judgment of death, except on appeal, the Legislature has provided in effect that the courts of this state are without power, except as provided by statute, to determine the sanity of a person who has been sentenced to be executed for a capital offense and is in the custody of the warden of a state prison for the purpose of execution. See People v. Sloper, 198 Cal. 601, 608, 246 P. 802. Thus, regardless of what the common law powers of a court may be, when the procedure for the determination of the question of the sanity of a person who has been sentenced to death is covered by statute, a court has no inherent power to determine that question and such a person has no right to a judicial determination of the question unless the statutes so provide. State v. Alexander, 87 Utah 376, 381, 49 P.2d 408; Howell v. Kincannon, 181 Ark. 58, 24 S.W.2d 953, 956; Cribb v. Parker, 119 Ga. 298, 46 S.E. 110; Baughn v. State, 100 Ga. 554, 28 S.E. 68, 70, 38 L.R.A. 577; Nobles v. Georgia, 168 U.S. 398, 404, 18 S.Ct. 87, 42 L.Ed. 515: see Baranoski's Case, 9 Pa.Co.Ct.R. 264, 266; cases collected 49 A.L.R. 804; 38 L.R.A. 577, 588.

In California, moreover, this matter has never been governed by common law principles. Since the first Criminal Practice Act in this state (§ 505, Stats. of 1850, p. 312; § 473 of the Criminal Practice Act of 1851, Stats. of 1851, p. 264; § 1224 of Penal Code of 1872), the question of the sanity or restoration to sanity of such prisoners has been governed by statute. Until 1905, either the Governor or a judge of the trial court could determine whether or not a prisoner was sane and order his execution after he had been found insane by an inquisition. This provision was changed in 1905 by an amendment to section 1224 of the Penal Code whereby all reference to the court was omitted and the Governor was directed to issue a warrant for the execution of the prisoner on receipt of a certificate from the superintendent of the hospital. Section 3704 is a continuation of this provision. (Penal Code § 10000.) The courts of this state have therefore never had the right, independent of statute, to determine the question of the restoration to sanity of a defendant who is in the custody of a warden of a state prison for execution pursuant to a lawful judgment of death.

[7, 8] The question remains whether the statutory procedure for determining the question of restoration to sanity is constitutional. Petitioner contends that defendant has a right to an adjudication of the question of his sanity, protected by the due process clauses of the Constitution of the United States and the Constitution of California. Const.U.S.Amend. 14; Const. Cal. art. 1, § 13. There is no such right under either constitution. The United States Supreme Court has held that the procedure for determining the question of the sanity of a person who has been properly convicted of a capital offense and sentenced to death is a matter for the Legislature and courts of the jurisdiction in which the defendant is convicted and presents no federal question. Nobles v. Georgia, 168 U.S. 398, 404, 18 S.Ct. 87, 42 L.Ed. 515. On this ground the court affirmed a decision by the Supreme Court of Georgia (Baughn v. State, 100 Ga. 554, 28 S.E. 68, 70, 38 L.R.A. 577) that under the laws of Georgia a person convicted of a capital offense and sentenced to death who thereafter becomes insane has no right to a judicial determination of the question of his sanity. See also, cases collected in 49 A.L.R. 804. We see no reason why the due process clause of the California Constitution should be interpreted differently.

[9] The statutes of this state therefore provide the measure of defendant's rights to any determination of the question of his sanity. Defendant has thus far been afforded the full protection of those statutes. He was entitled to a judicial determination of the question of his sanity after

conviction and sentence only because the warden of the state prison at San Quentin believed that he was insane. The effect of the adjudication that he was insane was to prevent his execution until the superintendent of the state hospital to which he was sent certified that he had recovered his reason. His only right to another judicial determination of that question depends on the belief and action of the warden of the prison to whose custody he has been returned. See, People v. Farrell, 31 Cal. 576, 581; People v. Rice, 83 Cal. App. 55, 61, 256 P. 450.

[10] This court has already decided that the authority given the warden constitutes adequate protection to one who has been properly convicted of a capital offense. In People v. Sloper, 198 Cal. 601, 604, 607, 608, 246 P. 802, 804, the defendant was convicted of murder in the first degree and sentenced to death. On appeal to this court, the judgment was affirmed. Defendant then sought to prevent the fixing of a date for execution and to obtain a trial on the question of his sanity. Upon the denial of this motion defendant applied to this court for a stay of execution. In denying the application, this court, on the authority of Penal Code section 1220 (now section 3700), held that no court in this state has the power to suspend the execution of a judgment of death to determine the question of the sanity of a person who became insane after his conviction and sentence. The court stated that "adequate statutory provision is made for the complete protection of the rights of a defendant who may have become insane after his conviction and sentence. * * * If it be found that the defendant is insane [pursuant to these statutes], the court must direct that he be taken to one of the state hospitals for the insane and there kept in safe confinement until his reason is restored. When the defendant recovers his reason the superintendent of the hospital must certify that fact to the Governor, who must thereupon issue to the warden his warrant appointing a day for the execution of the judgment. * * * We must conclude, therefore, that it was the intention of the Legislature to limit the jurisdiction of the trial court in proceedings of this nature to the making of the orders necessary to carry the judgment into effect. We are of opinion, also, that, in view of the comprehensive and adequate provision made for the determination of the question of the sanity of a defendant who is alleged to have become insane after the rendition of a judgment of death, no substantial right of the defendant, Sloper, was affected by the action of the court below in denying his motion. * * * If it be a fact in this case that the condemned man is insane, it must be assumed that the warden of the state prison will do his full duty to the end that the question of the prisoner's sanity may be judicially determined."

[11] In the Sloper case, there was no prior adjudication of insanity, but the opinion contains a clear expression of approval of the procedure thus far followed in the present case. Petitioner contends, however, that because a court of law determined that the defendant was insane, only a court of law can determine that he is now sane. This contention is clearly inconsistent with section 3700 of the Penal Code and with the cases interpreting the provision of section 1372 of that code similar to the provision of section 3704. Sections 3700-3704 of the Penal Code provide for the adjudication, not of some continuing status, but only of the question whether the defendant is sane at the time of the hearing initiated by the warden. Moreover, the adjudication relied on by the petitioner did not purport to decide what the condition of defendant's mind would be thereafter. There was no determination that defendant's insanity was incurable, even if it is assumed that such a determination would have been within the court's jurisdiction. The defendant was found insane at that time, and his execution was suspended only until he recovered his reason. It was the order of the court that the defendant be kept in confinement in the state hospital until he recovered his reason and "when said William Jerome Phyle recovers his reason, that the Superintendent of the State Hospital in which he is confined certify that fact to the Governor oı the State of California for further proceedings as is required by law." There is thereore no merit to the contention that

the adjudication that defendant was insane at the time of this trial gave him a vested right to the status of an insane person therefore no merit to the contention that mined that he is sane.

[12, 13] The petitioner contends also that the separation of powers provision of section 1 of Article 3 of the California Constitution is violated by leaving the final determination of a prisoner's sanity to administrative officers. The contention that the power to determine the question of restoration to sanity of such a person cannot be given to the superintendent has already been answered adversely in this state in People v. Superior Court, 4 Cal.2d 136, 146, 47 P.2d 724, supra, and People v. Rice, 83 Cal.App. 55, 60, 256 P. 450, supra. In these cases it was held to be within the proper scope of the superintendent's powers to determine the question of the restoration to sanity of defendants who had been adjudged insane before conviction. Thereafter the defendants were returned to the judge pursuant to section 1372 of the Penal Code and their trial continued. The judge at that time could again have concluded pursuant to section 1368 that it was doubtful whether the defendant was sane, and provided for a determination of the question in a proper judicial proceeding. See People v. Farrell, 31 Cal. 576, 581, supra; People v. Rice, supra, 83 Cal.App. at page 61, 256 P. 450. In this case that power and duty is given to the warden by section 3701 of the Penal Code, for the defendant is returned, not to a court but to the warden.

Even if the warden's power in this regard is judicial, there is no violation of section 1 of Article 3 of the California Constitution, for section 7 of Article 10 specifically provides that "*Notwithstanding anything contained elsewhere in this Constitution,* the Legislature may provide for the establishment, government, charge and superintendence of all institutions for all persons convicted of felonies. For this purpose, the Legislature may delegate the government, charge and superintendence of such institutions to any public governmental agency or agencies, officers, or board or boards, whether now existing or hereafter created by it. *Any of such agencies, officers, or boards shall have such powers, perform such duties and exercise such functions in respect to other reformatory or penal matters, as the Legislature may prescribe.*" (Italics added.)

The delegation of power contained in the former sections of the Penal Code on this subject (sections 1221 to 1224) was validated by the same section of the Constitution in the following terms: "All existing statutes * * * purporting * * * to so delegate such government, charge and superintendence, to so prescribe such powers, duties, or functions * * * are hereby ratified, validated and declared to be legally effective until the Legislature provides otherwise." By moving these provisions from one part of the Penal Code to another, the Legislature did not change their effect. Penal Code, § 10000.

Even if it is assumed that the power of the superintendent of the state hospital, to whom defendant was delivered, to determine whether defendant has recovered his reason is a judicial power, the foregoing provisions of the California Constitution authorize the delegation of this power. Under the statutes the prisoner is delivered to the custody of the superintendent as a person convicted of a felony, and thereafter, so far as the superintendent's authority over such a person is concerned the superintendent exercises not only the authority of an officer entrusted with the superintendence of an institution for convicted felons but the duties and functions prescribed in Penal Code Section 3704.

[14] It follows that unless the warden of the prison in which defendant is incarcerated believes that defendant is now insane, no court of this state has jurisdiction to determine the question of his sanity. It has been suggested that this conclusion must be wrong on the ground that if the matter is left to the discretion of the warden, a circular process may begin whereby defendant will again be found insane, again sent to a state hospital, and again declared restored to sanity. It has therefore been suggested that only a judicial determination of this question at this time will prevent such circuity. This suggestion is based on the assumptions that

the warden believes that defendant is insane, that a jury would find him to be insane, and that the superintendent of the Mendocino State Hospital was in error—assumptions that this court cannot properly make. Moreover, it does not follow that a judicial determination of this question will prevent circuity. If this court were to hold that defendant has a right to a judicial determination of the question of his restoration to sanity under some procedure not specified in Penal Code sections 3700 to 3704, such a determination would be either that defendant is sane or insane. If the verdict is that he is insane, the defendant would have to be delivered to an institution and detained there until in a judicial proceeding he was found sane. If the verdict is that he is sane, the defendant would be delivered to the warden for execution, and the date for execution would have to be set again. During the interval between this adjudication and the date for execution, the defendant may again become insane. Unless the warden is to execute an insane person in violation of Penal Code section 1367, it would be the warden's duty, if he had good reason to believe that defendant was insane, to set in motion again the procedure for determining the defendant's sanity. The duty of preventing execution of an insane person is given by statute to the warden and to the Governor, and even if it were held that defendant has a right to a judicial determination of the question of his sanity, the determination that he is sane at the time finally set for his execution must be made by the warden.

The writ is discharged, and William Jerome Phyle is remanded to custody.

GIBSON, C. J., and SHENK, EDMONDS, and SPENCE, J.J., concur.

SCHAUER, Justice (dissenting).

I dissent.

I cannot agree that the privilege of the writ of habeas corpus may be denied to a person solely because he has been convicted of crime, sentenced to death, adjudged insane, and committed to a state hospital; nor can I agree that the powers vested in the warden of a state prison or in the medical superintendent of a state hospital for the insane transcend and abrogate the powers of the courts to entertain proceedings on habeas corpus. It is indisputable, I think, that the powers of the courts on habeas corpus proceedings are substantially abrogated in cases of this type by the holding of the majority opinion that the factual determination of an administrative agent is absolutely conclusive on the courts in such proceedings.

The real issue here is not what is stated in the majority opinion. It really is more simple and much more grave. On behalf of the prisoner it is alleged in material part "That on the 24th day of December, 1946, after a jury trial in the Superior Court * * * William Jerome Phyle [the prisoner] was adjudged insane, and said Superior Court committed said * * * Phyle to the State Hospital at Talmadge, to be held there as an insane person, and there kept in a state of confinement *until his reason be restored.* [Italics added.]

"That thereafter, said William Jerome Phyle remained in the Mendocino State Hospital at Talmadge, California, until January 18, 1947, at which time the Superintendent of the Mendocino State Hospital presented to the Governor his certificate that the said William Jerome Phyle had recovered his reason, *whereas said Phyle was, and still is, insane.* [Italics added.]

"That thereafter, the Governor of the State of California issued to the Warden [of the state prison] the Governor's warrant, appointing the 2nd day of May, 1947 for the execution by means of lethal gas of William Jerome Phyle. * * *

"That unless this Court restrains Clinton T. Duffy [the warden of the state prison] from carrying out the warrant of the Governor, that said * * * Phyle will be executed on Friday, the 2nd day of May, 1947."

According to the return to the writ, the prisoner had been sentenced to death; thereafter upon proper legal proceedings under Chapter 2, Title 3, Part 3 of the Penal Code, a jury found he was insane and the superior court on December 24, 1946, ordered that he be confined in a state hospital "until his reason be restored"; the superintendent of such hospital on January 18, 1947, certified to the governor that he was sane; the governor made his warrant of execution; and the warden holds the prisoner pursuant to such sentence and warrant.

The controlling facts shown by the petition and return are that the prisoner was duly adjudged insane and committed by judgment of the superior court to be confined in a state hospital "until his reason be restored"; that his reason has not in fact been restored (that he "was, and still is, insane") but that, notwithstanding the judgment and his continuing insanity he has been released from the state hospital and the custody of its superintendent and transferred to the state prison and custody of the warden and will be executed while insane unless this court intervenes. It is most important to note that the vital allegation that the prisoner "was, and still is, insane," is not challenged in the return and must be deemed admitted. The majority opinion necessarily holds that this fact, or at least the allegation of it, is wholly immaterial because the superintendent of the hospital has presumptively determined and has certified that the prisoner has recovered his reason; such determination and certification, the majority hold, are conclusive on the prisoner and on this court; hence habeas corpus will be denied. Obviously, the determination of the majority does not rest upon any inquiry or determination *by the court* as to the fact of sanity or insanity of the prisoner; it rests squarely on the holding that the administrative agent has sole and uncontrolled authority to determine and certify the fact of sanity or insanity and that such fact, when so certified, cannot be disputed by the prisoner or inquired into by the court. This, clearly, is abrogation of the rights and powers of habeas corpus in such a case.

Contrary to the implications of the majority opinion (the order reads, "The writ is discharged, and William Phyle is *remanded to custody*" (italics aded)), the petition does not seek *release* of the prisoner; as appears on its face and as is hereinafter shown in detail, it seeks only to have him transferred in custody from an unlawful to a lawful custodian; i. e., from the custody of the warden of the prison to the custody of the superintendent of the state hospital. As is also more particularly shown hereinafter, upon the unchallenged facts alleged the superintendent of the hospital is the sole lawful custodian of the prisoner.

The relief sought may be granted on petition for habeas corpus. Section 1493 of the Penal Code provides that "In cases where any party *is held under illegal restraint or custody, or any other person is entitled to the restraint or custody of such party,* the judge or court may order such party to be committed to the restraint or custody of such person as is by law entitled thereto." (Italics added.) Section 1487 of the same code provides that "If it appears on the return of the writ that the prisoner is in custody by virtue of process from any court of this state, or judge or officer thereof, such prisoner may be discharged [or remanded to proper custody as provided by section 1486] * * * 5. When the person having the custody of the prisoner is not the person allowed by law to detain him." As previously set forth, the petition alleges facts which indubitably entitle the prisoner to the relief sought if the facts be true. Such facts are that the prisoner has been convicted of crime and sentenced to death; that after such conviction he was duly adjudged insane and committed to the state hospital "to be there confined until his reason be restored"; that he "was, and still is, insane"; that notwithstanding the actual continuance of his insanity the superintendent of the hospital has certified that he is sane and he has been transferred from the custody of the hospital superintendent to the custody of the prison warden and that he will be executed by the prison warden unless this court restrains such action.

From what has been above related it appears that the basic issue here is, is the asserted determination of the medical superintendent that the prisoner is now sane conclusive on the court and on the prisoner in a habeas corpus proceeding wherein it is alleged that the prisoner is in fact insane? In other words, does certification of sanity by the state hospital superintendent preclude the prisoner from alleging and proving and the court from determining that, contrary to the certification, the prisoner is in truth insane? If the answer to these questions is yes, as the majority hold, then the right of habeas corpus is effectively abrogated as to persons in the status of the prisoner before us.

The holding of the majority opinion that the medical superintendent has exclusive and transcendent powers to determine questions of sanity of prisoners is squarely contrary to earlier holdings of this court. In Gardner v. Jones (1899), 126 Cal. 614, 59 P. 126, we find a case which in material legal principles is identical to that now before us. Dr. A. M. Gardner was then (1899) superintendent of the Napa State Hospital. He applied to this court "for a writ to prohibit defendant [judge of the superior court of Contra Costa county, and the superior court of Napa County] from entertaining jurisdiction in a certain habeas corpus case" whereby the Napa county superior court was assuming to determine the question of the restoration to sanity of one Buchanan, who had been committed to the state hospital as insane. This court said (pages 615, 616 of 126 Cal., pages 126, 127, 128 of 59 P.): "The question is an important one, inasmuch as it involves the right of an inmate of a state hospital, who happens at the time to be resting under a criminal charge and is committed pending trial for his crime, to have his alleged insanity made the subject of judicial inquiry by the writ of habeas corpus. It is claimed [exactly as here] that *'the medical superintendent is the only person or tribunal vested by law with authority to determine whether or not an insane patient of this class has recovered.'* * * *

"The provisions of the Penal Code regulating the commitment of persons charged with crime are found in sections 1367 to 1373. No question arises as to the regularity of Buchanan's commitment under these provisions. Section 1372 provides as follows: 'If the defendant is received into the asylum, he must be detained there until he becomes sane. When he becomes sane, the superintendent must give notice of that fact to the sheriff and district attorney of the county. The sheriff must thereupon, without delay, bring the defendant from the asylum and place him in proper custody until he is brought to trial or judgment, as the case may be, or is legally discharged.'

"Section 1473 of the Penal Code provides as follows: 'Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint.'

"Section 5, art. 1, of the constitution reads: 'The privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require its suspension.'

"We find in the statutes no authority for making two classes of insane,—one civil and the other criminal,— and by any such classification to take the latter out of the operation of the statute as to the right of habeas corpus. Section 13, art. 3, of the insanity law makes no such distinction. But plaintiff contends that section 14, Id., in terms confers authority upon the medical superintendent to determine when the patient of the criminal class is restored to sanity, and, as the authority is not conferred upon any other person or tribunal, it is necessarily exclusive, and also proves that the law recognizes the two mentioned classes of insane. We cannot believe that the legislature intended to enact a law so entirely out of harmony with the spirit and letter of the constitution and the statutes to which attention has been called. It is our duty to harmonize sections 13 and 14, art. 3, of the insanity law so as to conform to the constitution and to the statutes quoted, if we can, rather than resort to the more extreme necessity of holding section 14 to be unconstitutional, as defendant claims it to be, if given the construction placed upon it by plaintiff. We think it was intended by section 14 to provide means by which a patient of Buchanan's class, whose reason has become restored, could be at once remanded to the sheriff of the proper county for trial; but it was not intended that the arbitrary power should rest with the medical superintendent to deprive the patient of the right to be so returned, *nor was it intended that the medical superintendent should be the exclusive* *judge of the patient's restoration.* [Italics added.] * * *

"[126 Cal. at page 618, 59 P. at page 127] The question of Buchanan's recovery, in our opinion, is jurisdictional, and may be examined upon habeas corpus. * * *

"[126 Cal. at page 619, 59 P. at page 128] Section 1493 [Pen. Code] provides: 'In cases where any party is held under illegal restraint or custody, or any other person is entitled to the restraint or custody of such party, the judge or court may order such party to be committed to the restraint or custody of such person as is by law entitled thereto.' In his petition Buchanan does not ask to be restored to his freedom. He asks to be redelivered to the sheriff of Yuba county * * *. We can see no reason why the court or judge should not have the power by an order to direct that Buchanan be redelivered to the sheriff as prayed for * * *."

In accord with the reasoning above quoted the application of the medical superintendent for the writ of prohibition was denied and thereafter in the habeas corpus proceeding the superior court proceeded to determine the issue as to the defendant's restoration to sanity. *It determined that the defendant-petitioner was still insane and remanded him to the custody of Dr. Gardner.* Thereupon application for habeas corpus was made to this court. Chief Justice Beatty, authoring the opinion of the court, again referred to Dr. Gardner's claim of exclusive jurisdiction, as asserted in his application for prohibition, and declared (In re Buchanan (1900) 129 Cal. 330, 332–333, 61 P. 1120, 50 L.R.A. 378), "it was there [in Gardner v. Jones (1899), supra, 126 Cal. 614, 59 P. 126] contended that the insanity law of 1897 (St. 1897, p. 311) has made the superintendent of the asylum the sole and final judge, in a case of this kind, whether the prisoner has become sane, and that the courts no longer have the power to conduct the inquiry by habeas corpus or otherwise. It was held, against this contention, that *the question of unlawful restraint of the liberty of a citizen is, and must be as long as our present constitution endures, a judicial question, to be determined by the courts, and that the statute referred to would be unconstitutional if it required the construction contended for.* [Italics added.] * * * In consequence of this decision the superior judge proceeded with the hearing upon return to the writ of habeas corpus issued by him, and, having concluded upon the evidence that Buchanan was still insane, made an order remanding him to the custody of Dr. Gardner. Thereupon the present proceeding was commenced in this court, and upon the same evidence submitted to the superior judge, and some additional testimony, *we must now decide the question of fact whether Buchanan has become sane.* [Italics added.]

"The question, however, is not whether he has become sane in every sense of the word, but whether he has become sane in the sense of the statute, which requires a suspension of the proceedings in a criminal cause whenever it is found that the defendant is presently insane. In other words, if there is a difference between the medical view of insanity and the view upon which the statute is founded, the question of sanity or insanity is to be determined with reference to the latter, as contradistinguished from the former, view. That there is such a difference is notorious * * * ." In the light of that difference the writ was sustained and Buchanan was ordered "returned to the custody of the sheriff of Yuba county." (Here we have no way of knowing what standard of sanity or insanity the present superintendent of the state hospital applied in certifying that the prisoner is sane.)

Several vices in the majority opinion become apparent from what has been quoted from Gardner v. Jones (1899), supra, 126 Cal. 614, 59 P. 126, and from In re Buchanan (1900), supra, 129 Cal. 330, 61 P. 1120, 50 L.R.A. 378. In the first place the majority opinion unconstitutionally denies the protection of habeas corpus, at least as exemplified by a court trial of the issue of fact (if there be one under the pleadings in view of the failure to deny that the prisoner is presently insane) to this petitioner. Our state Constitution (art. I, § 5) declares that "The privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require its suspension." Section 9, clause 2 of article I of the United States Constitution makes the same provision. There is in this case no suggestion that there is extant any status of rebellion or invasion whereby to justify suspension of the writ in the public safety. But the majority opinion, in all practical effect, suspends it —even abrogates it altogether—insofar as concerns persons who have been convicted of crime, sentenced to death, and thereafter adjudged insane. If the prisoner's insanity in fact continues, as is specifically alleged and not denied, the law and the judgment of the superior court require that he be continued in the state hospital until his sanity is restored. As shown hereinabove habeas corpus is a proper remedy. If we refuse him the relief sought, solely on the ground that the medical superintendent's certificate of restoration is conclusive of the fact of sanity, we are necessarily abrogating our power in the premises—our power to determine the fact of insanity. And, furthermore, we are abrogating the right of the prisoner to even challenge, on habeas corpus, one of the facts upon which the legality of his custody and impending execution depend. That is certainly an abrogation of the right of habeas corpus. No authority is cited for holding that a person in the status of this prisoner may be deprived of the rights of habeas corpus.

It is important also to note that section 1367 of the Penal Code provides that "A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane." If this section means anything at all it should mean that it establishes a right which a convicted person, sane or insane, or one who speaks for him, may enforce in the courts. If the courts cannot enforce it, it is a poor right. If the right of habeas corpus is to be denied to such a person it should be by clear constitutional provision, not by court legislation.

It should be observed also that the state may eventually find that the majority holding here is unfortunate. If the statutes in question, as held by the majority, vest absolute, conclusive, and exclusive power in the superintendent of the state hospital "for the determination of the question of the sanity of a person who has been sentenced to death," and if it be true, as is also held by the majority, that "a court has no inherent power to determine that question," then, of course, the determination of the superintendent is equally final regardless of whether he determine that the prisoner is sane or insane. In some future case such a superintendent may rule that a prisoner remains insane although other state officers have reason to believe that such prisoner has recovered his sanity. Under the majority holding the fact of recovered sanity would be wholly immaterial; an allegation to that effect, although not denied, would be totally disregarded. Neither the prisoner himself nor the prosecuting officers of the state would be heard to contend that in truth the prisoner had recovered his reason. Only the certificate of the superintendent, based on any standard of sanity (medical or legal) which he might elect to use, could determine that fact; his discretion in any event would be wholly uncontrolled and if he refused to give the certificate the courts of this state would be powerless to intervene.

The majority opinion devotes much space to a discussion of the duties and powers of the hospital superintendent and to those of the prison warden and suggests that the warden, if so disposed, can again initiate proceedings for another jury trial on the issue of the prisoner's present sanity status. But such speculation is scarcely germane to the issue before us. The duties of the warden are one thing; our duties on habeas corpus are quite another. The petition alleges that "unless this Court restrains Clinton T. Duffy [the prison warden] from carrying out the warrant of the Governor, that said * * * [prisoner] will be executed on Friday, the 2nd day of May, 1947." The fact that the writ prayed for originally issued and that in consequence the date of execution has been postponed until this cause is finally decided, does not mean that the jeopardy of the prisoner is lessened. The allegation, coupled with the other averments above quoted, still unmistakably means that the prisoner, although presently insane, will be executed under the warrant which has been issued unless we rule otherwise. Whether that allegation be true, the majority hold, we will not inquire because we have no power in any event to prevent the execution. I cannot subscribe to such a doctrine.

Failure to espouse such doctrine does not mean that any statute in question is made meaningless. The provisions of Penal Code section 3704 that "When the defendant recovers his reason, the superintendent of such [state] hospital must certify that fact to the Governor" and that the defendant may then be returned to prison and executed, like the provisions of section 1372, hereinabove cited and discussed in the quotation from the Gardner case, may be given effect and applied in all proper cases. Under the language of that section (§ 3704) it may well be that a superintendent of a state hospital has implied authority to make a prima facie determination that a prisoner has recovered (or not recovered) his sanity and to certify him back to the warden of the state prison for execution. But this does not mean that the prisoner must be denied habeas corpus, or an examination and determination *by the court* upon habeas corpus, of the fact, if it be alleged, that the prisoner is in fact insane (or sane) although the superintendent may have determined and certified that he is sane (or insane).

The history of habeas corpus, the great care with which the rights of all persons to invoke that remedy have been guarded by provisions of our national and state constitutions and the jealous solicitude with which the courts have heretofore protected those rights, all combine to forbid the holding which the prosecuting officers of this state now espouse and which the majority make.

The state, if it requests such relief, should be given opportunity to challenge the now admitted averment that the prisoner "still is" insane; that issue should then be tried out before a referee; and our order should depend on our determination of the fact, not on subservience to an asserted "conclusive" determination of an administrative agent. Thus may the right of habeas corpus be preserved, the court maintain its jurisdiction, and justice still run its full course.

CARTER, J., concurs.

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**In re REED'S ESTATE.**

**PARKER v. FEDERATION OF STATE SOCIETIES.**

**Civ. 15980.**

District Court of Appeal, Second District, Division 2, California.

Nov. 19, 1947.

Rehearing Denied Dec. 8, 1947.

Hearing Denied Jan. 15, 1948.

**1. Wills 🔑573(2)**

Where income of real or personal property or both is given without other disposition of property, an outright gift of property from which income is to be derived is thereby made.

**2. Charities 🔑31**

Provisions of will that testator set aside $5,000 to establish a foundation under auspices of a named federation to carry on work of testator and his wife through writings, that a reasonable sum for development of foundation should be paid out of $5,000 and that net profits from the writings should go to federation did not constitute an absolute gift of the $5,000 to the federation.

**3. Charities 🔑18, 22(1)**

A provision of will stating that testator set aside $5,000 to establish a foundation to carry on work of testator and his wife through writings could not be upheld as a trust, since no trustee was designated and objects of trust were not sufficiently explicit.

**4. Wills 🔑671, 866**

Where intention to create trust is sufficiently expressed, but objects or subjects of it are uncertain, the gift fails and heir or next of kin is let in to beneficial ownership.

5. **Charities** ⚷4
**Wills** ⚷858(1)

Under will providing that testator set aside $5,000 to establish a foundation to carry on work of testator and his wife through writings, but failing to give the $5,000 to any one, the gift failed and that sum became a part of residuary estate.

◆

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Proceeding in the matter of the estate of McClellan Reed, deceased, wherein J. M. Parker petitioned for partial distribution and the Federation of State Societies claimed an alleged bequest under the will. From an order decreeing partial distribution, the claimant appeals.

Order affirmed.

Edwin J. Miller, Vernon Day and Lin Price, all of Los Angeles, for appellant.

Merriam, Rinehart & Merriam, Rinehart, Merriam, Parker & Berg, and Jay D. Rinehart, all of Pasadena, for respondent.

McCOMB, Justice.

This is an appeal by the Federation of State Societies, a corporation, from an order of the probate court decreeing partial distribution of the estate of McClellan Reed, deceased.

The essential facts are these:

Mr. Reed died leaving a will dated April 13, 1944, which contained the following provision:

"Fourth: I hereby set aside $5,000.00 to establish a McClellan Reed and Edna E. Reed foundation under the auspices of the Federation of State Societies of California. The purpose of this foundation is to carry on the work of McClellan Reed and his deceased wife, Edna E. Reed, through the writings, books, and manuscripts of all kinds and description whatsoever; a reasonable sum for expenses to be allowed for the promotion and development of this Foundation to be paid out of the $5,000.00; and all net profits from said writings, books and publications, to go to the Federation of State Societies, to be used by them in any manner they see fit."

At the time of hearing of the petition for partial distribution appellant contended that it was entitled in addition to certain other assets of the estate to the $5,000 referred to in paragraph Fourth of the will, supra.

Predicated upon the will the court distributed to appellant all writings, phamplets and manuscripts prepared by decedent and his wife, but held that appellant was not entitled to any of the $5,000 mentioned in the fourth paragraph of the will and that the same became a part of the residuary estate of decedent.

This is the sole question necessary for us to determine:

*Did decedent make an absolute gift and bequest of the $5,000 mentioned in paragraph Fourth of his will to appellant (Federation of State Societies)?*

[1, 2] This question must be answered in the negative. Appellant concedes that a trust of the $5,000 here in question was not created by the will but contends that where the income of real or personal property or both is given without other disposition of the property this amounts to an outright gift of the property from which the income is to be derived. This is a correct statement of the law in California. (Estate of Franck, 190 Cal. 28, 32, 210 P. 417.) However, in the instant case decedent did not give the income from the $5,000 mentioned in the fourth paragraph of his will to appellant. All that he gave to appellant was the net proceeds from his writings, books and publications and in conformity with the rule of law just stated; the court in its decree awarded to appellant the writings, books and publications of decedent and his wife.

[3-5] So far as the $5,000 was concerned decedent failed to make any disposition thereof. Though it is clear that he intended to create a trust, such attempt was abortive for the reasons (1) no trustee was designated, and (2) the objects of the trust were not sufficiently explicit and expressed with sufficient certainty to create it. Therefore the rule controlling the present case is that stated in the case of Estate

of Ralston, 1 Cal.2d 724, where the court says at page 727, 37 P.2d 76, 78, 96 A.L.R. 953, that "where the intention to create a trust is sufficiently expressed, and yet the objects or the subjects of it are uncertain, the gift fails, and the heir or next of kin is let in to the beneficial ownership." Since in the present case the testator intended to create a trust which failed for uncertainty, the court properly held that the gift failed and that such sum became a part of the residuary estate of decedent.

Harrison v. Brophy, 59 Kan. 1, 51 P. 883, 40 L.R.A. 721, 722, Clark v. Campbell, 82 N.H. 281, 133 A. 166, 45 A.L.R. 1433, and Estate of Hamilton, 181 Cal. 758, 186 P. 587, relied on by appellant, are distinguishable from the present case for the reason that in each of the cases cited a gift of the property was made to certain specific persons. However, in the instant case the will does not give the $5,000 in question to anyone. Therefore such cases are not helpful in deciding the present matter.

The order is affirmed.

MOORE, P. J., and WILSON, J., concur.

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82 Cal.App.2d 450

## DICK e al. v. LA MADRID et al.

Civ. 3584.

District Court of Appeal, Fourth District, California.

Nov. 19, 1947.

Rehearing Denied Dec. 12, 1947.

Hearing Denied Jan. 15, 1948.

**1. Venue 🔑52(1)**

On motion for change of venue for convenience of witnesses, convenience of witnesses in attending the trial rather than the place of their actual residence, is the controlling element. Code Civ.Proc. § 397.

**2. Venue 🔑52(1)**

Statute authorizing trial court on motion, to change place of trial when convenience of witnesses will be promoted by change, vests considerable discretion in the trial court. Code Civ.Proc. § 397.

**3. Venue 🔑68**

On motion for change of venue for convenience of witnesses, burden of proof rests on the moving party. Code Civ.Proc. § 397.

**4. Venue 🔑68**

Though inferences may be drawn from facts presented on motion for change of venue for convenience of witnesses, there must be some evidentiary showing in order to justify the drawing of such inferences. Code Civ.Proc. § 397.

**5. Venue 🔑67**

Denial of plaintiffs' motion for change of venue from Kern County to Los Angeles County where automobile accident occurred, on ground of convenience of witnesses, was not an abuse of discretion, where affidavit was silent with respect to convenience of witnesses in attending trial in Kern County and with respect to their residence except that it was alleged that two of witnesses were still police officers in Los Angeles. Code Civ.Proc. § 397.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Leslie L. Dick and Marie L. Dick against R. J. La Madrid and Donald Thiefes to recover for damages arising from an automobile collision. From an order denying a motion for change of venue, the plaintiffs appeal.

Order affirmed.

Joslyn & Hollopeter, of Pasadena, and Jacob Chaitkin, of Los Angeles, for appellants.

Thomas P. Menzies and Harold L. Watt, both of Los Angeles, and West & Vizzard, of Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is an appeal from an order denying a motion for a change of venue, in an action for damages arising from an automobile collision which occurred in the city of Los Angeles on September 21, 1945. The action, originally filed in Los Angeles

County, was on motion of the defendants transferred to Kern County. Demurrers were there overruled and answers filed by the defendants.

On October 1, 1946, the plaintiffs filed notice of a motion to transfer the action to Los Angeles County for trial, on the ground that the convenience of witnesses and the ends of justice would thereby be promoted.

An affidavit in support of this motion was filed by the plaintiff husband. This affidavit states that affiant and his wife live in the city of Los Angeles, and that five persons are material and necessary witnesses for them. That one of them will testify that he was operating a Los Angeles streetcar at the time of the accident and saw the defendants drive through a boulevard stop without slackening their speed. That two other witnesses will testify that they are police officers in the city of Los Angeles; that they found certain skid marks at the scene of the accident; and that one of the defendants admitted to them that he did not see the boulevard stop sign and did not stop. That another witness will testify that she is a nurse; that she attended Mrs. Dick at the latter's home in Los Angeles for four months commencing on October 3, 1945; and that during this time Mrs. Dick was incapacitated and required certain services. That another witness will testify that he is a physician and surgeon, admitted to practice his profession "in the State of California"; that he treated Mrs. Dick for injuries sustained by her on September 21, 1945, and still attends her for such injuries; that she was confined to a hospital in Los Angeles from September 21, 1945 to October 3, 1945, and "thereafter has been treated at her home"; and that she sustained certain injuries.

Each of the defendants filed an affidavit stating that he was, and has been, a resident of Kern County; that the motion for change of venue from Los Angeles County was granted on the ground that Kern County was the proper county for the trial of the action; that he is willing to consent to taking the depositions of any witnesses who may reside in Los Angeles County; and that a trial in Kern County will be less expensive to the parties and consume less trial time.

The matter was submitted to the court on these affidavits, the motion for change of venue was denied, and the plaintiffs have appealed from that order. The sole question presented is whether the trial court abused its discretion in denying this motion.

[1] While the convenience of the witnesses in attending the trial is the controlling element in connection with such a motion, rather than the place of their actual residence (Willingham v. Pecora, 44 Cal. App.2d 289, 112 P.2d 328), the affidavit here is entirely silent with respect to both of these matters. The affidavit alleges neither the place of residence of any of these witnesses, nor any facts indicating anything material to their present convenience in attending a trial, wherever it might be held. Although it was filed more than a year after the accident occurred nothing is alleged, with respect to three of the five witnesses, concerning their present whereabouts or usual activities. As to the streetcar operator, nothing is said as to where he is now located, what he is doing or why Kern County is not the most convenient place for him to attend a trial. The same is true as to the nurse, nothing appearing as to where she is or what she has been doing since about February 1, 1946. With respect to the doctor, it is not even alleged that he customarily practices in Los Angeles, and nothing is said concerning any facts which would make it inconvenient for him to attend a trial in Kern County. Everything in the affidavit could be true if these three witnesses all resided in Bakersfield and were presently active in that community.

The only thing in the affidavit justifying any possible inference as to the present whereabouts of any of these witnesses appears in connection with the two police officers, it being alleged that they were, and still are, police officers in the city of Los Angeles. No facts are given, however, which have any bearing on their availability in Kern County for the trial of this action, and none with respect to how little or how much they would be inconvenienced by so appearing. It is possible, however improbable it may be, that they would welcome an opportunity to leave Los Angeles for a short time.

[2–5] Considerable discretion is vested in the trial court by section 397, Code Civ. Proc. When such a motion is made, the burden of proof necessarily rests upon the moving party. While inferences may be drawn from facts presented, there must be some evidentiary showing in order to justify the drawing of such inferences. On the issue which was material, no showing of essential facts was here made. It cannot be held that the evidence here was sufficient to require a ruling favorable to the appellants, or that the court abused its discretion in refusing to order this transfer on the meager and unsatisfactory showing made.

The order is affirmed.

MARKS and GRIFFIN, JJ., concur.

Hearing denied; CARTER, J., dissenting.

82 Cal.App.2d 355

## NEGLEY v. NEGLEY.

Civ. 3591.

District Court of Appeal, Fourth District, California.

Nov. 12, 1947.

**1. Divorce** 🔑27(3)

Where divorce is sought on ground of extreme cruelty consisting of previous mental suffering with no claim of bodily injury, grievous mental suffering is the ultimate fact which alone will entitle plaintiff to a divorce and unless such mental suffering is established as a result of the acts of defendant, a judgment granting a divorce cannot be sustained. Civ.Code, § 94.

**2. Divorce** 🔑109

Where acts complained of as constituting extreme cruelty as ground for divorce are such as to inevitably cause grievous mental suffering, trial judge may draw the inference of such suffering from such acts. Civ.Code, § 94.

**3. Divorce** 🔑109

Wife's habitual nagging, insistence on daily church attendance and refusal to go out with husband were not of such a nature as to compel inference of grievous mental suffering of husband as a result thereof and hence did not justify granting husband a divorce in absence of proof showing such mental suffering. Civ.Code, § 94.

**4. Divorce** 🔑298(6)

Awarding to father custody of 16 year old daughter, who was self-supporting and lived at Y.W.C.A. because she could not get along with mother, and 11 year old son who wished to remain in father's custody was not abuse of discretion.

**5. Divorce** 🔑186

Where entire judgment granting husband a divorce and awarding custody of minor children to him was before appellate court for review and judgment of divorce must be reversed for lack of evidentiary support, though award of custody of minor children was not abuse of discretion, judgment would be reversed as a whole, so that best interests of children might be considered and protected under circumstances appearing at second trial.

◆

Appeal from Superior Court, Fresno County; Arthur C. Shepard, Judge.

Action for divorce by Frank Richard Negley against Zina Eliza Negley, wherein defendant filed a cross-complaint for divorce. From an interlocutory judgment granting plaintiff a divorce and custody of the minor children and dividing the community property, defendant appeals.

Judgment reversed.

Claude L. Rowe, of Fresno, for appellant.

No appearance for respondent.

MARKS, Justice.

This is an appeal from an interlocutory judgment of divorce in favor of plaintiff which divided the community property and awarded the custody of the two minor children to plaintiff.

Plaintiff has filed no brief here. He has filed an affidavit stating that he is without funds to employ an attorney, as well as to have a brief printed. He consented to the submission of the case but challenged generally the statement of facts in defendant's brief.

Plaintiff filed his complaint alleging cruelty that had caused him grievous mental suffering. Defendant's cross-complaint contained like allegations in asking for a divorce and custody of the children.

Defendant urges that there was no sufficient evidence of cruelty and none of grievous mental suffering to support the judgment in favor of plaintiff and that it was a breach of discretion to award plaintiff the custody of Betty May Negley, a daughter sixteen years old, and Donald Richard Negley, a son eleven years old.

The divorce action was tried very briefly on February 20, 1947, with the result already indicated, except that the custody of the daughter was then given to defendant. Findings of facts were waived.

On March 13, 1947, and before entry of the interlocutory decree, defendant, with another attorney, moved to reopen the case to take further evidence on the question of the custody of the children. The trial court granted the motion with the order that "The matter then will be reopened upon stipulation of counsel on the issue of custody of the children only."

The evidence on the question of the cruel treatment of plaintiff by defendant is very brief. Plaintiff testified in his own behalf on this question as follows: "Q. Now you allege in your complaint that during the time you were living with your wife that her conduct toward you caused you to suffer mentally and physically. Will you tell the court what the trouble was? A. In the first place, just church all the time, continually. It was coming to—just before I left it was every night. And she would insist on the children going just as regularly as she did, and myself, too. She wouldn't go anywhere with me; wouldn't go to a show, anyplace I asked her to go. And I couldn't smoke in my own house; couldn't have an ashtray in my own house. The neighbors there brought one so I would have one in the house. And just picking at me and nagging at me all the time. No matter who I worked with, who I went with, whatever it was, whatever. It was just on my mind all the time; just continually crabbing about one thing and another. If I would come home maybe she would be crying, and come to find out she had had an argument with the neighbors about religion. And that was the way it was. Not just for a short time. It has been over a period of our married life."

Plaintiff's mother was called as a corroborating witness. She testified as follows: "A. I don't like it. My daughter and I have never had words. But we have talked over many times her not going with my son where he wants to go. It wouldn't make any difference. Once in a while she would go, but it was always too dirty or something like that, and the children of the family, she picked on them. Particularly Betty May, when she comes home. And that is the reason that all led up to this. And now lately Mrs. Negley is gone very much on religion. It has made her extremely nervous, extremely so, because it is a church where they get up and cry and just go on, like Holy Rollers, and on that order. Still it was all right. I enjoyed it until they got like that. And we have talked over many times, and I told her I wouldn't go any more. She is morally a good woman."

This is all of the evidence offered by plaintiff on the question of his right to a divorce. The corroboration is extremely meager, to say the least.

Defendant testified that plaintiff became infatuated with another woman and contracted a social disease; that this made her unhappy and nervous.

The daughter was called to corroborate her mother. She testified as follows:

"Q. Was there unhappiness in this home before the separation? A. Yes.

"Q. And just generally did your mother appear to be upset and nervous? A. Yes.

"Q. And did these controversies with your father about various things—have you ever seen your mother crying and indicating a nervous breakdown? A. Yes.

"Q. And who do you blame for those problems? A. Well, it is sort of both of them."

This is all of the evidence in the record of the trial of the divorce action bearing on the question of cruelty. It is true that on the second hearing neighbors testified that plaintiff told them that he had a social disease, but under the stipulation of counsel and the court order we assume that this was admitted on the question of the fitness of plaintiff to have the custody of his children. At least the trial judge announced several times that all testimony then taken was limited to the question of custody.

As applicable here, extreme cruelty as a ground for divorce "is the wrongful infliction of * * * grievous mental suffering upon the other by one party to the marriage." Civ.Code sec. 94.

[1] It is well established that where the wrong complained of by the injured spouse is grievous mental suffering with no claim of bodily injury, the grievous mental suffering is the ultimate fact which alone will entitle a party to a divorce and unless such mental suffering is established as a result of the acts of the other party, a judgment awarding a divorce cannot be sustained. Ritter v. Ritter, 103 Cal.App. 583, 284 P. 950. As said in Hunsberger v. Hunsberger, 99 Cal.App. 130, 277 P. 1092, 1093: "* * * it is patent that the trial court was exercising a sound discretion in refusing to base a decree of divorce on any one or all of the acts alleged. There is not a particle of evidence in the record to show that the defendant inflicted any bodily injury on the plaintiff nor that any one or all of her acts produced any grievous mental suffering on the part of the plaintiff. For all of these reasons the trial court did not err in holding that the plaintiff had not proved a cause of action as for extreme cruelty. Barnes v. Barnes, 95 Cal. 171, 176, 30 P. 298, 16 L.R.A. 660." See, also, Truax v. Truax, 62 Cal.App.2d 441, 145 P.2d 88; Nason v. Nason, 48 Cal.App.2d 500, 120 P.2d 37.

[2] It is also the rule that where the acts complained of "were such as to inevitably cause grievous mental suffering" a trial judge is justified in drawing the inference of such suffering from those acts. Bush v. Bush, 72 Cal.App.2d 487, 164 P.2d 774, 776; Maloof v. Maloof, 175 Cal. 571, 166 P. 330.

[3] In the instant case, there being no claim of bodily injury, the conduct complained of by plaintiff was not of such a nature as to compel the inference of grievous mental suffering, so there should have been proof showing such grievous mental suffering to support the decree, and there is none in the record.

[4] We have carefully read all of the record and conclude that there was no breach of discretion in awarding custody of the two children to plaintiff. The daughter was over sixteen years of age and was self-supporting. She could not get along with her mother. At the time of the last hearing she was living at the Y.W.C.A. Several witnesses testified that it was a good place for her to live and provided proper care for and supervision over her. She desired to continue living there and her father proposed to let her do so under his guidance and direction. Donald was provided a reasonably good home with his father and wished to remain in his custody.

[5] As the judgment of divorce must be reversed, and as the whole judgment is before us for review, we believe it should be reversed as a whole so that the best interests of the children may be considered and protected under the circumstances appearing at the second trial.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

82 Cal.App.2d 359

## Ex parte BAUMAN.

Cr. 2507.

District Court of Appeal, First District,
Division 1, California.

Nov. 12, 1947.

**1. Habeas corpus** ⚷25(2)

Habeas corpus is the proper means of determining rights of custody to minor children.

**2. Divorce** ⚷332

An order of Oklahoma court which had jurisdiction of parties to divorce suit and subject matter, in husband's proceeding for modification of the order relating to custody of child, was entitled to full faith and credit in California and was res judicata of rights of parties as of that date, and only ground on which divorced wife could prevail against it was by showing subsequent changed conditions warranting modification of the order.

**3. Divorce** ⚷332

Order of Oklahoma court modifying its prior order relating to custody of child of parties to divorce suit by granting husband exclusive custody of child on ground that mother was not fit person to have such custody, and providing that before child could be taken from Oklahoma by mother she must post a $250 bond, could not be collaterally attacked in California by allegation that on date of modification order judge told wife that she could take child to California and that she had no notice of order to post bond.

**4. Divorce** ⚷332

Where custody order of Oklahoma court rendered in divorce suit was modified to give husband exclusive custody of daughter on ground that wife was unfit person to have custody, and wife, without complying with requirement of such order that, before she could take child from jurisdiction she must post $250 bond, removed child to California, husband, in habeas corpus proceeding in California, was entitled to obtain custody of child, in absence of proof of changed circumstances after modifications order.

**5. Divorce** ⚷332

The "changed circumstances" required by rule that decree of court of sister state awarding custody of child of divorced parties is entitled to full faith and credit in California, in absence of changed circumstances, is not shown by fact that mother, who was deprived of custody by modification order, in violation of the order, removed child to California.

See Words and Phrases, Permanent Edition, for all other definitions of "Changed Circumstances".

**6. Divorce** ⚷332

Where divorced wife was ordered in California habeas corpus proceeding to return custody of minor daughter to husband as required by Oklahoma decree modifying custody order, wife could attempt to secure a modification of Oklahoma decree by showing changed conditions or by proceeding by guardianship proceedings in California after restoring custody of child to husband. Probate Code, §§ 1440-1442.

◆

Proceeding in the matter of the application of Albert C. Bauman for writ of habeas corpus on behalf of Arletta Jane Bauman, a minor, to secure the custody of his daughter, opposed by petitioner's divorced wife, now remarried, Pauline Bauman Whitford.

Decision in favor of petitioner in accordance with opinion.

Felton L. Watson, of Oakland, for petitioner.

Hoey & Hoey, of Martinez, for respondent.

PETERS, Presiding Justice.

[1] Petitioner by this proceeding in habeas corpus seeks to secure the custody of his daughter, aged eight, the child now being in the custody of his divorced wife, who has remarried, and is now residing in Contra Costa County. It is quite clear, and no contention is made to the contrary, that habeas corpus is a proper means of determining rights of custody to minor children. See cases collected 13 Cal.Jur p. 251, § 29.

From the petition, the return, and the documents filed by stipulation, the following facts appear: Albert and Pauline Bauman were finally divorced in Oklahoma in 1944. By that judgment it was provided that each parent should have alternate fixed periods of custody of the child. In May, 1947, the father petitioned the Oklahoma court to modify the divorce decree by granting him exclusive custody of the child on the ground that the mother was not a fit and proper person to have such custody. This petition came before the Oklahoma court for hearing on June 19, 1947. The order signed by the judge on that date recites that both the mother and father were then present in court, and were represented by counsel; that the court continued the hearing to a stated date in September; that the father called attention to the fact that the mother was then living in California and was about to leave the jurisdiction with the child, and demanded that she be put under bond to appear with the child in September. The court thereupon ordered that before the child could be taken from the jurisdiction the mother must post a $250 bond. The petition for a writ of habeas corpus recites, and this allegation is not denied, that the mother thereupon left Oklahoma with the child and came to California, without posting the required bond.

The next order of the Oklahoma court is dated September 11, 1947, to which date the modification proceeding had been continued. That order recites that the mother was in court on June 19, 1947, to contest the father's petition for modification of the custody order; that the court on that date made its order requiring the mother to post a bond providing for the return of the child for this hearing; that the mother, in disregard of the orders of the court, left Oklahoma and brought the child to California without posting the required bond; that the mother is not a fit and proper person to have custody of the child. The order grants the father, petitioner herein, "full and complete custody of [the] minor child * * * and [he] is authorized to legally proceed to take custody of said child wherever he may find her."

[2] Before discussing certain allegations of the return, the general law applicable to this type of situation should be stated. It is quite apparent that the Oklahoma court had jurisdiction of the parties and subject matter in the modification proceeding. That being so, the order of the Oklahoma court, as of the date it speaks —September 11, 1947—is entitled to full faith and credit, and is res judicata of the rights of the parties as of that date. This court cannot go behind the Oklahoma decree. That decree is just as binding on this court as if it had been rendered by a court in this state. The only ground upon which the mother can prevail is upon a showing that since the date of the Oklahoma order there have been changed circumstances warranting a modification of the custody order. These principles have recently been discussed at length in the case of In re Kyle, 77 Cal.App.2d 634, 176 P.2d 96. There, as here, the father had a decree of a sister state granting him custody of the children. The father allowed one of the children to visit her mother in California. The mother refused to return the child to the father and a petition for habeas corpus was filed by the father. The court quoted the applicable rules as follows, 77 Cal.App.2d at page 636, 176 P.2d at page 98:

"The rule which is binding upon us is stated in the later case of Foster v. Foster, 8 Cal.2d 719, at pages 727, 728, 68 P.2d 719, at page 722:

" 'This same rule that former decrees of custody may be modified only upon a showing of change of circumstances arising subsequent to the entry of the former decree applies with equal force to the question of the finality of the decree of custody of a sister state made and entered in a divorce proceeding. It has been so held in the cases of In re Wenman, 33 Cal.App. 592, 165 P. 1024; In re Marshall, 100 Cal.App. 284, 279 P. 834; In re Livingston, 108 Cal. App. 716, 292 P. 285, 286; Titcomb v. Superior Court, 220 Cal. 34, 29 P.2d 206. The case of In re Livingston, supra, quotes with approval from In re Marshall, supra, and says: "The quotation just set forth * * * indicates the rule generally prevailing that a decree of a court of one state, having jurisdiction, relating to the custody of minor children is under the doctrine of comity prevailing among sister states and subject of course to the right of the parties to show a change in the circumstances or conditions, entitled to recognition in another state." This same case also quotes with approval from a case note appearing in 20 A.L.R. at page 815, where the authorities on the subject are collected, as follows: "With some variation of statement, and an occasional intimation to the contrary, it is established by the great weight of authority that in the absence of fraud or want of jurisdiction, affecting its validity, a decree of divorce awarding the custody of a child of the marriage must be given full force and effect in other states as to the right to the custody of the child at the time and under the circumstances of its rendition; but that such a decree has no controlling effect in another state as to facts and conditions arising subsequently to the date of the decree; and the courts of the latter state may, in proper proceedings, award the custody otherwise upon proof of matters subsequent to the decree which justify the change in the interest of the child." * * *

"'The trial court in the instant case, by an express finding, indicated that it felt itself bound by the doctrine of comity to give recognition to the decree of the South Dakota court and that, in the absence of a change of circumstances and conditions affecting the welfare of the child, the decree of the South Dakota court was entitled to full faith and credit in this state. Having determined, after hearing all the evidence adduced by both parties, that there had been no change of conditions affecting the welfare of the child, the trial court in the instant case refused to modify the decree of custody of the South Dakota court, and refused to grant to appellant the sole and exclusive custody of the minor child in contravention of the decree of the South Dakota court. It is evident that in so doing the trial court was supported by ample authority.'

"Under this rule we are bound to enforce the Nevada decree for custody in the absence of some affirmative showing justifying its modification."

[3] There is no direct allegation in the return that any changed circumstances have occurred since September 11, 1947. It was admitted on the oral argument that in June and September, 1947, the mother was then married to her present husband and was living in California, so there has been no changed circumstance in this respect. The attorney for the mother then admitted that he had no evidence that the condition of the father had in any way changed since the date of the Oklahoma order. He did contend that even if the mother was an unfit person to have custody in September, 1947, that now in November, 1947, two months later, she is a fit and proper person. The return seeks to collaterally attack the orders of the Oklahoma court of June 19 and September 11, 1947. It is averred that the mother was in court on June 19th and that the judge in chambers told her that she could take the child to California, and that she had no notice of the order to post a bond. These allegations are directly contradicted by the recitations in the order. The order may not be attacked in this fashion.

[4-6] It is quite apparent in this habeas corpus proceeding that, under the rules heretofore announced, there being no proof or allegation of any changed circumstances since September 11, 1947, the custody of the child must be returned to the father. Certainly, the "changed circumstances" required by the rule cannot be that the mother has improperly and in violation of a court order removed the child to another state. As was pointed out in the Kyle case, the mother is not without remedy. She may attempt to secure a modification of the Oklahoma decree, or may proceed by guardianship proceedings here. But the unlawful condition that she has created must be rectified before she is entitled to any relief.

It appears from the petition for a writ of habeas corpus that the mother has instituted guardianship proceedings in Contra Costa County. These proceedings were stayed by this court to await the determination of this habeas corpus proceeding. That stay order is terminated. The mother, after first complying with the order of this court to restore the custody of the child to the father, if she has any evidence of changed circumstances, may proceed to offer such evidence to that court. That court has full powers to make its own orders for temporary custody and may fully investigate the question of changed circumstances, if any. §§ 1440–1442, Probate Code.

The stay order in No. 14,405 now pending in the Superior Court of Contra Costa County is terminated and Pauline Bauman Whitford is ordered and directed to deliver custody of the minor Arletta Jane Bauman to Albert C. Bauman, the petitioner.

WARD and BRAY, J.J., concur.

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82 Cal.App.2d 400

## MURRAY et al. v. FULLER et ux.

Civ. 15823.

District Court of Appeal, Second District,
Division 3, California.

Nov. 14, 1947.

Hearing Denied Jan. 12, 1948.

**1. Adverse possession 🔑115(1)**

The sufficiency of adverse possession or use to create a prescriptive title depends upon particular facts of the case.

**2. Easements 🔑36(3)**

In suit for declaration of a right of way easement and for removal of an obstruction, evidence was sufficient to show that, over a 23-year period, driveway in question was used uninterruptedly and continuously by plaintiffs, their predecessors in interest and their several tenants, whenever there was an occasion to reach plaintiffs' property by motor vehicle.

**3. Easements 🔑36(3)**

In suit for declaration of right of way easement and for removal of an obstruction, evidence of uninterrupted use of driveway over a 23-year period sustained finding that use of driveway was adverse and under claim of right, in absence of any evidence that permission was ever asked or given.

**4. Easements 🔑8(1)**

The use of driveway over adjoining property by owners and their predecessors and their tenants without express permission amounted to trespass and afforded grounds for redress in favor of the predecessors of adjoining owners and hence was sufficient to initiate prescriptive title.

**5. Easements 🔑6**

A tenant cannot originate adverse user in his landlord's favor when his lease does not expressly or impliedly include the easement, but user by the tenant does inure to landlord's benefit if it is under a lease which expressly or impliedly includes the easement.

**6. Easements 🔑36(3)**

In action for declaration of right of way easement and for removal of an obstruction, evidence was sufficient to show an implied agreement with plaintiffs' several tenants that they might use driveway over adjoining property of defendants, and hence use by tenants inured to benefit of plaintiffs.

**7. Easements 🔑36(3)**

In action for declaration of right of way easement and for removal of an obstruction, evidence was sufficient to show that use was initiated by landlords and not by tenants.

**8. Easements 🔑6**

Where successive leases were made by landlords with knowledge that it was the common practice of tenants to use driveway over adjoining property and where use of driveway benefited landlords in that it made their stores more accessible and desirable, use by tenants was, in law, use by landlords and, for purpose of establishing a prescriptive right, inured to benefit of landlords.

**9. Easements 🔑7(6)**

Customary use of driveway over adjoining property was not wholly terminated by construction of a fence which only shut off use of a part of property, so as to preclude prior use as part of prescriptive term.

**10. Easements ⚷8(1)**

Where title to easement had become well established before 1936 when bank became servient owner, lack of direct proof as to actual knowledge by bank of uses that were being made of easement during period 1936–1944, would not preclude declaring existence of easement.

◆

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by H. Wallace Murray and another against Oscar K. Fuller and another, husband and wife, relating to an easement. From a judgment declaring plaintiffs to be owners of easement and ordering defendants to remove an obstruction, defendants appeal.

Affirmed.

Robert Wanamaker and Jacob Chaitkin, both of Pasadena, for appellants.

Cutler & Cutler, of Pasadena, for respondents.

SHINN, Acting Presiding Justice.

Defendants Oscar K. Fuller and wife appeal from a judgment declaring that plaintiffs H. Wallace Murray and wife are the owners of an easement for right of way over a strip of land approximately seven feet wide along the west boundary of defendants' lots in the city of Pasadena, and ordering defendants to remove an obstruction which they have placed thereon. The findings which are the basis of the judgment read as follows: "That said strip of land has been used as a driveway for ingress and egress from the rear of Plaintiffs' property to Orange Grove Avenue by Plaintiffs and Plaintiffs' predecessors in interest for more than twenty-three years; that said use by the Plaintiffs and their predecessors in interest was without asking or receiving permission of any person and without opposition from the Defendants or their predecessors in interest. That such use by the Plaintiffs and their predecessors in interest was open, continuous, notorious and adverse to the Defendants and their predecessors in interest."

Defendants' property is located at the northwest corner of Lake Avenue, a north and south street, and Orange Grove Avenue, an east and west street. It has a frontage on Lake Avenue 87.11 feet and on Orange Grove Avenue of 133 feet. Plaintiffs' property, which adjoins on the north, is of the same depth and has a frontage on Lake Avenue of 42 feet. The Lake Avenue frontage of both properties is improved with brick store buildings. Plaintiffs' building has a depth east and west of approximately 50 feet and the portion lying west of the store building is unimproved except for a small garage building in the northwest corner. One of defendants' buildings covers the entire Lake Avenue frontage and extends to the west 83 feet; west of that is another brick building which extends to within 6.94 feet of defendants' west boundary and about 50 feet north from Orange Grove Avenue. Plaintiffs, therefore, have an unimproved area approximately 42 x 80 feet to the west of their building and defendants have a courtyard, approximately 30 x 50 feet unimproved except for a small building in the northeast corner. Since the entire Lake Avenue frontage of both parties is improved, there is no means of access from Lake Avenue to the areas above described except through the store buildings, and from Orange Grove Avenue along defendants' unimproved strip at the west boundary.

The court received evidence that the strip had been used by plaintiffs and their predecessors, and also by their respective tenants. Defendants claim insufficiency of the evidence to support the quoted findings and they argue (1) that the evidence as a whole failed to prove the elements of prescriptive right, (2) that the use by the owners themselves was insufficient, and (3) that the use by the tenants did not inure to the benefit of the owners.

[1] The present case is no exception to the rule that the sufficiency of adverse possession or use to create a prescriptive title depends upon the particular facts and circumstances of the case in hand. The conclusions upon which the present judg-

ment rests are therefore primarily conclusions of fact. The evidence was not conflicting upon the main issues but in some respects was open to conflicting inferences. We have concluded that the evidence, and the obvious inferences to be drawn therefrom, fully support the findings.

[2] In 1923 plaintiffs' lot was improved with a two-story dwelling house set well back from Lake Avenue, the frontage being then unimproved. In that year a store building was erected covering the entire frontage except for a strip about three feet wide between the building and the north line of the lot. Prior to 1927, the dwelling house was moved from the lot, and in 1927 a building was erected on the lot immediately to the north. The passageway was thereafter enclosed within the building on plaintiffs' lot. The stores in the several buildings of the parties were leased from time to time and were occupied by many different tenants. For convenience, we will refer to the tenants of plaintiffs' stores as plaintiffs' tenants, and those of defendants' stores as defendants' tenants, although there were changes of ownership of the two properties. Prior to 1936 the land of Horemian, lying immediately west of the properties of the parties, was unimproved and unfenced along its east boundary. From 1923 to 1936 vehicles or pedestrians crossing defendants' property to enter either of the courtyards above described were not confined to the property of defendants but could also use the necessary portion of the land of Horemian. In 1936 Horemian constructed a fence along the dividing line between his property and that of plaintiffs. It extended also along Horemian's east line to a point a short distance south of plaintiffs' south line. The remainder of the Horemian east line remained unfenced, and defendants were able to use the driveway as it had theretofore been used for the purpose of entering their courtyard. But, since the west wall of defendants' building was taken as the approximate east line of the established driveway all the way across defendants' property, the easement was given the same width, namely, 6.94 feet at the north corner of defendants' building, and 6.97 feet at plaintiffs' south line. We have not been advised as to when the buildings were constructed on the property of defendants, but from the testimony we would judge that it was prior to 1923. Before the Horemian fence was constructed there was ample room for trucks and other motor vehicles to use this so-called alley as a means of access to the courtyards of both properties. In 1923 and thereafter there was a well-defined road across defendants' property to and upon the property of plaintiffs. The property now owned by defendants was owned in former years by a Mr. Grund. He was described as a very agreeable person. He built a large incinerator on the rear of his lot which he allowed plaintiffs, his own and plaintiffs' tenants, to use freely. He allowed automobiles to be driven through the drive to a garage on plaintiffs' property and to be parked in plaintiffs' courtyard. He allowed his own tenants to use the drive in order to park their cars in the garage on plaintiffs' property and he allowed the predecessors of plaintiffs and their tenants to use the drive freely in going to and from their property. Such uses by plaintiffs and their tenants were frequent and uninterrupted, that is to say, the drive was used whenever occasion arose to reach the rear of plaintiffs' property. One tenant, who ran a cleaning establishment in one of plaintiffs' stores, used it frequently and regularly for many years in taking loads of clothing to and from his place of business. He occupied one or another of the stores for fifteen years and regularly parked his car in plaintiffs' courtyard. Charles Penz, a former employee of Mr. Grund and who worked for him from 1925 to 1931, described the use that was made of the driveway as "neighborly like. It was open range. Everybody used it." Two of Mr. Grund's tenants parked their cars on plaintiffs' property in plaintiffs' garage building for a couple of years prior to 1936; one of them put up a small lean-to on plaintiffs' property and rented it from plaintiffs' predecessor. Access was over the driveway as usual. A witness who had been a tenant of one of plaintiffs' stores for 10 or 11 years, commencing in 1923, used the driveway and parked his car in the rear of his store daily, and he did this with the knowledge and implied con-

sent of Mr. Grund. He moved the garage on plaintiffs' property so he could drive straight into it. Another of plaintiffs' tenants used the driveway every day from 1937 to 1942, and parked his car on the rear of plaintiffs' lot, and yet another used it in like manner until late in 1944. Plaintiffs' property was acquired in 1923 by a Mr. Hopp, and title passed to his son-in-law, a Dr. Blahnick, in 1933. Dr. Blahnick testified that he was living in the residence on plaintiffs' property from 1924 until 1927 when it was moved off the lot, and that people coming to see him would use the driveway. He testified that "they used to drive into our place. Everybody parked in back. It was a kind of community street back there. Everybody used that. Everybody used the incinerator"; that after he moved away he returned to the property over the driveway several times a month just to look it over; that he was on very friendly terms with Mr. Grund but had never asked him for permission to pass over his property, although Grund knew he was using it, explaining, "we just went through there like the rest of them." He also testified that from 1924 on, he had been familiar with the property, that he had collected rents for his father-in-law from 1924 on, and had always used the driveway when he had occasion to drive a car to the rear of the property. This he did frequently up to 1936; his son used the driveway regularly once or twice a month when he would go there to clean up the lot. Upon one occasion when the son was doing some painting he used the driveway daily for a period of some weeks. There was evidence of other similar uses of the property by plaintiffs and their tenants. It is unnecessary to state the testimony in further detail.

The evidence as outlined was sufficient to show that over a 23-year period the driveway in question was used uninterruptedly and continuously by plaintiffs, their predecessors in interest, and their several tenants, whenever there was occasion to reach plaintiff's property by motor vehicle.

[3] Defendants attack the finding that the use of the driveway was adverse to defendants and their predecessors and they claim that the evidence shows at most a permissive use by plaintiffs and their tenants without any claim of right. The argument is clearly without support in the facts. There was no evidence that permission was ever asked or given. It might have been inferred that the driveway was used before the buildings on plaintiffs' lot were constructed, and that plaintiffs' predecessors were using it as a means of access which rendered it unnecessary for them to provide an entrance to the rear of their property from Lake Avenue. It scarcely seems reasonable that they would have constructed their building with no driveway from Lake Avenue if they had believed that their use of the driveway was under permission which might be terminated at any time at the will of defendants' predecessor. There was ample evidence that their use of the driveway was adverse and under a claim of right.

Defendants analyze the evidence of the user by plaintiffs and their predecessors apart from user by the tenants, and contend that it was insufficient to establish any right. They are in error, however, in contending that the use by the tenants did not inure to the benefit of the landlords, and that evidence of such use should be disregarded. Plaintiffs' claims were based upon use by the owners and the tenants as well; this was the case that was decided, and it would be unnecessary to consider the use that was made of the driveway by the owners alone, unless the use by the tenants should be disregarded.

[4] The use of the driveway by plaintiffs and their predecessors and their tenants without express permission amounted to trespass and afforded grounds for legal redress in favor of defendants' predecessors, and it was therefore sufficient to initiate a prescriptive title.

[5] While it is well-settled that a tenant cannot originate adverse user in his landlord's favor, when his lease does not expressly or impliedly include the easement (28 C.J.S., Easements, § 8; Holmes v. Turner's Falls Lumber Co., 150 Mass. 535, 23 N.E. 305, 6 L.R.A. 283; Bayne v. Brown, 60 Or. 110, 118 P. 282; Umhau v. Bazzuro, 76 U.S.App.D.C. 394, 133 F.2d 356; Capps v. Merrifield, 227 Mich. 194, 198 N.

W. 918; Deregibus v. Silberman Furniture Co., 121 Conn. 633, 186 A. 553, 105 A.L.R. 1183), it is also settled that the user by the tenant does inure to the landlord's benefit if it is under a lease which expressly or impliedly includes the easement. Holmes v. Turner's Falls Lumber Co., supra; Deregibus v. Silberman Furniture Co., supra; Deregibus v. Silberman Furniture Co., 124 Conn. 39, 197 A. 760; Holtzman v. Douglas, 168 U.S. 278, 18 S.Ct. 65, 42 L.Ed. 466.

[6] We believe it is scarcely open to doubt that the right to use the driveway by plaintiffs' tenants was implied in all the lease arrangements with tenants who had automobiles or who had other uses for the driveway. The privilege of parking in the rear of the stores was enjoyed by the tenants. It was of substantial benefit to them, and they parked their cars in the rear of their stores instead of on the street, not on rare occasions, but daily, and for a period of many years. They could not have done this without making use of the driveway. There was no evidence of an express agreement between the owners and the tenants with respect to the use of the driveway, but the well-traveled road was there, the owners were using it, and it was reasonable that the parties should take it for granted that the tenants would also have the right to use it. The evidence was sufficient to show an implied agreement with plaintiffs' several tenants that they might use the driveway. For this reason the use by the tenants would inure to the benefit of the landlords.

[7, 8] We are also unable to agree with the contention that the use was initiated by the tenants. The evidence was that the driveway was being used by the owners when the tenants first began using it, and the inference would be that the owners began using it some time before they constructed their building. The tenants we have referred to specifically, who parked their cars on the lot, went into possession of their respective stores in the year following the completion of the stores. They found the driveway in use by the owners and they continued to use it along with the owners. There were altogether some 18 tenants in plaintiffs' stores during the period in question. Successive leases made to them with the knowledge on the part of the owners that it was the common practice to use the driveway and without objection to such use by the tenants, would certainly have involved the owners in trespasses by the tenants upon defendants' land. The use of the driveway benefited the owners in that it made their stores more accessible and desirable, and they could not have been heard to say that they had not encouraged and invited the use of the driveway by their tenants. Therefore, the use by the tenants was, in law, use by the landlords, and for the purpose of establishing a prescriptive right, inured to the benefit of the latter. Bernstein v. Dodik, 129 Cal.App. 454, 18 P.2d 983.

[9] A further contention of defendants is that the customary use of the driveway was wholly terminated by the construction of the Horemian fence and that the use that had been made prior to that time was not to be considered as any part of the prescriptive term. We cannot accept this view. The Horemian fence only shut off use of a part of the Horemian property. The driveway continued to be used for the passage of motor vehicles, although trucks that had formerly come to defendants' south line, or vehicles exceeding the width of the easement, could no longer pass through. There was no abandonment of the original easement, only a withdrawal of a part of the Horemian land that had formerly been used.

[10] It is finally argued that defendants' property, for a number of years commencing with 1936, was owned by a bank which was not shown to have had any actual knowledge of the use that was being made of the driveway. Title to the easement was well-established before 1936. Under the circumstances, it is immaterial that there was no direct proof as to actual knowledge of the bank as to the uses that were being made of the driveway during the period 1936–44.

The judgment is affirmed.

WOOD, J., VALLEE, Justice pro tem, concur.

82 Cal.App.2d 390

## WESTON v. KAPLAN et al.

Civ. 15810.

District Court of Appeal, Second District, Division 1, California.

Nov. 14, 1947.

**Contracts ⚷47**

A so-called contract which merely granted permission by plaintiff to defendant to obtain work for her in certain commercial lines was nudum pactum where there was no agreement by plaintiff to accept employment or to do the work.

◆

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Dorothy Weston, sometimes known as Paula Weston, against Leonard Kaplan and another to recover for alleged breach of contract. From an adverse judgment, plaintiff appeals.

Affirmed.

Arthur Strock, of Los Angeles, for appellant.

Ray L. Smith, of Los Angeles, for respondent Nardoni.

DORAN, Justice.

This is an appeal from the judgment following the granting of a motion for a nonsuit.

The action is for damages for breach of contract. Briefly, the complaint alleges in four counts that defendant Kaplan was a partner of defendant Nardoni at the time the memorandum was executed; that Kaplan was acting as the agent of the partnership; or, that "Kaplan was acting as the agent within the scope of his authority as such agent of defendant August Nardoni."

The memorandum of the agreement upon which the action is based is as follows:

Memorandum of Agreement

"This memorandum of agreement is entered into between Leonard Kaplan, hereafter called the party of the first part, and Dorothy Weston, hereafter called the party of the second part.

"The party of the first part hereby contracts the party of the second for her exclusive services for motion picture acting, radio, fashion modeling and any and all appearances for commercial purposes. The party of the second part hereby grants permission to the party of the first part to obtain work for her in any of the above renumerated lines of endeavor. The party of the first part shall pay to the party of the second part the sum of one hundred dollars ($100) per week for a period of six months. An option is hereby granted the party of the first part for another six months at the same time.

"L. Kaplan
"Dorothy Weston

"Signed this day of June 7, 1945
"Hollywood, Calif."

It is contended on appeal that "The court erred in granting a dismissal and a nonsuit" for the reasons, it is argued that the memorandum was clear and unambiguous and, "the evidence of partnership and other agency relationship, both actual and ostensible, is more than sufficient in law to establish a prima facie case for plaintiff and appellant."

The evidence on the part of plaintiff consisted of the testimony of one witness, the deposition of the plaintiff, one letter and one photograph; on the part of defendants, the deposition of Kaplan. Incidentally, the record reveals that Kaplan is serving a term in San Quentin penitentiary.

Defendant Kaplan was not represented by counsel at the trial.

At the close of plaintiff's case defendant Nardoni made the motion for a nonsuit. In connection with the disposition of the motion the trial judge remarked, "I don't think that contract will support a judgment. I think I will have to stand on a nonsuit as to Kaplan too. I don't feel that I would be doing the right thing to say that it was a valid and binding contract and meant anything at all; that it was enforceable or had any mutuality between the parties to it. It will be so ordered."

The trial judge's conclusions are supported by the record. There was no evidence tending to establish "a prima facie case", as contended for by appellant. The so-called contract, so far as appellant is concerned, merely "grants permission to the party of the first part to obtain work for her". There is no agreement on the part of Dorothy Weston to accept the employment or to do the work nor indeed, is there any promise on the part of Dorothy Weston to do anything.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

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82 Cal.App.2d 290

## SAN FILIPPO v. VITA.

Civ. 13483.

District Court of Appeal, First District, Division 1, California.

Nov. 6, 1947.

Hearing Denied Dec. 30, 1947.

**1. Deeds 🔑58(4)**

The deposit of a deed with a third person with reservation in grantor to recall the deed is not a valid delivery and no title is thereby transferred.

**2. Deeds 🔑61**

Where deed was delivered to a third person in envelope on which was written directions that deed was to be redelivered to grantor on demand or in event of his death it was to be delivered to grantor's son, there was no valid delivery of the deed.

**3. Escrows 🔑3**

The duties of a depositary of title papers are measured by the instructions of the depositor, since by accepting the deposit and acquiescence in the instructions the depositary undertakes to perform according to the terms thereof.

**4. Appeal and error 🔑931(4)**

A judgment quieting title to realty in deceased grantor's son implies a specific finding of conduct indicating a change of intent after actual deposit of deed with third person by grantor, who reserved right to take possession of deed on demand and a subsequent intent to renounce the right to recall the deed and to make the delivery unconditional and complete.

**5. Deeds 🔑208(1)**

In action to quiet title, finding that grantor after delivery of deed with reservation of right to possession of deed during his life, grantor changed his mind and renounced right to recall the deed was sustained by the evidence and warranted judgment quieting title in grantee.

**6. Appeal and error 🔑1010(1)**

Appellate court is bound by finding of trial court which is supported by substantial evidence.

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Action by S. M. San Filippo, as administrator of the estate of Frank Vita, deceased, against Joe Vita to quiet title. From a judgment for the defendant, the plaintiff appeals.

Judgment affirmed.

C. B. Wooster and Kirby & Pasquinelli, all of San Jose, for appellant.

Rankin, Oneal, Luckhardt, Center & Hall, of San Jose, for respondent.

FINLEY, Justice pro tem.

This is an appeal from a judgment quieting title in respondent Joe Vita to certain real property in the City of San Jose.

Joe Vita is the son and only child of Frank Vita, deceased. His mother was Frank's first wife who died in February, 1933. The property in question was accumulated during this marriage, with the aid of Joe's earnings prior to his own marriage in 1930. Joe's age does not appear in the record.

In March of 1933, about a month after the death of Joe's mother, Frank requested G. F. Paull, who conducted a real estate business, to prepare deeds conveying the property in question to Joe. The deeds were executed by Frank, placed in an envelope and left in the office of Mr. Paull. On the envelope appeared the following instruction signed by Frank: "This envelope contains papers which are to be delivered to me on demand or in event of my death then to be delivered to my son Joseph C. Vita."

In September of the same year, 1933, Frank remarried. This second wife, Lucy, survived him. The date of Frank's death does not appear but Lucy testified that they had been married eleven years and two months. Some time after Frank's death the deeds were turned over to Joe. The trial court quieted his title to the property, thereby impliedly finding that Frank had made valid delivery, and the attack on this finding presents the only issue to be determined here.

Respondent maintains that "the original deposit of the deeds with Paull constituted a complete delivery." As a second line of defense, however, he argues that, assuming this to be not so, then Frank Vita "by a subsequent manifestation of his intention so to do did make a new, independent and complete delivery."

The circumstances surrounding delivery of the deeds to Paull in the first instance are shrouded in some obscurity. It appears that before his first wife died Frank Vita prepared similar deeds to those involved here, conveying the property to her, and placed them in escrow in an envelope containing the identical instructions as those with which we are here concerned, excepting, of course, that her name appeared as the deliveree rather than the name of Joe Vita. When Frank executed the deeds to Joe in Paull's office he produced this envelope and Paull or Mrs. Paull who was also in the office copied the instructions on the envelope containing the deeds to Joe. On the stand Paull could not say just what directions Frank gave in this connection, but it was at least assumed that this was what Frank wanted. Later, by affidavit which was made part of the record by stipulation he testified that Frank brought in the old envelope and asked that the deeds to Joe be placed in a new envelope with the same kind of instructions thereon which were on the old envelope. Frank could neither read nor write English, but having withdrawn the deeds to his first wife he apparently understood the import of the language used and intended to create the same situation with regard to the deeds to Joe. In other words, he intended to retain control of them during his lifetime and that the title should not pass until his death.

The findings of the trial court are very general, and no special formal finding was made on this point. In his memorandum for judgment, however, Judge Del Mutolo states: "It is my opinion that the instructions given G. F. Paull were not sufficient to constitute absolute delivery."

[1, 2] Obviously if Frank Vita's intention was that the envelope containing the deeds to Joe should bear the instruction as it actually appears, delivery in the first instance was not complete. "* * * the question as to the intention of a grantor in delivering a deed to a third party is one of fact, *unless* the instructions are entirely in writing, when it becomes one of law." (Emphasis added). Van Core v. Bodner, 77 Cal.App.2d 842, 849, 176 P.2d 784, 788. As a matter of law, deposit of a deed with a third party, reserving in the grantor at all times the power to recall is no present delivery at all and no title is thereby transferred. Williams v. Kidd, 170 Cal. 631, 151 P. 1, Ann.Cas.1916E, 703; Moore v. Trott, 156 Cal. 353, 354, 104 P. 578, 134 Am.St.Rep. 131. We must therefore agree with the trial court that there was no valid delivery to Joe at the time Frank signed the instructions on the envelope, deposited the deeds therein, and left them with Paull.

The remaining point for decision is whether the subsequent conduct of Frank Vita with reference to these deeds constituted valid delivery at a later date. As stated above, Frank's first wife died in February, 1933. The deeds to Joe were executed and left with Paull in March, 1933. In September of the same year Frank married Lucy, who had property of her own, and two sons by a former marriage. By pre-nuptial oral agreement Frank and Lucy agreed that his property should belong to Joe and her property to her two sons. Thereafter on various occasions and to several persons who testified Frank declared that the property was "all Joe's"—"Everything is Joe's"—"It belongs to Joe" and that "Joe could collect the rent if he wanted to."

Joe testified that prior to Frank's marriage to Lucy he and his father had conversations relating to the property and that these continued over the period of the marriage and up until three months before Frank died. Following are excerpts from Joe's testimony:

"Q. * * * Now, Joe, did you know that your father was going to get married? A. Yes.

"Q. Did he talk to you about it? A. That's right.

"Q. And did he talk to you about the property, and what— A. That's right.

"Q. Would happen to it in the event of his marriage? A. When he told me about it, he wanted to marry her, I don't know how they got together, but when he told me he was going to marry her, he made me understand what—

"Q. Just tell what he told you. A. Well, he says I didn't have to worry about the property, that it was all taken care of, and that if I wanted to, I could take care of all the rent myself.

"Q. * * * you mean right then? A. Right then, if I wanted to. * * *

"Q. What if anything, did he say to you about the ownership of the property? A. He said that they were all taken care of, and it was all mine, and if I wanted to, I could collect the rent right now, and I left him to take care of the whole thing. * * * He just didn't care any more, he just threw up the sponge."

In the case of Moore v. Trott, supra, there were two appeals. The first, referred to above, is reported in 156 Cal. 353, 354, 104 P. 578, 579, 134 Am.St.Rep. 131. It held that the delivery of the deeds in question by the grantor to a third person, with instructions to deliver them to the grantee only "in case of my not returning from the * * * Hospital * * * where I am going for to have an operation" was not an absolute delivery. On the second trial of the case, additional facts were presented, from which the court found (162 Cal. 268, 122 P. 462) that the grantor had made absolute and unconditional delivery after his return from the hospital. The subsequent acts and conduct of the grantor, which were held sufficient in that case are set forth in the court's decision on the second appeal. Substantially such acts and conduct consisted of statements made by the grantor concerning his real property; that he had "deeded it" and that at page 274 of 162 Cal., at page 465 of 122 P. "the deeds would be delivered when he would not be here." He stated that he had left deeds to his real property so that there would not be any "lawing over it after he had passed away" and advised grantee that at page 274 of 162 Cal., at page 465 of 122 P. "Mr. Tietzen would give her the deeds after he (Moore) passed in his checks." Such declarations were made by grantor after his return from the hospital. The third person who held the deeds in that case was never advised as to any change in the grantor's intent. In the course of its opinion, the court stated at page 276 of 162 Cal., at page 465 of 122 P.: "* * * it is to be remembered in this connection that the single question for determination is whether the evidence supports the court's finding of a delivery. Therefore, the proposition is not whether this evidence fairly conveys an inference that Moore in these declarations had in mind the delivery which he made to Tietzen, but it is, 'Does the evidence support the inference which the court made and embodied in its finding to the effect that the testator, subsequent to the Tietzen letter, expressed his intent and made a new, independent, and complete delivery?' We think it cannot be said that such an inference is not permissible, and, if it be permissible, it supports the finding of the court. It is true that Tietzen was not advised of the grantor's changed determination, but it is equally true that it was not necessary so to advise him to effect a new and complete delivery. [Citing Ruiz v. Dow, 113 Cal. 490, 45 P. 867.]"

[3, 4] The duties of a depositee of title papers are created and measured by the instructions of the depositor. By accepting the deposit and by acquiescence in the instructions the depositee undertakes to perform according to the terms thereof. There is a meeting of the minds and the

birth of a contract. It is somewhat anomalous that a relationship so created by personal negotiation can be abrogated by subsequent declarations made to others, including the grantee, even though they should come to the attention of the depositee. We are not aware of any other contract subject to amendment in this fashion. Supposing the depositor should make many and positive statements to others renouncing his right to recall the papers and then should appear and demand them of the depositee. Would the fact that such declarations had been made, whether brought to the attention of the depositee or not, relieve the latter of the duty of complying with the demand? Apparently it would under the rule announced in the second Moore v. Trott case, supra, for the grantee in whom title has vested is as against the grantor certainly entitled to the muniments thereof. If the depositee is not so relieved of the obligation created under the instructions then, the depositor has made complete and unconditional delivery while still retaining dominion over the actual documents themselves, which cannot be the case. The explanation is that a title document is merely a conduit through which title passes; that after a deed is properly executed, passage of title to the property described therein becomes a matter of intent. If it can be satisfactorily demonstrated that the grantor then or at any time thereafter formed the positive and unconditional intent to part with title, thereupon title does pass and physical possession of as distinguished from right of dominion over the conduit becomes immaterial. It may even remain in possession of the grantor and never come into the hands of the grantee. Moore v. Trott, supra, 162 Cal. 268, 275, 122 P. 462.

Whatever the situation, the rule of the second Moore v. Trott case, supra, does not, to say the least, lighten the burden of determining where title actually reposes in any analogous case. Obviously one effect of it is to render easier the circumvention of probate. It is, however, a pronouncement laid down and followed by the Supreme Court and it must be followed here.

[5, 6] The trial court herein specifically predicating its decision on the rule laid down in the second Moore v. Trott case, supra, quieted title to the property in Joe Vita. This implies a specific finding of conduct indicating a change of intent after actual deposit of the deeds by Frank Vita. It amounts to an implied finding of a subsequent intent to renounce the right to recall the deeds and to make the delivery unconditional and complete. Since this finding is supported by evidence as substantial as that in the second Moore v. Trott case, supra, we cannot quarrel with the inference drawn by the trial court from the evidence, and are bound by its finding.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; SPENCE, J., dissenting.

82 Cal.App.2d 453

## CITY OF SAN DIEGO et al. v. STATE BOARD OF EQUALIZATION et al.

Civ. 3661.

District Court of Appeal, Fourth District, California.

Nov. 19, 1947.

Hearing Denied Jan. 15, 1948.

**1. Intoxicating liquors** 🔑46½

Where second paragraph of section of statute fixed ratio between population and on-sale liquor licenses, prohibited additional licenses other than as authorized in the "section", and provided that for purposes of such "paragraph" population should be determined by latest federal census, and subsequent paragraphs provided for increase of licenses on satisfactory evidence of increase in population since latest federal census, provided that total number did not then exceed the maximum specified in second paragraph, additional licenses may be so issued without regard to the census. Gen.Laws, Act 3796, § 38f.

**2. Intoxicating liquors ⟹46½**

The State Board of Equalization may issue additional on-sale liquor licenses on requisite increase in population on its own initiative. Gen.Laws, Act. 3796, § 38f.

**3. Intoxicating liquors ⟹46½**

Evidence sustained issuance of additional on-sale liquor licenses in San Diego county on ground that increase of population had resulted in unfair discrimination. Gen.Laws, Act. 3796, § 38f.

**4. Intoxicating liquors ⟹46½**

Neither cities nor counties have any right to make general protest against policy of issuing additional liquor licenses. Gen. Laws, Act. 3796, §§ 21, 38f, 39–41; Const. art. 20, 22.

**5. Constitutional law ⟹70(3)**

Courts must pass on the law as it is regardless of personal views as to its wisdom.

◆

Appeal from Superior Court, San Diego County; C. C. McDonald, Judge.

Action by the City of San Diego and the County of San Diego for a writ of mandate directing the State Board of Equalization to cancel 52 additional on-sale liquor licenses issued by it. From a judgment for plaintiffs, the defendant appeals.

Reversed.

Fred N. Howser, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for appellant.

Ralph E. Swing, of San Bernardino, and Phil D. Swing and C. Scharnikow, both of San Diego, amici curiae on behalf of appellants.

J. F. DuPaul, City Atty., Bertrand L. Comparet, Deputy City Atty., James Don Keller, Dist. Atty., and Bertram McLees, Jr., Deputy Dist. Atty., all of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment ordering the issuance of a writ of mandate directing the State Board of Equalization, hereinafter called "the board," to cancel and annul 52 additional on-sale liquor licenses which were issued pursuant to section 38f of the Alcoholic Beverage Control Act, Deerings Gen.Laws, Act 3796, which will be referred to as "the act."

Section 38f was added to the act in 1945. At that time there were 364 on-sale licenses in effect in San Diego County. Under a rule of the board no new licenses had been issued since 1939. The population of that county was 289,473, as shown by the 1940 census. Later special censuses had been taken in all cities in the county, with the exception of Escondido, and in the unincorporated portion of the county. The special census in the city of San Diego was not completed or the result announced until after these licenses were issued, although a "spot census" had theretofore been taken.

After the adoption of Sec. 38f, and on November 18, 1945, representations were made to the board by persons and organizations from San Diego County that its population had greatly increased, and that an unreasonable discrimination existed in this regard. The board thereupon ordered a survey and report to be made by the State Liquor Administrator. On December 13, 1945, he reported, among other things, that there were at least 415,875 persons in certain areas in the county. The board, upon the information presented, determined that the population of the county was at least 415,875, and that a discrimination existed with respect to the ratio of licenses to population, as compared with other counties, and authorized its staff to receive applications for new licenses during the month of January, 1946. 325 such applications were filed, each applicant filing the standard form of application and, in addition, a "preliminary application" with additional information called for by the board, including a question as to how the public convenience would be furthered by granting the same. Notices were given, the applicants were investigated in the usual manner, and 225 of the applicants were found to meet the general qualifications. In all cases where a protest was filed the applicant was eliminated. On April 18, 1946, the board, after consideration of all matters before it, ordered the questioned licenses issued to 52 of the applicants against whom no individual protests had been made.

Before these licenses were issued, and on March 26, 1946, the city council of San Diego passed a resolution reciting, in effect, that the board was acting without proper evidence, that no discrimination existed, that public convenience and necessity did not demand more licenses, and that, in its opinion, it would be contrary to public welfare and morals to issue more licenses prior to the 1950 census, and directing that a protest and demand for hearing be filed with the board. On the same day, the mayor and city manager sent a copy of this resolution to the board, with a letter stating that they protested against the issuance of additional on-sale licenses in the city; that those already issued were not only sufficient but in excess of any actual need; that more would be detrimental to the public interests; that the amount of business done by the present licensees had diminished; that no discrimination existed; and that a public hearing upon reasonable notice was desired "before the Board commits itself to the issuance of further on-sale licenses in this community." No hearing on this protest was held by the board. Although the board of supervisors directed the district attorney to file a similar protest, none was filed with the board, but the county later joined the city in this action.

The petition filed in this action followed the lines of the resolution and protest sent to the board, and alleged, in substance, that more than one license per thousand population, under the 1940 census which was controlling, were already outstanding, and that under existing circumstances and the law no additional licenses were justified or could be issued. While the 52 new licensees were not named as parties to the action, the petition alleged, as to each of them, that he had failed to set forth in his application, and prove, the matters required by paragraph 6 of section 38f. It was further alleged that no public hearing had been accorded to the city on its protest, and that this protest was not based upon any objection to the individual licensees or premises, but upon the contention that an excessive number of licenses already existed and that any more would be both unnecessary and detrimental to the public morals and welfare.

The board's answer and return, in addition to its denial of the matters in the petition, set forth the minutes of the board and transcripts of the proceedings at the three meetings held in this connection, with the evidence received by the board and its findings thereon. Among other things, it was also alleged that the population of San Diego County had increased since the 1940 census, and exceeded 415,875 at all times in question; that the additional licenses were within the number permitted by section 38f of the act; that no protest had been filed against any particular applicant, or on the ground that the population was not at least 415,875, or upon any ground specified in the act; and that no protest of any kind was filed within the time specified in the act. A special defense was based on the failure to bring in the in the individual licensees as parties to the action.

At the hearing it was conceded that a special census of the city had been completed and that the result had not yet been announced, and it was stipulated that when announced this census, with other special censuses in the county, would show that the population of the county was at least 415,001 persons. A letter and a certificate from the director of the bureau of the census were introduced in evidence. The letter stated that while no statement could be made as to the official population of the county upon any given date, from a sample survey taken in March, 1944, "a figure of 415,875 was reported as the population of the county." It was further stated that the enclosed certificate presented the population of various areas within the county as of the dates indicated. This certificate recited that, according to the returns of special censuses, the population of eight areas within the county under special censuses taken at various times between June 6, 1944, and April 17, 1946, was certain numbers which total 546,874 (omitting the census for Escondido, which was not taken until June 3, 1946.)

The trial judge filed an opinion in which he interpreted the last sentence of paragraph 2 of 38f as limiting any action under paragraph 5 of that section, and accordingly held that no sufficient showing could be made until the completion of a new census report, that the 1940 census was controlling here, and that no additional licenses could be issued. In its findings the court found all of the allegations of the petition to be true. Among other things, it was found that a special census had been separately taken in each of the separate areas of the county, from which it would be determined that the number of inhabitants was not less than 415,001 persons; that the evidence received by the board on December 11, 1945, was not received under oath and was merely hearsay and opinion; that in issuing the licenses the board acted without evidence; that the board did not require the applicants for these new licenses to allege and show the things required in paragraph 6 of section 38f; that a copy of the petition and of the alternative writ was served on each of the 52 licensees, with the exception of five who were not served; and that none of the licensees had intervened or otherwise appeared in the action. Judgment was entered directing cancellation of the 52 licenses and the board, its members and officers have appealed.

The appellants contend that the petition did not state a cause of action; that the evidence does not support the findings; that the court was without jurisdiction to declare the licenses void; and that the judgment is against law. While the respondents do not and could not claim that the actual increase in population was not sufficient to justify these additional licenses on the basis of one for each 1000 of the then population, they earnestly contend, for various reasons, that the board was without power to issue these licenses under the circumstances here appearing, and that under the law these licenses are utterly void. In passing upon the questions thus raised, and since the court largely followed the respondents' contentions, we will consider the several reasons advanced by them for the claimed invalidity of these licenses.

Most of the questions raised depend upon an interpretation of the meaning and effect of Sec. 38f. That section provides for a limitation on the number of licenses which may be issued in any county, and further provides for an increase in the number otherwise allowed, under certain circumstances. Insofar as material here, the second paragraph of this section limits the number of on-sale licenses in any county to one for each 1000 or fraction thereof of its inhabitants, with the provision that no additional licenses "other than * * * as permitted hereinafter in this section," shall be issued where that ratio has been exceeded. The last sentence of this paragraph reads:

> "Population, for the purpose of this paragraph, shall be determined by the most recent United States decennial or special census."

The fifth and sixth paragraphs of this section, outlining the circumstances under which additional licenses, as referred to in the second paragraph, may be issued and also setting forth the requirements for any individual application which is based upon the ground of increased population, read as follows:

> (5) "Whenever it shall be made to appear to the board by satisfactory evidence that the population in any county shall have increased by more than 1,000 or multiples of 1,000 inhabitants since the most recent United States decennial or special census, and it shall appear to the board that by reason thereof, the inhabitants of such county are unjustly and unfairly discriminated against, and *provided that the total number of licenses in such county do not then exceed the maximum specified in the second paragraph of this section,* the board shall have power to issue not to exceed one on-sale general license and one off-sale general license for each increase of 1,000 inhabitants in such county since the taking of such census. In all other respects the limitation hereinbefore provided for shall continue in effect.

> (6) "Any person applying for an off-sale general license or on-sale general license on the ground of increased population as hereinbefore provided, shall set forth in his application for such license and shall affirmatively show (1) that he is a qualified applicant and that his premises qualify under the law and rules and regulations of the board, (2) that the issuance of the license

applied for would serve the public convenience or necessity, (3) that the issuance of the license applied for would not be contrary to public welfare and morals, (4) that inequality in the ratio of licenses exists between the community in which the applicant's premises are located and other communities in the State, (5) that the population in the county for which such license is applied has increased to the extent and under the conditions mentioned in the preceding paragraph of this section." (Italics and paragraph numbers added.)

The seventh paragraph requires an investigation and report when "any such application" is filed with the board, and the eighth and final paragraph of the section reads:

"If a protest against the issuance of any license is filed with the board, the hearing thereon shall be had and conducted as provided in this act."

It is first contended that these 52 licenses were issued in excess of the statutory limit specifically provided by section 38f. It is argued that paragraph 5 of this section permits the issuance of additional licenses not merely when the population has increased, but provided also that the number of licenses already outstanding does not exceed the maximum specified in the second paragraph; that this maximum, by the language of the second paragraph, must be determined by the most recent census; that the power of the board to issue additional licenses, even where the population has increased, depends entirely upon whether the number already outstanding exceeds the maximum fixed by the second paragraph, under the last census; that the legislature intended by 38f to provide that in counties where the limit, as thus fixed, had not already been exceeded the board could issue more licenses upon satisfactory evidence of increased population, but in counties where that limit had been exceeded in the past the board could not act upon any evidence other than that of a completed new county-wide census; that 364 licenses were already outstanding in this county, which was in excess of the 290 which was the maximum allowable under the 1940 census; and that it follows that these licenses were all in excess of the statutory limit fixed in section 38f.

The language used in section 38f discloses an intention contrary to that thus contended for. The last sentence of paragraph 2, providing that population shall be determined by the most recent census, is specifically limited by the words "for the purpose of this paragraph." Not only does this indicate an intention that this method of determining population shall not be controlling with respect to other paragraphs, but paragraph 2 also clearly provides that no additional licenses, beyond the limit there fixed, shall be issued "other than * * * as permitted hereinafter in this section." This refers to paragraph 5, which authorizes such additional licenses where certain things have occurred "since the most recent * * * census." These provisions indicate an intention to make an exception to the general rule, set forth in paragraph 2, that population must be determined by a census, and to provide that additional licenses may be issued based upon "satisfactory evidence" of a sufficient increase in population since a census was taken. The condition set forth in the fifth paragraph, "provided that the total number of licenses in such county do not *then* exceed the maximum specified in the second paragraph," clearly relates to the situation that will exist after the additional licenses thus permitted are issued, and not to whether or not an excess has previously existed or to the number outstanding before the determination of an increase in population was made.

[1] The plain meaning of paragraph 5 is that when an increase in population, since the last census, appears by satisfactory evidence the board shall have power to issue additional licenses providing that the total of the new and old licenses shall not exceed the maximum, fixed in the second paragraph, of one license for each 1000 people. The interpretation argued for by the respondents is opposed to both the spirit and letter of the fifth paragraph and would largely, if not entirely, destroy its meaning and intention which is to permit additional licenses when a sufficient increase in population has taken place be-

tween censuses. Insofar as the language of the statute is concerned, the issuance of these licenses was not in excess of the statutory limit.

It is next contended that these licenses are void because the respective applicants did not comply with the requirements of section 38f in that they did not set forth in their applications all of the five matters specified in paragraph 6 of this section. Each of the applicants filed an ordinary application and a supplemental application as called for by the board. The supplemental application contained nothing with respect to the matters mentioned in paragraph 6, except for one question as to why public convenience would be furthered by granting the application.

[2] This argument seems to be based upon the theory that paragraphs 5 and 6 are inseparably connected in forming one complete procedure, under which additional licenses may be issued, and that no such licenses can be issued if any part of the procedure is omitted. We think this view is erroneous. Paragraph 5 authorizes the board to issue additional licenses, within the limit fixed, when it appears to the board that an increase in population has resulted in a discrimination. The board is given this power on these conditions alone, with nothing said about the necessity of alleging or proving the additional matters mentioned in paragraph 6, or about acting only upon a special kind of application.

On the other hand, paragraph 6 permits any person to apply for a license on the same ground. In that event, he must allege and prove not only the additional elements of convenience, or necessity, and of public welfare and morals, but also the matters of increased population and discrimination, as otherwise required by paragraph 5. This indicates that it was not intended to make paragraph 6 applicable in cases where the board had already acted under paragraph 5. The intention seems rather to be to provide, by paragraph 6, an additional procedure available to individuals in cases where the board has not already acted under paragraph 5.

There is nothing unreasonable in requiring a broader showing, where the entire matter is initiated by an applicant for a license, than is required of the board in determining whether a particular situation exists. It would be unreasonable, however, to interpret these provisions as depriving the board of power to act without first requiring the applicants to again allege and prove the very things which the board had already passed upon and found to exist. The contention that these applications are not sufficient to meet the jurisdictional requirements of the statute cannot be sustained.

It is next contended that these licenses were void because there was no evidence before the board to show jurisdictional facts. Most of the argument in this connection is to the effect that no evidence was produced before the board, by the individual applicants, to show the facts required by paragraph 6 of section 38f. This contention is sufficiently disposed of by what we have said in discussing the preceding point.

[3] Aside from this contention, it is further argued that the board made its findings and determination as to increased population and discrimination, as required by paragraph 5, on evidence that was merely hearsay and opinion, and without sworn testimony. The record discloses that at its various hearings on this matter a full report from the State Liquor Administrator was received, a number of individuals and representatives of institutions presented their views with facts and figures, and a large number of documents were received, including census reports, comparisons with other counties in the state, newspaper clippings, Chamber of Commerce and other publications, and many other things. Many facts were thus brought out, as well as some things which could only be matters of opinion. While the question of increase in population was one of fact, there was considerable practical evidence of that fact, and it was never disputed, even during the trial of this action, that the actual increase in population greatly exceeded that which the board found to exist. The question as to discrimination, while one of fact, involved a large element of opinion, and depended upon statistics and official records in various communities of the state, and upon matters which neither called for nor which

could have been much affected by the addition of sworn testimony. Paragraph 5 of section 38f provides that such additional licenses may be issued whenever it shall be made to appear to the board by satisfactory evidence that an increase in population and a discrimination exists. In view of the requirements of this statute, and of the nature of the questions before the board at these hearings, it cannot be held that the evidence before the board was legally insufficient, in such a proceeding, to sustain the finding and determination which was made. Parente v. State Board of Equalization, 1 Cal. App.2d 238, 36 P.2d 437; Ray v. Parker, 15 Cal.2d 275, 101 P.2d 665.

We regard the next point raised, that the 52 licenses are all void because of the claim that some of them were issued in lieu of other licenses, contrary to the provisions of section 38f, as without merit and as not supported by the record.

[4] The respondents' final contention is that the city was entitled to a hearing on its protest, and that the failure of the board to grant such a hearing was jurisdictional and makes all of these licenses void. As a practical matter, it is difficult to think of any good reason for the board's action in this respect, regardless of whether or not such a hearing was required by law, unless it desired to emphasize a fundamental evil in our present liquor control law, and to help bring about a repeal thereof at an earlier date than would otherwise be possible. However, we are here concerned with what was required by the existing law.

Regardless of any individual opinion as to the wisdom thereof, the power of regulating and licensing the liquor business has been vested by a vote of the people in the state government. Art. XX, Sec. 22 of the Const. One result of this elimination of all right of local control is that the only rights of protest or to a hearing, in connection with the issuance of licenses, presently existing are those specifically given by the provisions of the act. The controlling question is whether the right here claimed is included in the rights thus given.

Section 21 of the act provides, in connection with an original application for a license, that notice shall be given to the governing body and certain officers of a county and city, and that if a protest is filed within fifteen days a public hearing must be held within the county or city before a license is issued. No such protest was here filed, and none within that time. Section 39 of the act provides for the denial of a license on the ground of an adverse report with respect to an applicant or to the premises and, in effect, permits the applicant to then petition for a further hearing if he so desires. In the event he does so, the section further provides that protests may be made at any time prior to the issuance of a license. No such a situation existed here. Sections 40, 40.5 and 41 of the act provide for complaints against any licensee who has already been licensed and for a hearing thereon, but none of these sections have any application here. All of these sections seem to apply to protests, and to permit objections to be made, against the issuance of specific licenses, or to complaints against specific licenses; and also to protests on individual grounds, and not with respect to an issue of policy before the board.

The respondents argue that the protest made by the city on March 26 was filed within the time permitted by the act, because of that part of section 39 which reads: "Protests may be made to the board at any time prior to the issuance of a license against either the original issuance of a license or the renewal of a license." Not only was the protest here made not one of the kind there contemplated, but that provision itself is not a general one extending the right of protest as given in other connections, but is one which is related to, and made applicable in, the particular circumstances covered by section 39. It merely provides that in a situation where a license has been once denied, because of an adverse written report, and a subsequent hearing is had upon a petition for further consideration, protests against that license may be made at any time prior to the time it is issued.

The respondents further argue that a right of protest and hearing was given to them here by paragraph 8 of section 38f, which reads: "If a protest against the issuance of any license is filed with the board, a hearing thereon shall be had and conducted as provided in this act." Not only was this not intended to enlarge the rights theretofore given, nor to so extend the right of protest as to cover the general policy with respect to issuing licenses, but it rather clearly appears that it was intended to protect the already existing right of protest, as against individuals and places, and to make this applicable to any additional licenses which might be applied for, either under paragraph 6 or after proceedings taken under paragraph 5.

It seems quite clear that section 38f of the act was adopted for the purpose of providing a limitation on the number of licenses and, by way of exception, to permit the issuance of additional licenses where an increase in population in a particular county would make the application of the rule more reasonable. It was not adopted for the purpose of extending any rights of protest or to a hearing thereon which had already been given to persons or communities, nor to enlarge the grounds upon which protests might be made. Nothing in section 38f indicates any intention to give to cities or counties any right to make a general protest against the policy of issuing additional licenses, a right which would be entirely different in nature from anything otherwise given to them, and contrary to the purpose expressed in the constitutional provision which vests such matters exclusively in the state government.

We find nothing in section 38f, or in any other provision of the act, which gives the city a right to protest upon the grounds or for the purposes disclosed by the protest made by the city on March 26. It follows that no jurisdictional defect appears in this connection which took away the board's power to act, or which makes these licenses void.

The appellants raise another serious question as to whether these licenses could be ordered cancelled in a proceeding to which the licensees were not made parties. Under the views above expressed, it is unnecessary to consider this and two other points raised by them and more exhaustively treated in amicus curiæ briefs which have been filed in their support.

[5] It is our function to pass upon the law as it is, and not to apply our personal views of what it should be. While we entertain grave doubts as to whether the public convenience, welfare and morals of this county will be promoted by the issuance of these licenses, we are forced to the conclusion that the board did not exceed its powers in issuing them, and that the court erred in directing their cancellation.

The judgment is reversed.

MARKS and GRIFFIN, JJ., concur.

Hearing denied; SHENK, J., dissenting.

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82 Cal.App.2d 296

## DEEBLE v. STEARNS.

Civ. 15894.

District Court of Appeal, Second District, Division 2, California.

Nov. 6, 1947.

Hearing Denied Dec. 30, 1947.

**1. Appeal and error** 🔑**110, 782**

An order denying motion for new trial was a nonappealable order and appeal therefrom would be dismissed.

**2. Brokers** 🔑**49(1)**

The seller of property could not avoid liability for broker's commission on ground that agreement with purchasers was uncertain in that it acknowledged receipt of $2,000 from purchasers and thereafter, in reciting terms of purchase, acknowledged receipt of only $1,000, where seller actually received and retained $2,000.

**3. Brokers** 🔑**64(1)**

The seller's approval of contract for sale of realty and his acceptance and retention of purchasers' deposit constituting part payment estopped seller from denying broker's claim for commission, notwithstanding that purchasers thereafter repudiated the contract.

**4. Brokers ⚷49(1)**

A broker through whose efforts a binding contract is made has earned his commission.

**5. Brokers ⚷54**

The execution of contract of sale by owner of realty is conclusive proof that he was satisfied as to qualifications of purchaser and his ability to perform contract so as to render owner liable for payment of broker's commission.

**6. Appeal and error ⚷690(5)**

In broker's action to recover commission, rulings excluding evidence relating to conversations between broker's salesman and third person with whom property involved had been listed would not be reviewed, where there was nothing in record to indicate that such conversations were pertinent to issues or that answers would have been favorable to defendant.

**7. Appeal and error ⚷207**

Where objection to question is sustained and question does not indicate that answer would be favorable to party making inquiry, ruling will not be reviewed by appellate court in absence of offer of what was proposed to be proved to the trial court so that reviewing court can determine whether proposed evidence would have been material.

**8. Evidence ⚷445(1)**

In broker's action to recover commission, evidence of conversation between broker's salesman and third person, allegedly representing defendant, to effect that no commission was to be paid except in event of a sale and that such commission was to be divided equally between broker and third person, was inadmissible as an attempt to vary written agreement of sale acknowledging broker to be defendant's agent and agreeing to pay broker a commission.

**9. Brokers ⚷36**

Even though broker may not have been seller's agent when he received deposit from prospective purchasers, seller ratified transaction by approving written agreement of sale and could not thereafter disavow it.

**10. New trial ⚷103**

Where broker suing seller to recover commission had not been party to purchasers' suit in municipal court to recover deposit from seller, decision in municipal court case would not have been admissible in broker's action and so could not be considered as newly discovered evidence justifying a new trial in such action.

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Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by R. E. Deeble, doing business under the fictitious firm name and style of Deeble-Chapman Company, against I. C. Stearns to recover a commission for sale of real property. From a judgment for the plaintiff and from an order denying the defendant's motion for new trial, the defendant appeals.

Judgment affirmed, and appeal from order denying motion for new trial dismissed.

Robert E. Krause and Roland G. Swaffield, both of Long Beach, for appellant.

E. O. Leake and J. J. Leake, both of Long Beach, for respondent.

WILSON, Justice.

[1] Respondent, a licensed real estate broker, recovered judgment against appellant for a commission growing out of the sale of real property. This appeal is from the judgment and from the order denying the motion for a new trial. Since the latter is a nonappealable order the appeal therefrom will be dismissed.

Appellant, who was the owner of the real property involved, listed it for sale with one Koerner, a real estate broker, at the price of $70,000. Ben M. Murphy, a salesman employed by respondent, interviewed Koerner and obtained the latter's consent to show the property to a prospective purchaser. At that time neither respondent nor Murphy had a listing of the property. Pursuant to Koerner's permission Murphy showed the property to Carlo Caliguiri and wife who agreed to purchase it for $69,500.

The written agreement which forms the basis of this action consists of three parts: (1) A temporary receipt and agreement of sale signed by Murphy as salesman for respondent, acknowledging receipt from the Caliguiris of the sum of $2,000, "being deposit and part payment on account of the purchase" of the property. The price agreed upon for the property was recited to be $69,500, to be paid in the following manner: $1,000, "receipt of which is hereby acknowledged," $48,000 to be paid in escrow, and a loan of $19,500 to be assumed by the purchasers. (2) The purchasers' approval, signed by the Caliguiris, in which they agreed (a) "that an inspection has been made of the above described property and [the undersigned] hereby approves the transaction to purchase the same as above outlined;" (b) "that no representation of any kind has been made binding Deeble-Chapman Company as the agent herein except to obtain a signed agreement with the seller providing for the conveyance of said property * * * in accordance with the terms outlined in this purchase agreement;" and (c) that in the event of failure on their part to complete the purchase the deposit made by them should be retained by respondent as liquidated damages; (3) the seller's approval, signed by appellant, in which he approved the sale of the property "upon the terms and conditions hereinabove set forth" and agreed to pay respondent "the sum of $3500.00 Dollars ($......) for services rendered." The three parts of the agreement above outlined were included in one document.

At the time the Caliguiris signed the agreement they handed their check to Murphy for $2,000. Murphy delivered the check to Koerner who, in turn, delivered it to appellant. The latter cashed the check and signed the seller's approval. The completed contract was returned to respondent. Thereafter the purchasers refused to pay the balance of the purchase price and repudiated the contract.

[2] 1. *The alleged uncertainties in the agreement.* Appellant maintains that the agreement is so uncertain as to exonerate him from liability to pay a commission to respondent in that the first portion of the temporary receipt acknowledges payment of $2,000 as a deposit and part payment on the purchase price and in the recitation of the terms of purchase the receipt of $1,000 is acknowledged. He argues that since the latter sum, added to the cash to be paid and the loan to be assumed, amounts to only $68,500, or $1,000 less than the agreed purchase price, the amount which the Caliguiris agreed to pay for the property is indefinite.

It is manifest that the statement in the receipt that $1,000 had been received by respondent on the purchase price is a clerical error since the receipt in the very first lines clearly acknowledges payment of $2,000. This sum with the $48,000 cash and the assumed loan of $19,500 totals the full sum of $69,500 which the Caliguiris agreed to pay for the property. Furthermore, the check for $2,000 given by the purchasers at the time the receipt was signed was received by appellant and deposited in his bank account. The balance then remaining unpaid by the purchasers amounted to $67,500, which is the total of the cash remaining to be paid and the loan to be assumed. Appellant, having received and retained the sum of $2,000, is in no position to claim that only $1,000 was paid when the original receipt was signed by Murphy.

[3-5] 2. *The commission was earned by respondent.* Appellant was not bound to accept the offer of the purchasers without a reasonable opportunity to satisfy himself both as to the purchase price of the property and as to the ability of the purchasers to perform their part of the agreement. Appellant's approval of the contract submitted by him and his acceptance and retention of the deposit of $2,000 which constituted part payment estop him from denying the claim of the broker for his commission. Wood & Tatum Co. v. Basler, 37 Cal.App. 381, 384, 173 P. 1109. A broker through whose efforts a binding contract is made has earned his commission. Carrington v. Smithers, 26 Cal.App. 460, 466, 147 P. 225. The execution of a contract of sale by the owner of real property is conclusive proof that he was satisfied as to the qualifications of the purchaser and of his ability to perform the contract, thus rendering the owner liable for the payment of the broker's commission. McNamara v. Steckman, 202 Cal. 569, 572, 262 P. 297.

[6] 3. *Exceptions to rulings on admission of evidence.* After Murphy had testified that in a conversation with Koerner

the latter stated that appellant had signed the agreement and that he, Murphy, later had another conversation with Koerner "in regard to seeing more of the premises" he was asked "What was that conversation?" to which an objection by respondent's counsel was sustained. Objections to other questions relating to conversations between Murphy and Koerner were sustained.

Appellant maintains that Murphy, respondent's salesman, was the agent of the Caliguiris, that Koerner was the agent of appellant, and that therefore the conversations between them as representatives of appellant and respondent were admissible. Whether or not Koerner was appellant's agent is immaterial since there is no evidence that Murphy was the Caliguiris' agent at any time. Murphy was respondent's salesman. By the written agreement appellant made respondent his agent and agreed to pay the latter a commission for consummating the contract. Murphy therefore was the representative of appellant.

[7] Moreover, there is nothing in the record to indicate the subject matter of any conversations that may have been had between Murphy and Koerner nor anything from which it may be determined that any of the conversations were pertinent to the issues involved in the action, or that if answers to the questions had been permitted they would have been favorable to appellant. When an objection to a question is sustained and the question does not indicate that the answer would be favorable to the party making the inquiry the ruling will not be reviewed by an appellate court unless an offer of what was proposed to be proved was made to the trial court (Price v. Price, 71 Cal.App.2d 734, 738, 163 P.2d 501) so that the reviewing court can determine whether the proposed evidence would have been material to the action and beneficial to the party offering it. Sumida v. Pacific Auto Ins. Co., 51 Cal.App.2d 472, 478, 125 P.2d 87. Defendant was not precluded by the rulings of the court from proving any fact material to the case. More than once the court stated that appellant would be permitted to present evidence pertaining to any issue of the case and on one occasion stated "It is the fact you just don't ask your questions properly to prove it."

[8] The only offer of proof made by appellant to which our attention has been called was that he expected to prove that Murphy, representing respondent, and Koerner, representing appellant, had a conversation to the effect that no commission was to be paid except in the event of a sale, that if the sale should be consummated the commission was to be divided equally between respondent and Koerner, and that the receipt given by Murphy to the Caliguiris was used only for the convenience of the parties. Obviously such evidence was inadmissible because (1) it was an attempt to vary the terms of a written agreement by oral testimony; (2) there was no evidence that Koerner was appellant's agent, since the mere listing of the property with Koerner for sale did not create an agency by which Koerner could bind appellant; (3) appellant had already acknowledged respondent to be his agent by the signing of the writing whereby he approved the contract and agreed to pay respondent a commission, and Murphy, as the latter's salesman, was representing appellant.

[9] Appellant maintains that respondent was not his agent at the time the latter received the deposit from the Caliguiris. If this view should be adopted appellant nevertheless ratified the transaction in the writing which created the agency and cannot now disavow it. McBride v. McCartney, 53 Cal.App. 707, 709, 200 P. 756; Johnson v. Krier, 59 Cal.App. 330, 332, 210 P. 966.

[10] 4. *The ruling on the motion for new trial.* At the hearing of appellant's motion for a new trial he proffered an affidavit with reference to an action brought by the Caliguiris against Koerner and appellant Stearns in the municipal court of Long Beach in which they sought to recover the deposit of $2,000 made by them when the agreement was signed. The decision of the appellate department of the superior court was filed on the day before the findings of fact and judgment in the instant case were signed. By that decision the judgment of the municipal court in favor of Stearns was reversed. Appellant sought to present the memorandum of opinion of the appellate department as newly discovered evidence which could not have been pro-

duced at the trial for the reason that the same had not been filed.

Since respondent in the instant action was not a party to the municipal court case the opinion of the appellate department in the latter would not have been admissible if it had been in existence at the time of the trial and cannot be considered as a basis for a new trial in this action.

The judgment is affirmed. The appeal from the order denying appellant's motion for a new trial is dismissed.

MOORE, P. J., and McCOMB, J., concur.

## PEOPLE v. SLOBODION.*

Cr. 2433.

District Court of Appeal, First District, Division 1, California.

Nov. 6, 1947.

Hearing Granted Dec. 4, 1947.

**1. Criminal law 🔑507(7)**

In prosecution for a lewd and lascivious offense against child under 14 years of age the child is not an "accomplice" and need not be corroborated. Pen.Code, § 288.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

**2. Infants 🔑20**

In sexual crimes against children, corroborative evidence is admissible unless objectionable on some specific ground, but is not always essential.

**3. Criminal law 🔑507(7)**

There must be some awareness of the wrongfulness of the act to determine that a child witness who was the victim of a sex crime is an accomplice.

**4. Criminal law 🔑1169(1)**

In prosecution for lewd and lascivious offense against a child under 14 years of age and for sex perversion, testimony concerning child's identification of defendant and how child entered deserted house where offenses were committed and of the commission thereof was corroborative of the child's testimony, and admission of it was not prejudicial. Pen.Code, §§ 288, 288a.

**5. Criminal law 🔑683(1)**
**Witnesses 🔑414(1)**

Where child was confused on cross-examination with respect to certain matters, evidence to show the truth or falsity of the child's testimony on such matters was proper.

**6. Infants 🔑20**

In prosecution for a lewd and lascivious offense against child under the age of 14 years and for sex perversion, evidence sustained conviction. Pen.Code, §§ 288, 288a.

**7. Criminal law 🔑984**

Sex perversion committed at same time as lewd and lascivious offense against a child under 14 years of age was included in the latter offense and separate punishment for prior offense was not permissible. Pen.Code, §§ 288, 288a.

**8. Statutes 🔑241(1)**

A penal statute must be construed favorably to the offender.

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Appeal from Superior Court, Alameda County; Benjamin C. Jones, Judge.

John Slobodion was convicted of a lewd and lascivious offense against a child under the age of 14 years and of sex perversion, and he appeals.

Order in accordance with opinion.

Prior opinion, 181 P.2d 868.

William H. Quinn, of Oakland, for appellant.

Fred N. Howser, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

WARD, Justice.

Defendant was charged in two counts of an information alleging (1) a violation of Penal Code section 288, defining a lewd and lascivious offense against a child under the age of fourteen years, punishable by a term of imprisonment of from one year to life; and (2) a violation of Penal Code section 288a, designated as sex perversion. The violations are based upon two incidents directly pertaining to one occurrence, involving a female child of the age of six years, and consisted (1) of defendant placing his "private parts upon the bare body and private parts" of the child; and (2) "copulating the mouth" of the defendant "with the sexual organ" of the child. Defendant was convicted on each count. It was ordered that the sentence on the second count run concurrently with that on the first.

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* Subsequent opinion 191 P.2d 1.

Two questions are raised by appellant: the sufficiency of the evidence to support the verdict, and the erroneous admission of alleged hearsay evidence claimed to be prejudicial to the rights of the defendant. A portion of such evidence was presented without objection, and the remainder over the objection of appellant. The evidence claimed to be prejudicial consisted in (1) testimony of a police officer that he was taken by the child to a partly deserted house, where the child explained how she entered the house, and the details of the commission of the offense; (2) that the child complainant was permitted to testify that she went down to the City Hall and picked defendant out of a line-up of men; (3) that a witness was permitted to testify that the child pointed out the defendant to the witness on September 15, 1945, the date of the commission of the offense, and the same witness was permitted to testify that thereafter he recognized the defendant in a "line-up"; (4) that a police officer testified that the child, on December 12, 1945, identified the defendant in a "line-up" of ten men in jail as the man guilty of the acts committed upon her on September 15, 1945.

[1] A child, under fourteen years of age, qualified as a witness, need not be corroborated on a charge of a violation of section 288. The reason for the rule is that such child is not classed as an accomplice. Penal Code, sec. 1111, as amended by Stats. of 1915, p. 760; People v. Slaughter, 45 Cal.App.2d 724, 115 P.2d 30. In People v. Putnam, 20 Cal.2d 885, 129 P.2d 367, the defendant was convicted of violating section 288. The court held (page 891 of 20 Cal.2d, page 370 of 129 P.2d) that "No corroboration is required in cases like the present one since it is ordinarily precluded by the very nature of the offense." See, also, People v. Carlson, 73 Cal.App.2d 933, 167 P.2d 812; People v. Campbell, 80 Cal.App.2d 798, 182 P.2d 626.

[2, 3] In sexual crimes against children, corroborative evidence is admissible unless objectionable on some specific ground (8 Cal.Jur. 75), but it is not always essential. There must be some awareness of the wrongfulness of the act to determine that a child witness is an accomplice. Section 288a denounces the performance of a specified act as penal, but no age limit of the victim is designated. "A child under the age of fourteen is not an accomplice whose testimony requires corroboration within section 1111 of the Penal Code, in the absence of clear proof that he knew the wrongfulness of the act committed." 23 Cal.Jur. 402. In People v. Vaughan, 131 Cal.App. 265, 21 P.2d 438, involving a girl eleven years old, wherein the accused was charged with a violation of Penal Code sections 288 and 288a, it was held (page 267 of 131 Cal.App., page 439 of 21 P.2d): "It is not necessary, in order to sustain conviction of either of these offenses, that the testimony of a child of tender years be corroborated, since such a child cannot be classed as an accomplice."

[4] All of the testimony which appellant now claims as inadmissible was corroborative of the child's testimony. If inadmissible, was its admission prejudicially erroneous? Appellant now requests that the alleged hearsay testimony be expunged from the record; that, if considered, it was prejudicially erroneous, and if deleted that the evidence is insufficient to sustain the verdict. This claim requires that this court relate the evidence.

The mother established the child's age. Whatever confusion may have arisen in the mind of the child as evidenced by her testimony relative to the date of the commission of the offense may be set at rest. A boatswain in the United States Coast Guard, not related to the child but living with his wife at the child's home, testified that the child had made a complaint at about 2:00 or 2:30 on the afternoon of September 15, 1945, and shortly thereafter the child pointed toward a man, who was the defendant, walking up the street near their home. In addition, the defendant testified that during the month of September, 1945, work was slack and that he had been laid off on Saturdays and Sundays, and that September 15 was the day on which he was accused of the offense. The defendant at that time denied the commission of the offense, but admitted that he had talked to the child and stated: "I just asked the little girl if she wanted ice cream."

On direct examination the child identified the defendant as the perpetrator of the offense, and testified that when she first saw defendant she was skating in front of her home. He was walking at the time and said "hello." He then took her to a vacant house in the block. "He tried to get in the front way but he had to go back, through the back way." They went into the second room of the house which contained a bed and a table. He took off his hat and coat, laid a bottle of whiskey or wine on the bed, took off part of her clothing and unbuttoned his pants. The defendant then proceeded to perform the acts referred to in counts one and two. The child testified: "I said I wanted to go home but he said, 'Wait for a little minute,' and I said I wanted to go home again, and he said, 'Wait,' and I waited for a little minute and I said I wanted to go home. Finally he let me go. I went out the front door and he went out the back door. I skated up the hill as fast as I could." The child proceeded to her home and made complaint to a married woman who was taking care of her that afternoon while the mother shopped or worked.

Whatever may have been said in People v. Adams, 14 Cal.2d 154, 93 P.2d 146, is not applicable to the facts of the present case. In the Adams case "many" discrepancies are noted. In the present case only a few appear. In the Adams case, among other errors, the mother of the child testified to conversations with the child occurring two years prior to the alleged offense; the district attorney was guilty of misconduct; a child, who was unable to qualify as a witness, was permitted to make statements before the jury. In the Adams case any one of the errors may have been sufficient to reverse the judgment, or each error may have been trivial, but collectively were deemed prejudicial. Like incidents do not appear herein.

In the present case approximately nine months after the commission of the offense the child, on cross-examination, made inconsistent and contradictory statements as to the date, the description of the defendant, including his height, weight and attire. There was some slight confusion relative to the color of the house, and other minor discrepancies appear in the record of the child's testimony. There is no uncertainty in the child's description on the witness stand of the furnishings of the house. The testimony relative to the inside of the house was verified by police officers on the witness stand who examined the house on the day of the commission of the offense. The testimony of the child describing the furnishings was admissible though her statements to the officers on the day of the commission of the offense were not proper evidence. Within an hour after the commission of the offense, and while he was proceeding along the street where he had originally met the child, appellant had in his possession a bottle of intoxicating liquor. In his hand he held an ice cream cone which he admitted to the boatswain witness he had promised the child.

[5] The child was cross-examined relative to the description of the defendant, the house, and the circumstances of the commission of the offense. The record indicates that she was confused on some of these matters. Under such circumstances it was proper thereafter to present evidence to show the truth or falsity of the child's testimony on the matters upon which she was interrogated on cross examination.

[6] The statements of the child to the police officer shortly after the commission of the offense show that she entered the house; giving the location of the table and bed therein; the fact that she identified the defendant some time thereafter in a

line-up; the corroboration of the police officer on this point and that the boatswain identified the defendant in a line-up were unnecessary corroborative evidence that might well have been kept out of the record but was not prejudicially erroneous. The testimony of the child is not inherently improbable. People v. Carlson, supra; People v. Kearney, 20 Cal.2d 435, 126 P.2d 612. In People v. Chaddock, 2 Cal.App.2d 643, 645, 38 P.2d 473, it is said: "Conflict in evidence created by contradiction or otherwise does not constitute inherent improbability nor of itself alone constitute ground for reversal by this court." In People v. Kearney, supra, the court said (page 436 of 20 Cal.2d, page 613 of 126 P.2d): "Minor inaccuracies and uncertainties in the testimony of the prosecutrix do not serve to destroy her credibility as a witness or render her story unbelievable. On the contrary, a reading of the record indicates that a child of such tender years could have related the story with such detail and consistency only if she had actually undergone an impressionable experience such as that narrated by the prosecutrix and which led to defendant's conviction on count two." It was held in People v. Quinn, 12 Cal.App. 2d. 752, 754, 55 P.2d 1277, 1278: "Reviewing judges are, obviously, in no position to determine the credit which should be accorded to witnesses or to weigh their testimony. Undoubtedly for that reason our Constitution * * * provides that the appellate courts are not authorized to review evidence, except where, on its face, it may justly be held that it is insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact, but purely one of law." It is said in People v. King, 53 Cal.App.2d 123, 127, 127 P.2d 605, 607: "However dubious we might be, from a reading of the cold record of this case, as to the verity of the testimony given by the prosecuting witnesses, unless we can justly conclude that their entire testimony is per se unbelievable we are without authority to interfere with the findings of the triers of fact." The claims that the admission of evidence was prejudicial to the rights of the defendant, and that the evidence is insufficient to support the verdict are without merit.

In People v. Greer, 30 Cal.2d 589, 184 P.2d 512, it was held that where the same act forms the basis of a prosecution under Penal Code section 288 and likewise was an act that constituted another crime under any provisions of part one of the Penal Code, separate punishment for the additional offense was not authorized. The reason for the rule is the language used in section 288 as amended in 1937 (Stats. 1937, ch. 545), and the fact that the punishment under section 288 was greater than provided for the other two offenses named in People v. Greer. Penal Code, sec. 261 (1) and Welfare and Institutions Code, sec. 702. The court said (page — of 30 Cal.2d, page 520 of 184 P.2d): "Section 288 now specifically includes acts constituting other crimes and permits a greater penalty for those acts, if they are committed with specified intent, upon a child under 14 years of age." The rule is only applicable when the same act is relied upon for more than one conviction. (page 603 of 30 Cal. 2d, page 520 of 184 P.2d.)

[7, 8] The child in the present case was under fourteen years of age and the acts designated in the two counts occurred as a perpetration of an attempt to commit rape (People v. Esposti, Cal.App., 185 P.2d 866) or an assault with intent to commit rape, Penal Code, sec 220. No charge of rape or of a direct lesser offense, included in rape, is involved in the present case. In the Greer case, the court said (page 604 of 30 Cal.2d, page 521 of 184 P.2d): "To hold that the removal of the prosecutrix' underclothing constitutes an act separate from the rape, however, would be artificial in the present context and would permit double punishment not authorized or contemplated by section 288." In the present case the act set forth in count two as a violation of section 288a constituted an act that was not separated from the facts related in count one, but is a necessarily included offense under the facts of this case, and the evidence is sufficient to base a verdict thereon. Under the holding in the Greer case, therefore, it must be determined to be a violation of section 288. As the penalty provided for a violation of section 288 is imprisonment for "one year to life," and that for violation of section

288a imprisonment for "not exceeding fifteen years," it appears that in the maximum if not the minimum the punishment is greater under the provisions of section 288. Construction of a penal statute more favorable to the offender is ordinarily preferable and is the prevailing rule. People v. Ralph, 24 Cal.2d 575, 150 P.2d 401; People v. Greer, supra. By that rule this court is bound.

The judgment and the order denying defendant's motion for a new trial on count one are affirmed. The judgment and the order denying the motion for new trial on count two are reversed. On count two the trial court is directed to proceed in accordance with the views expressed herein.

PETERS, P. J., and BRAY, J., concur.

82 Cal.App.2d 337

### WADE et al. v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 13343.

District Court of Appeal, First District, Division 1, California.

Nov. 10, 1947.

**1. Municipal corporations 🔑122(2)**

An ordinance prohibiting solicitation on any public street or sidewalk or in any area or doorway or entrance immediately abutting thereon of magazine subscriptions for future delivery is prima facie constitutional.

**2. Constitutional law 🔑240(1)**

Allegations that officers of the city and county of San Francisco had not arrested any other persons who continually violated ordinance, but that they had enforced such ordinance against plaintiffs with intent to discriminate against plaintiffs and plaintiffs' business, sufficiently showed that the plaintiffs had been denied the equal protection of the laws. U.S.C.A. Const. Amend. 14.

**3. Constitutional law 🔑211, 240(1)**

Mere laxness in enforcement of an ordinance does not deny persons against whom ordinance is enforced equal protection of laws, but an enforcement against them with intent to discriminate against their business does. U.S.C.A. Const. Amend. 14.

**4. Appeal and error 🔑917(1)**

On appeal from a judgment following the sustaining of a demurrer to complaint, allegations of complaint must be taken as true for purposes of appeal.

**5. Injunction 🔑85(2)**

The right to carry on an established business is a "property right", and owner of it may enjoin the enforcement of an ordinance on the ground that his business is irreparably damaged by the discriminatory enforcement of the ordinance. U.S.C.A.Const.Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Property Right".

◆

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by John L. Wade, etc., and others to enjoin the discriminatory enforcement of an ordinance by the City and County of San Francisco. From a judgment for the defendants, the plaintiffs appeal.

Judgment reversed with directions.

Henry C. Clausen, of San Francisco, for appellants.

John J. O'Toole, City Atty., and Joseph F. Murphy, Deputy City Atty., both of San Francisco, for respondents.

DOOLING, Justice.

[1] This is an appeal from a judgment which followed the sustaining of a demurrer to the complaint. The complaint is one in equity to enjoin the enforcement against plaintiffs of the same ordinance of the City and County of San Francisco which was attacked by the petitioner in Re Mares, 75 Cal.App.2d 798, 171 P.2d 762. The petitioner in the Mares case was an employee of the appellants and the same attacks that were made on the constitution-

ality of the ordinance in the Mares case have been renewed on this appeal. Since every question so presented was fully discussed and disposed of by us in our opinion in the Mares case we will not burden this opinion with a reconsideration of them further than to restate our conclusion that the ordinance on its face is not invalid or unconstitutional. There are however certain allegations of intentional and deliberate discrimination against the plaintiffs in the enforcement of the ordinance which do state a cause of action for relief. These allegations are here quoted:

> "Many persons other than plaintiffs and other than plaintiffs' agents and employees have, on numerous occasions, violated with impunity the provisions of said ordinance in that they have, on the public streets and sidewalks of said City and County and in areas, doorways and entranceways immediately abutting thereon, solicited, and are continuing to solicit, the sale, to persons on said places, of subscriptions to magazines and periodicals for future delivery, and have sold, and are continuing to sell, to persons on such places tangible personal property to be delivered to the purchasers thereof at subsequent times.
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> * * * * * *
>
> "None of said other persons who have so violated the provisions of said ordinance have ever been arrested or prosecuted, or in anywise molested by defendants, or by either of them, or by any of the agents or representatives of defendants, or of either defendant, or by any of the police officers of said City and County of San Francisco.
>
> "Defendants, their agents and representatives, and police officers of said City and County of San Francisco who act under the authority of said defendant Chief of Police, have at all times had notice and knowledge of said violations of said ordinance by said third parties as aforesaid, and, possessing such notice and knowledge, defendants, their agents and representatives, and said police officers, with intent to discriminate against plaintiffs and plaintiffs' said business, have at all times deliberately refrained from enforcing said ordinance as against said third party violators thereof."

[2] The plaintiffs by these allegations bring their case within the principle first announced in Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, and recently followed by the Supreme Court of this state in Brock v. Superior Court, 12 Cal.2d 605, 610, 86 P.2d 805. The latest statement of that principle that has come to our attention is found in Glicker v. Michigan Liquor Control Commission, 6 Cir., 160 F.2d 96. The court in that case reviewed the decisions of the United States Supreme Court on the subject and reiterated the rule that the intentional and arbitrary discrimination in the enforcement of a statute fair on its face is a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States which entitles the person discriminated against to relief in the courts.

[3, 4] Respondents argue that mere lax enforcement of a law or ordinance violates no constitutional rights. This is a correct statement of the law, but appellants allege more than mere laxity of enforcement. They plead that the ordinance is enforced against them and no others "with intent to discriminate against plaintiffs and plaintiffs' said business." This brings them squarely within the rule announced in Glicker v. Michigan Liquor Control Commission, supra; Snowden v. Hughes, 321 U.S. 1, 11, 64 S.Ct. 397, 88 L.Ed. 497; and Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350, 352, 38 S.Ct. 495, 62 L.Ed. 1154. In each of those cases the distinction between mere laxity of enforcement and intentional or purposeful discrimination is recognized and it is held that while mere laxity of enforcement, although it may result in the unequal application of the law to those who are entitled to be treated alike, is not a denial of equal protection in the constitutional sense, it is otherwise in the case of deliberate or intentional discriminatory enforcement which is a denial of the equal protection guaranteed by the constitution. While we are fully aware that proof frequently falls short of pleading appellants by their pleading have stated a cause of action which if proved will entitle them to relief and for the purposes of this appeal respondents by

their demurrer have admitted the truth of the pleaded facts.

[5] Respondents further argue that equity will not enjoin a criminal prosecution. "It is settled that where a penal statute causes irreparable damage to property rights, the injured party may attack its constitutionality by an action to enjoin its enforcement." Jones v. City of Los Angeles, 211 Cal. 304, 306, 295 P. 14, 16. It is now equally settled that the right to carry on an established business is such a property right. Bueneman v. City of Santa Barbara, 8 Cal.2d 405, 407, 408, 65 P.2d 884, 109 A.L.R. 895. The allegations of the complaint are sufficient to bring the case as pleaded within this rule.

For the guidance of the trial court it is proper to point out that if the proof satisfies the court that the ordinance is being enforced against appellants with intentional discrimination, any injunction issued by the court should be so framed as to permit the future enforcement of the ordinance against all violators without discrimination if the defendants see fit in the proper performance of their duty so to enforce it.

The judgment is reversed with directions to overrule the demurrer to the complaint.

NOURSE, P. J., and GOODELL, J., concur.

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82 Cal.App.2d 417

## DOOLING et al. v. DABEL et al.

Civ. 7396. Sac. 5845.

District Court of Appeal, Third District, California.

Nov. 17, 1947.

**1. Easements 🔑5**

A prescriptive right to an easement in a roadway over the property of another person may be acquired only by clear evidence of adverse use, openly, notoriously and continuously asserted for statutory period of five years and claim of right must be communicated to owner of land, or use of roadway must be so obviously exercised as to constitute an implied notice of adverse claim.

**2. Easements 🔑36(1)**

The burden is ordinarily on one who claims a prescriptive right to an easement in a private roadway over another man's property to affirmatively prove the essential elements thereof.

**3. Easements 🔑36(1)**

Evidence of obvious, open, notorious and continuous use of a private roadway over another man's property for more than five years constitutes prima facie evidence of constructive notice of a claim of prescriptive right thereto, which may require the owner to rebut the presumption by proof that the road was not so used or that it was traveled by permission of the owner.

**4. Easements 🔑37**

When evidence of a prescriptive use of a private roadway over another man's property is conflicting, trier of fact determines from the facts whether prescriptive title thereto has been established.

**5. Appeal and error 🔑1011(1)**

Where evidence of prescriptive use of a private roadway over another man's property is conflicting and there is substantial evidence to support findings of court or jury, conclusions of court may not be interfered with on appeal.

**6. Easements 🔑36(3)**

Evidence that plaintiffs used roadway over defendants' land from time to time, by riding over road on horseback and by driving their cattle thereon in winter season without protest or opposition from defendants and that line of travel varied did not establish plaintiff's title to an easement thereon by prescription particularly in view of evidence that part of road from public highway to buildings on land was constructed and maintained for defendants' convenience and necessity.

**7. Easements 🔑36(3)**

Evidence sustained finding that plaintiffs had not used roadway over defend-

**ants' land continuously, openly, notoriously or adversely or with a claim of right for five successive years and had not acquired title by prescription nor adverse possession to easement in roadway, but had merely used roadway by permission of defendants and their predecessors through neighborly courtesy.**

**8. Easements ⟹6**

A right of way across another person's property can be acquired by prescription only by a definite and certain line of travel for the statutory period of time.

**9. Easements ⟹6**

The mere traveling over land of defendants in various courses and directions for a period of five years does not establish prescriptive title to an easement in a roadway.

◆

Appeal from Superior Court, Colusa County; C. C. McDonald, Judge.

Suit by M. R. Dooling and others, against Herman A. Dabel and others, to quiet title to an easement in a roadway across defendants' farm. From an adverse judgment, plaintiffs appeal.

Judgment affirmed.

McComish & Pettitt, of Colusa, and Blaine Pettitt, Deputy Dist. Atty., of Fresno, for appellants.

Ralph Rutledge, of Colusa, for respondents.

THOMPSON, Justice.

Plaintiffs brought suit to quiet title to an easement in a roadway across defendants' farm, claimed to have been acquired by prescriptive use for a period of more than five years. The trial court adopted findings to the effect that plaintiffs traveled the roadway by mere permission of the owners, and therefore acquired no prescriptive title thereto. Judgment was accordingly rendered against plaintiffs. From that judgment this appeal was perfected.

It is contended that the findings and judgment are not supported by the evidence. No other issue is raised on this appeal.

Defendants' predecessors in title, Mr. and Mrs. J. Will Jones, acquired title to a 1,320 acre farm in Colusa County, purchased from the Estate of Cornelia C. Millington, deceased, for the sum of $17,400, July 25, 1924. They moved to the ranch in November of that year. Mr. Jones died in 1940. Mrs. Jones continued to live on the farm until November, 1944, when she sold it to the defendants, Herman A. Dabel and wife. The grantees immediately took possession and now occupy the premises. In May, 1943, Mrs. Jones leased a part of the ranch to S. Almeida. The Jones ranch adjoins "County Road No. 21" on the west. It contained a dwelling house, barn and other buildings situated some distance from said county road, together with an enclosed corral containing gates. The Jones ranch was fenced. There was a roadway leading westerly from the county road to the dwelling house and barn. Beyond the buildings there was a trail leading westerly. When Mrs. Jones was asked if there was not a roadway westerly from the corral, she said, "If you would call it a road; there is a track there. We always drove our cattle over it and we got wood in over it. While we were there it was never used by the public. * * * It was for our convenience." For a number of years the field beyond the corral was plowed and planted to grain. The trail beyond the corral was often washed out by rain. It was sometimes traveled by the neighbors on horseback. Its course varied from time to time. It was not used by vehicles. To follow said road and trail through defendants' land to plaintiffs' ranch it was necessary to pass through four gates.

Plaintiffs' father filed on a section of government grazing land in 1917. It adjoins defendants' farm on the west. Plaintiffs obtained title to their range in 1924. They reside on the easterly portion of their ranch, and usually graze cattle on the more remote portion. Plaintiffs claim title by prescription to an easement in a roadway "sixteen feet in width." That roadway extended from the county road over defendants' land to their dwelling house and other buildings. From those buildings a trail or pathway led through or around their corral and westerly in a meandering course across a creek and through a gate into plaintiffs' property. Beyond the corral the trail or pathway was sometimes traveled by plaintiffs on foot or on horseback. It was not traveled by vehicles. The course of that trail varied from time to time. It was sometimes washed out, in part, by heavy rains. The defendants plowed and planted fields of grain beyond the corral, which travelers were required to drive their cattle around. It is true that two of the plaintiffs and several other witnesses testified that they traveled on horseback or drove cattle along that so-called roadway, at will, without protest, continuously, several times a month during the winter seasons when cattle were driven into the plaintiffs' grazing ranch. There is a conflict of evidence in that regard. There is convincing evidence that they did not always follow the same trail or course. Dan Biscaro, who was employed for five and a half years on the Browning ranch adjoining defendants' farm on the south, testified that he had observed plaintiffs "taking their cattle in and out of the hills * * * across the Browning land." Plaintiffs concede that they never asserted to the defendants, or their predecessors in title, the claim of a right to travel the roadway or trail. Mr. M. R. Dooling testified as follows: "Q. Did you speak to any of them? [about that right to travel the roadway] A. No. Q. You never had any conversations with them? A. No, not anything about any consent of going through." Mrs. Jones testified that when she was negotiating a lease of part of her premises to S. Almeida, in 1943, Mr. M. Ray Dooling "asked me if I would fix it so that they [plaintiffs] could go through and look after their cattle," and that she refused to make that provision in the lease. She testified that at no time did the plaintiffs "ever make any assertion or claim * * * they had a right to [go] over * * * [defendants'] land to get to their land to the west." Regarding plaintiffs' claim of right to travel the roadway and trail, the following colloquy occurred between Mr. M. R. Dooling and the court:

"The Court: Now, Mr. Dooling, you told the Court earlier in the trial that you claim a right to go through that driveway from the County road up past the house, past the barn, through four gates to get to your property over there where you [are] raising cattle. Will you tell the Court upon what you base that right? The Witness: Well, I have traveled that road for—

"The Court: * * * Did you claim any right to travel it then when you first started to traveling it? The Witness: No, nobody ever—no one, it was traveled there and we used it.

"The Court: When you go through a man's driveway, private driveway and you go right up within 60 feet of his house, past his barn, through four gates, you have a pretty good idea that you haven't any right to go through there, haven't you? The Witness: Well—

"The Court: You were going up through simply because he let you go through, weren't you? The Witness: Well, there was some other people going to other places.

* * *

"The Court: You didn't have any dealings with her that would give you the right to go through there, did you? The Witness: No, I never had any dealings with her but—."

Upon conflicting evidence the court adopted findings favorable to the defendants, determing that plaintiffs had not acquired title by prescription or by adverse possesion to an easement in the roadway or trail; that they had not used the roadway continuously, openly, notoriously or adversely, or with a claim of right for five successive years, but, on the contrary, that they had merely used it by permission of the defendants and their predecessors, through neighborly courtesy. Judgment was accordingly rendered in favor of the defendants.

[1-5] We are of the opinion the findings and judgment are adequately supported by the evidence. A prescriptive right to an easement in a roadway over the real property of another person may be acquired only by clear evidence of adverse use, openly, notoriously and continuously asserted for the statutory period of five years. The claim of right must be communicated to the owner of the land, or the use of the roadway must be so obviously exercised as to constitute an implied notice of the adverse claim. Smith v. Skrbek, 71 Cal.App.2d 351, 356, 162 P.2d 674; Clarke v. Clarke, 133

Cal. 667, 66 P. 10; Grimmesey v. Kirtlan, 93 Cal.App.658, 270 P. 243; 1 Cal.Jur. 608, sec. 81; 2 C.J.S., Adverse Possession, § 45. The burden is ordinarily on one who claims a prescriptive right to an easement in a private roadway over another man's property to affirmatively prove the essential elements thereof. Smith v. Skrbek, supra. It is true that evidence of obvious, open, notorious and continuous use of the roadway for more than five years constitutes prima facie evidence of constructive notice of a claim of prescriptive right thereto, which may require the owner to rebut the presumption by proof that the road was not so used or that it was traveled by permission of the owner. Smith v. Skrbek, supra; Fleming v. Howard, 150 Cal. 28, 87 P. 908; Pacific Gas & Electric Co. v. Crockett Land and Cattle Co., 70 Cal.App.283, 290, 233 P. 370; Shonafelt v. Busath, 66 Cal.App.2d 5, 151 P.2d 873; Wallace v. Whitmore, 47 Cal.App.2d 369, 117 P.2d 926. But, when the evidence of prescriptive use of a roadway is conflicting, it is the sole province of the jury or the trial judge to determine from the facts and circumstances of the case whether the prescriptive title thereto has been established. Where there is a conflict of evidence in that regard, and there is substantial evidence to support the findings of the court or jury, as there is in this case, the conclusions of the court may not be interfered with on appeal. Conaway v. Toogood, 172 Cal. 706, 709, 158 P. 200; McMorris v. Pagano, 63 Cal.App.2d 446, 450, 146 P.2d 944. In the Shonafelt case, supra, it is said at page 8 of 66 Cal.App.2d, at page 875 of 151 P.2d: "' * * * Upon a prima facie showing of title by the plaintiff, it is solely the province of the trial court to determine whether the same has or has not been overcome or dispelled by evidence presented by the defendant.'"

[6, 7] We think the evidence in the present case that the plaintiffs used the roadway and trail over defendants' land, from time to time, by riding over the road and trail on horseback and by driving their cattle thereon in the winter seasons, for several years, without protest or opposition from the owners of the land, does not necessarily establish their title to an easement therein by prescriptive right, particularly since the roadway from the county road to the dwelling house, barn, buildings and corral was apparently constructed, used and maintained for the owner's convenience and necessity. The way beyond the buildings passed through the corral and several gates maintained by the owners for their own use, and thence beyond that point to plaintiffs' land along a course which often varied, which was obstructed by the cultivation of defendants' grain field, and a part of which trail was sometimes washed out by heavy rains, and over which vehicles could not be driven. Even though it be assumed that plaintiffs' use of the roadway to defendants' house and farm buildings established prima facie evidence to title thereto by prescription, that presumption appears to have been adequately rebutted. The plaintiffs never affirmatively asserted an adverse right to use the road. They concede that fact. There is some evidence they did not claim that right, for when Mrs. Jones was about to execute a lease to S. Almeida, to a part of her premises, the plaintiff, M. R. Dooling, asked her to "fix it so that they could go through and look after their cattle," which she refused to do. We think the evidence refutes the presumption that plaintiffs acquired title to the easemen by prescription. In the Smith case, supra, which was similar to the present case in some respects, it is said at page 359 of 71 Cal. App.2d, at page 678 of 162 P.2d, regarding the presumption of prescriptive rights:

"It is a reasonable presumption that since the roadway was constructed by the defendants' predecessor in title, upon his own land, for his personal benefit, as means of access from the public highway to his dwelling house and farm buildings, that the plaintiff's use of the road was merely permissive, as a neighborly convenience. Jensen v. Gerrard, 85 Utah 481, 39 P.2d 1070; 28 C.J.S., Easements, p. 668, § 18(2). In the text last cited it is said:

"'Where a landowner opens up a way on his own land for his own use and convenience, the mere use thereof by another, under circumstances which do not injure the road nor interfere with the owner's use of it, will not in the absence of circumstances indicating a claim of right be considered as adverse, and will not ripen into a prescriptive right no matter how long continued.'"

The preceding declaration of law appears to fit the facts of the present case.

[8, 9] The plaintiffs claim prescriptive title to an easement in a 16-foot roadway along a definite course which is described in the amended complaint. There is persuasive evidence that described course, beyond defendants' farm buildings and corral was not a roadway, but merely a trail or pathway which was sometimes traveled by plaintiffs on horseback in driving cattle through defendants' property to the grazing fields of plaintiffs. It was not used except in the winter seasons. Nor was the described course continuously used. Plaintiffs frequently varied their course driving their cattle along other routes, sometimes along their line fence, and sometimes over the property of another neighbor by the name of Browning. Dan Biscaro, who worked on the Browning property for more than five years, testified that he saw them drive their cattle in and out of their property over the Browning land. Such frequent changes in the route of the claimed easement to a definite roadway tends to refute the prescriptive right thereto. It confirms defendants' claim that the use was merely permissive for the convenience of a neighbor. The rule is uniformly recognized that a right of way across another person's property can be acquired by prescription only by a definite and certain line of travel for the statutory period of time. The route must be confined substantially to a definite course. The mere traveling over land of an owner in various courses and directions for a period of five years will not suffice to establish prescriptive title to an easement in a roadway. (Matthiessen v. Grand, 92 Cal.App. 504, 510, 268 P. 675; 19 C.J., § 77, page 899; 28 C.J.S., Easements, § 18; 143 A.L.R. 1403, note.) In the Matthiessen case, supra, it is said on page 510 of 92 Cal.App., on page 678 of 268 P. that: "The line of travel over a roadway which is claimed by prescription may not be a shifting course, but must be certain and definite. Slight deviations from the accustomed route will not defeat an easement, but substantial changes which break the continuity of the course of travel will destroy the claim to prescriptive rights."

In 19 C.J., § 77, at page 899, it is said:

"To establish a private right of way by prescription the line of the traveled road must be definite. The practice of passing over land in different directions, however long continued, does not establish a right of way by prescription. Any material deviation in the line traveled from the previously traveled way breaks the continuity of the use required to establish a prescriptive right." See, also, 28 C.J.S., Easements, § 18.

Likewise the caption to annotations of authorities on that subject, supported by numerous cases from various jurisdictions, found in 143 American Law Reports, at page 1403, asserts that: "To acquire a right of way by prescription, the user must be confined to one definite and certain line or path. Travel over a tract of land in various courses or directions for the prescriptive period is insufficient to establish a right of way over any particular path."

The plaintiffs in this case have failed to establish an easement in a definite roadway or route through plaintiffs' land to their own property.

The judgment is affirmed.

ADAMS, P.J., and PEEK, J., concur.

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## HOUSMAN v. BOARD OF MEDICAL EXAMINERS OF CALIFORNIA et al.*

No. 13432.

District Court of Appeal, First District, Division 1, California.

Oct. 28, 1947.

Rehearing Granted Nov. 26, 1947.

**1. Administrative law and procedure 🔑511**
**Mandamus 🔑15**

An applicant for restoration of license to practice medicine waived issues involved by making a second application after denial of the first, so that court properly sustained demurrer to cause of action in proceeding for writ of mandate based on the first application.

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* Subsequent opinion 190 P.2d 653.

**2. Mandamus 🔑154(4)**

In proceeding for writ of mandate, petition charging arbitrary and capricious action of Board of Medical Examiners in denying application for restoration of license to practice medicine and alleging specifically that board admitted evidence relating to a drug addict without showing that applicant knew her and that board excluded testimony concerning insanity of one of witnesses against applicant sufficiently alleged arbitrary action of board.

**3. Mandamus 🔑163**

The fact that petition for writ of mandate may have been subject to special demurrer did not justify sustaining demurrer without leave to amend.

**4. Pleading 🔑225(2)**

Where a complaint is not subject to general demurrer it is an abuse of discretion to sustain a demurrer without leave to amend even though complaint may be subject to special demurrer.

**5. Pleading 🔑214(1)**

A demurrer admits truth of allegations of pleading.

**6. Pleading 🔑214(1)**

Although demurrer admits truth of allegations of pleading, facts judicially noticed must be considered as included in the pleading.

**7. Evidence 🔑48**

In proceeding for writ of mandate to review action of Board of Medical Examiners in refusing restoration of license to practice medicine, court in passing upon demurrer was not entitled to take judicial notice of record of proceedings before the board, including the testimony there taken.

**8. Mandamus 🔑143(1)**

Mandamus proceedings to review action of agency or board may be brought within 60 days after mailing or delivery of decision unless agency or board expressly sets an effective date of decision within 30-day period for reconsideration of a decision. Government Code, §§ 11521, 11523.

**9. Mandamus 🔑143(1)**

Under statute providing for judicial review by writ of mandate within 30 days after last day for reconsideration of decision and authorizing reconsideration within 30 days of delivery or mailing of decision or on date set by agency as effectve date of decision, Board of Medical Examiners by denying application to restore license to practice medicine did not thereby make decision immediately effective where it did not appear that decision was ever mailed or delivered to applicant. Government Code, §§ 11521, 11523.

**10. Administrative law and procedure 🔑722**
**Mandamus 🔑143(1)**

Under statute providing for judicial review of decision of agency by writ of mandate within 30 days after last day for reconsideration of decision and authorizing reconsideration within 30 days of delivery of decision or on date set by agency as effective date of decision, mere denial of a petition does not constitute setting of an effective date of decision, but there must be some affirmative declaration by board to shorten time to appeal. Government Code, §§ 11521, 11523.

**11. Administrative law and procedure 🔑327**
**Physicians and surgeons 🔑11(3)**

The provisions of administrative procedure act covering issuance and revocation of professional licenses and specifically including Board of Medical Examiners were also applicable to restoration of license to practice medicine. Government Code, § 11500 et seq.

**12. Mandamus 🔑187(4)**

Where petition for writ of mandate was filed within 60 days of decision to be reviewed, alleged delay in bringing proceeding on to be heard was matter of defense to be raised by answer and determined after a hearing, and would not be considered by reviewing court in absence of consideration by trial court. Government Code, § 11523.

**13. Mandamus 🔑187(4)**

The failure of petitioner for writ of mandate to proceed diligently would not be considered by reviewing court where record failed to disclose that the matter was presented to trial court.

**14. Administrative law and procedure ⇨234**
**Mandamus ⇨3(11)**

The lapse of approximately a year between denial of application for restoration of license to practice medicine and return of order to show cause in proceeding for writ of mandate to review action of medical examiners did not require applicant to file a new petition for purpose of exhausting administrative remedy.

**15. Mandamus ⇨143(2)**

Mere lapse of time would not preclude granting of relief otherwise justified in proceeding for writ of mandate to review action of Board of Medical Examiners.

**16. Mandamus ⇨151(2)**

In proceeding for writ of mandate to review action of Board of Medical Examiners in denying restoration of license, joinder of members of the board with the board as respondents was proper. Code Civ.Proc., § 411.

**17. Mandamus ⇨1**

Mandamus is in substance a personal action against the respondent and not one in rem against the office.

**18. Administrative law and procedure ⇨744**
**Licenses ⇨22**

The court in reviewing action of a state-wide administrative board under application for issuance of a license is not entitled to grant a trial de novo, as in case of revocation of license.

**19. Licenses ⇨38**

A person seeking restoration of a revoked license has no greater rights than a person seeking original license.

**20. Mandamus ⇨157**

On hearing of order to show cause for purpose of determining whether to issue an alternative writ of mandate to a board, the court, if record is present, must examine record in open court with a fair and full opportunity for petitioner to point out alleged arbitrary action of board. Code Civ. Proc., § 1094.5.

**21. Mandamus ⇨157**

In proceeding for writ of mandate to a board, on court's examination of record of board on hearing of order to show cause, petitioner is not entitled to offer evidence or submit anything which was not before the board, and if such evidence is necessary for a complete determination, case must be returned to board. Code Civ.Proc., § 1094.5 (c).

**22. Mandamus ⇨187(10)**

In proceeding for writ of mandate to review action of board of medical examiners in denying restoration of license, where record on appeal failed to disclose that trial court in examining record before board accorded applicant a hearing at which he could argue matters in record, reversal was required in order that a hearing might be held. Code Civ.Proc., § 1094.5; Rules on Appeal, rule 52.

**23. Mandamus ⇨168(2)**

In proceeding for writ of mandate to review action of board of medical examiners in denying restoration of license to practice medicine of applicant whose license had been revoked because of a conviction of a felony, board was not required to prove that applicant was not rehabilitated, but burden of establishing rehabilitation rested on applicant.

Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Judge.

Proceeding by Nathan S. Housman against the Board of Medical Examiners of the State of California and others for a writ of mandate to review the action of the board denying the petitioner's application for restoration of license to practice medicine. From a judgment sustaining without leave to amend the defendants' demurrer, the petitioner appeals.

Judgment reversed and matter remanded with instructions.

Booth B. Goodman, of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for respondents.

BRAY, Justice.

The court sustained without leave to amend a demurrer to, and denied, appellant's amended petition for writ of mandate. The grounds of the demurrer were, that the petition does not state a cause of action; that the alleged cause of action is barred by section 11523 of the Government Code; that it is barred by laches, and that there is a misjoinder of parties.

The main question is whether the amended petition (hereinafter for brevity called the petition) states a cause of action. This question depends principally on whether in passing on the demurrer the court had the right to take judicial notice of the proceedings of the respondent board, including the testimony there taken.

The petition contains two causes of action. The first alleges that on October 18, 1943, the respondent Board of Medical Examiners denied arbitrarily, in abuse of their discretion and without any evidence contrary to that produced by appellant as to his good moral character and his ability in medicine and surgery, except some newspaper reports allegedly considered by the board after submission, an application theretofore made by appellant for the restoration of his license. The second cause of action alleges his medical education, admission to the practice of medicine and surgery in California in 1920, his practice thereof until 1941, the revocation in that year of his license because of his conviction of "a felony, to wit: perjury; preparing false evidence; and presenting false evidence," and the circumstances that during incarceration at San Quentin he was assigned to hospital work, and that since his release in December, 1942, he has continuously studied medicine and surgery and is fully qualified to practice those subjects in California in accordance with the highest standards of the profession; and the filing of a second petition before the board for restoration of his license. It then alleges that the board capriciously and arbitrarily and to cause him loss of time and expense continued the hearing from time to time and to Sacramento, San Francisco and Los Angeles; that at the hearings he presented ample evidence of his good moral character and professional skill; that the board admitted against him evidence which was incompetent, irrelevant and immaterial, and designed to prejudice the board members against him. The petition then lists six instances in which evidence of bad reputation of other persons were given without any foundation as to their connection with appellant. It alleges that the board received the testimony against appellant of a man whom the board knew was insane at the time concerning which he testified, and that the board refused to permit appellant to prove the insanity of that witness. It alleges that appellant had received a certificate of rehabilitation under section 4852.13 of the Penal Code; and that the denial of the restoration of his license was arbitrary, capricious and unwarranted, and a clear abuse of discretion.

On the hearing of the demurrer the respondent contended the petition was defective for the following reasons: first, because the record of the proceedings before the board, including the testimony there taken, shows that the allegations of the petition are not true, and that the court had a right to consider such record in passing on the demurrer, for they contend that in considering a petition to review the action of an administrative board, there is an exception to the general rule as to demurrers in this, that the record of the proceedings of that board are matters of judicial knowledge and therefore, facts alleged by operation of law in every pleading; and secondly, that even without the board's record, the petition does not state sufficient facts because its assertions are not statements of ultimate fact but conclusions of law.

[1] We will consider the second point first. We agree with respondent that the court was right in sustaining the demurrer to the first cause of action, which dealt with a prior application for and denial of restoration of license, as the issues therein involved are moot and waived by appellant's failure to litigate them before, and by, making a second application. While perhaps the petition is not a model of pleading, it did set forth in the second cause of action a number of facts upon which are based the contention that the board acted arbitrarily. For example, it alleged that the board admitted evidence that a certain woman was a drug addict and had a police record, in spite of the fact that the record showed without dispute that

appellant had never known or seen her; that the board refused to permit testimony or records to show that the witness who claimed to have seen appellant give hypodermic injections to two certain people was insane at the time of the alleged occurrences.

[2] On the question of charging arbitrary and capricious action of a board it is difficult to undersand how a petitioner can charge it without using the words "arbitrary and capricious," which respondent contends are conclusions rather than ultimate facts. Taking the petition as a whole, there are sufficient facts alleged, if true, to show an arbitrary action of the board. Pavilion Ice Rink v. Bryant, 58 Cal.App. 584, 209 P. 76.

[3, 4] While the petition is probably subject to special demurrer, that fact does not justify the sustaining of the demurrer without leave to amend. It has consistently been held that where a complaint is not subject to general demurrer, it is an abuse of discretion to sustain a demurrer without leave to amend, even though the complaint may be subject to special demurrer. Wennerholm v. Stanford Univ. School of Medicine, 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358.

[5-7] This brings us to the first and principal point in the case. Respondent concedes that the general rule is that a demurrer admits the truth of the allegations of the pleading. Kingsbury v. Nye, 9 Cal. App. 574, 99 P. 985; Los Angeles City School District v. Odell, 200 Cal. 637, 254 P. 570. But, they contend, there is an exception to such rule, namely, that facts judicially noticed must be considered as included in the pleading. They are correct so far. 21 Cal.Jur. 96; 49 Corpus Juris, 440; Arnold v. Universal Oil Land Co., 45 Cal.App.2d 522, 114 P.2d 408. They then contend, the record of the proceedings before an administrative board, including the testimony there taken, is a matter of judicial knowledge on review of the acts of that board. The case principally relied upon by respondent is the case of French v. Senate, 146 Cal. 604, 80 P. 1031, 1032, 69 L.R.A. 556, 2 Ann.Cas. 756. That was an original proceeding in mandamus to compel the state senate to admit the petitioners as members. They were duly elected senators from their respective districts, but had been expelled from the senate for misfeasance in office. In their petition they charged that the senate did not give them a hearing, afford them a trial, or permit them to make a defense. The real ground upon which the court denied the writ was: "Under our form of government the judicial department has no power to revise even the most arbitrary and unfair action of the legislative department, or of either house thereof, taken in pursuance of the power committed exclusively to that department by the constitution. * * * An attempt by this court to direct or control the Legislature, or either house thereof, in the exercise of the power, would be an attempt to exercise legislative functions, which it is expressly forbidden to do." Having fully decided the case, the court then said: "We think it is proper to say further, out of respect to a co-ordinate department of the government, that, notwithstanding the arbitrary action apparently charged against the Senate by the language of the petition, we cannot give the statements therein contained their full force." It referred to the exception to the demurrer rule which we have mentioned above, and stated that the courts take judicial notice of the public and private official acts of the legislative department of the state. "Among these official acts are included the proceedings by which the petitioners were expelled and which are entered upon the journal of the Senate. We are therefore bound to take notice that charges were preferred against the petitioners in the Senate and were referred by it to a committee for investigation; that the committee reported that it had made the investigation and that the charges were true, and recommended that the petitioners be expelled; that this report was taken up and considered by the Senate; that the petitioners, being then members, had upon such consideration an opportunity to present, or have presented, arguments in their behalf; and that the resolution expelling them was regularly offered and adopted by the Senate." While the dictum in this case went a long way, it is to be noted

that it does not state that the testimony considered by the senate committee can be taken judicial notice of by the court on demurrer. The fact that charges were preferred, that they were referred to a committee, which reported the result of their investigation, finding and recommendation; that the report was taken up and considered by the senate and that the resolution expelling them was regularly offered and adopted, are all the matters noticed by the court. There is a vast difference between taking judicial notice of these matters and of the testimony adduced. Even applying the dictum in the French case, the most that could be said is that the court will take judicial knowledge of the fact that the appellant filed with the board a petition for restoration of his license, that hearings were had and that the board acted, but not that the court will take knowledge of the testimony admitted or refused. The cases cited by respondent hold the following as matters of judicial knowledge: official acts of departments of the state and nation, Land Office records, regulations of the Department of Interior (certain data in the Land Office, such as assignments of oil royalties, the time drilling started or was abandoned on permit properties, dates of leases, etc.) (Arnold v. Universal Oil Land Co., supra, 45 Cal.App.2d 522, 114 P.2d 408); public and private official acts of the legal, executive and judicial departments of this state and of the United States (Sec. 1875, Code Civ.Proc.); reports, records and proceedings of the debris commission and of the state engineer (Gray v. Reclamation District No. 1500, 174 Cal. 622, 163 P. 1024); letter of instructions of the land office to the surveyor-general (Southern Pacific Land Co. v. Meserve, 186 Cal. 157, 198 P. 1055); letters of the general land office (Southern Pac. R. Co. v. Wood, 124 Cal. 475, 57 P. 388; Livermore v. Beal, 18 Cal.App.2d 535, 64 P.2d 987); the consent form used by the State Department of Social Welfare (Adoption of McDonnell, 77 Cal.App.2d 805, 176 P.2d 778); their own record pending in the same court, Brock v. Fouchy, 76 Cal.App.2d 363, 172 P.2d 945. In McPheeters v. Board of Medical Examiners, 74 Cal.App.2d 46, 47, 168 P.2d 65, 66, appears this language: "The record before us consists of a clerk's transcript on appeal. Both counsel have gone outside the record in their briefs and arguments. While it is true that we may take judicial notice of the records of a public agency, as suggested by counsel, they should realize that we should be furnished with some official information of what those records contain as we should not be called upon to take judicial notice of facts of which we are in actual ignorance." It will be noted that the court is not considering the testimony before the board, it is the "record" necessary to enable the court to determine the question before it, namely, the venue of the proceeding.

In the cases cited by appellant as upholding a similar ruling to the one here, it is significant that it was not a case of the court taking judicial notice, but the testimony before the board was expressly made a part of the petition, as in Tobinski v. Board of Medical Examiners, 49 Cal.App.2d 591, 121 P.2d 861, and Hansen v. Board of Equalization, 43 Cal.App.2d 176, 110 P.2d 453, or as in Rinker v. State Board of Medical Examiners, 59 Cal.App.2d 222, 138 P.2d 403, where the parties submitted the testimony before the board to the court by stipulation. Even in the case where the record including the testimony is a part of the petition, or is before the court by stipulation, the petitioner must be given a full and fair hearing on that record. This subject is discussed hereinafter under the heading "Proceedings on Order to Show Cause."

### Cause of Action Not Barred by Section 11523, Government Code.

[8-10] This section provides for judicial review by a writ of mandate within thirty days after the last day on which reconsideration can be ordered. Section 11521 provides that the agency itself may order reconsideration within thirty days of the delivery or mailing of a decision "or on the date set by the agency itself as the effective date of the decision if such date occurs prior to the expiration of the thirty-day period." The petition was filed after thirty days but before sixty days from the date of the decision. Reading these two sections together it appears that after mail-

ing or delivery of decision sixty days is given in which to start mandamus proceedings, unless the agency itself, here, the board, expressly sets an affective date of the decision within the first thirty day period. Respondent takes the position that as the board denied the application to restore the license, the decision became effective immediately, and thereby the board set the effective date as within the thirty day period. There are two answers to that contention: first, it nowhere appears that the decision ever was mailed or delivered to appellant and hence the thirty days would not start to run; and secondly, it is obvious from a reading of section 11521 that a mere denial of a petition is not a setting of the effective date of the decision within the meaning of that section. There must be some affirmative declaration by the board in order to cut short a petitioner's time to appeal.

[11] Respondent contends that the provisions in the Administrative Procedure Act of which the above sections are a part, apply only to proceedings to revoke or suspend professional licenses and not to proceedings to restore them. However, the act expressly includes the board of medical examiners as one of the agencies covered and expressly provides the proceedings to be had for the issuance or renewal of licenses. It is apparent from an examination of the act that the Legislature was providing a method of procedure for all matters of licensing coming before the agencies, including the restoration of licenses.

### No Laches.

[12] It is not contended that the court considered or acted upon this contention. The court's action admittedly was based upon its examination of the testimony and proceedings before the board. The laches contended for here does not appear on the face of the petition. The original petition was filed within sixty days of the decision. The delay complained of is in bringing the matter on to be heard. That is a matter of defense to be raised by answer and to be determined by the court after hearing the reason for the delay, and upon a showing that the other party has been prejudiced by such delay. Goodfellow v. Barritt, 130 Cal.App. 548, 20 P.2d 740. Maguire v. Hibernia Savings & Loan Soc., 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062, and Orwitz v. Board of Dental Examiners, 55 Cal.App.2d 888, 132 P.2d 272, relate to delays in filing the suit. Farnsworth & Ruggles v. California etc. Comm., 79 Cal.App.2d 602, 180 P.2d 363, relates to delay in applying to the commission for certain statements.

### Failure to Proceed Diligently.

[13] Respondent contends that the appellant should be denied relief (whether here or below is not clear), because the proceedings were not carried on diligently. The record fails to disclose that this point was presented to the court below. The action was originally filed on December 1, 1945, in Amador County. It is contended that the judge there being sick was the cause of the delay. After his death and because of the decision in McPheeters v. Board of Medical Examiners, supra, 74 Cal.App.2d 46, 168 P.2d 65 (decided after the petition had been filed about five months), appellant on October 18, 1946, applied for a change of venue to San Francisco which was granted on October 21; the amended petition was filed December 4, after a demurrer to the original petition had been sustained on November 27. The consideration of this delay and the reasons therefor must first be determined by the trial court after issue framed by an answer.

### Failure to Exhaust Administrative Remedy.

[14, 15] The position of the respondent is that as approximately a year expired between the denial of his reinstatement and the return of the order to show cause, it was the duty of appellant to start all over again by the filing of a new petition. Supporting this contention respondent cites Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715, where the court held that until the appeals provided by the administrative procedure set forth in the Unemployment Insurance Act had been taken the court could not review the procedure. The other case cited is Alexander v. State Personnel Board, 22

Cal.2d 198, 137 P.2d 433, which held that the court would not review the proceedings of the State Personnel Board because the petitioners had failed to apply to the board for the statutory rehearing. These cases do not support respondent's contention. Under respondent's theory it would be impossible for a person to ever get a court hearing reviewing the action of an administrative board. By the time the matter could be heard by the courts, it would be necessary for petitioner to start all over again with the board. Such a result would be absurd. The same is true of the contention that the court, if the record before the board justified it, could not grant petitioner relief, simply because of lapse of time.

### Misjoinder.

[16, 17] Respondent contends that the board is the only proper party respondent, because it is the only agency which may afford any relief or take any action in the matter, and hence the joining of the members of the board with it constituted a misjoinder of parties. Boland v. Cecil, 65 Cal.App.2d Supp. 832, at page 840, 150 P.2d 819, 824, cited on this point, merely holds "'Where it is doubtful in what capacity a party sues or is sued, reference may be had to the entire complaint'"; that while the title to the complaint named the official title of only one defendant, "the language of such pleading itself leaves no doubt that the defendants [officials of the Department of Agriculture] are each charged in his official capacity only * * *." 65 Cal.App.2d Supp. at page 840, 150 P.2d at page 824. Reed v. Molony, 38 Cal.App.2d 405, 101 P.2d 175, followed the principle of the Boland case but held that the defendants were being sued in their official capacity when under the facts of that case they could be liable only, if at all, as individuals. These cases are not in point. Mandamus is "in substance, a personal action against the respondent and not one in rem against the office." 34 Am.Jur. 813. This fact is not changed by section 411, Code of Civil Procedure, which provides, in effect, that in proceedings against a state board or commission only the president or certain other officers need be served with summons.

### Proceedings on Order to Show Cause.

Respondent contends that aside from the propriety of considering the board's record in ruling upon the demurrer, the trial court properly considered said record on the hearing of the order to show cause. It is difficult to determine from the record just what did happen at the hearing. On October 30, 1946, based on the original petition filed the preceding November, an order to show cause was issued, commanding respondents immediately after its receipt to restore the right of appellant to practice medicine and surgery, or to show cause before the court on November 14 why they had not done so, and that they "certify at said time and place, petitioner's application, written communications, minutes of the Board, the record, motions, votings and proceedings of said case, and that the same will be inquired into by this Court." Respondent filed a pleading called "Return to Petition for Writ of Mandate, by Way of Demurrer." There is no record of any action of the court on November 14th. On November 27, this demurrer was sustained. The minute order sets forth that the demurrer was "heretofore submitted" and the grounds upon which the demurrer was sustained, but makes no reference to any hearing on the order to show cause other than the hearing of the demurrer. The amended petition was filed in December. Respondent filed a return to this petition and demurred only. On December 18 appears this minute order: "This case coming on regularly this day for hearing. Thereupon counsel for petitioner filed an affidavit. Thereupon the Attorney General objected to the affidavit. Thereupon the Court overruled the objection. Whereupon the Court ordered the case submitted upon filing of briefs 10 & 10. Court changes order to cause submitted for decision, 10 days to file points and authorities, affidavits and offer of proof." What had happened to the order to show cause in the meantime does not appear. The affidavit referred to in the minute order as having been filed does not appear in the record. The court did consider the record of the proceedings before the board. (The word "record" as used by us concerning the proceedings on the order to show cause includes the testimony of all proceedings before the board.) In its memorandum opinion in the clerk's transcript the court said: "This court *has extended its inquiry* as to whether or not the Board acted within its jurisdiction" etc. (Emphasis added.) Whether this was in connection wtih the consideration of the demurrer or was by reason of the order to show cause is not indicated by the record. It would appear that the order to show cause became functus officio on November 14. However, we will assume that the order to show cause was properly continued until December 18.

[18-22] The following cases (McDonough v. Goodcell, 13 Cal.2d 741, 91 P.2d 1035, 123 A.L.R. 1205; McDonough v. Garrison, 68 Cal.App.2d 318, 156 P.2d 983; Hansen v. State Board of Equalization, supra, 43 Cal.App.2d 176, 110 P.2d 453; San Diego Cotton Club v. State Board of Equalization, 139 Cal.App. 655, 34 P.2d 749; Glick v. Scudder, 69 Cal.App.2d 717, 160 P.2d 90), have established the rule that the court in reviewing the action of a statewide administrative board under an application for issuance of a license is not entitled to grant a trial de novo, as is the rule in cases of revocation of license. It is elementary that a person seeking restoration of a revoked license has no greater rights than a person seeking an original license. In re Mash, 39 Cal.App. 548, 179 P. 897. The rule of Laisne v. California State Board of Optometry, 19 Cal.2d 831, 123 P.2d 457; Dare v. Board of Medical Examiners, 21 Cal. 2d 790, 136 P.2d 304; Wyatt v. Cerf, 64 Cal.App.2d 732, 149 P. 2d 309, concerning revocation of licenses, does not apply. But while denying the right of trial de novo, these cases do not hold that the applicant is to be denied the right to a formal hearing on the record of the administrative board, and instead is to receive only an informal examination of such record by the judge in chambers. The record was in court, brought there pursuant to the demand in the order to show cause as authorized by section 1094.5 of the Code of Civil Procedure. As held in McDonough v. Goodcell and the other cases hereinbefore cited, the petitioner was not entitled to a trial de novo. Hence, under subdivision (c) of section 1094.5, the court is limited to a determination of whether the board's findings are "supported by substantial evidence in the light of the whole record." The court must then, if the record is present, on the hearing of the order to show cause and for the purpose of determining whether to issue an alternative writ of mandate, (a matter in the discretion of the court) examine the record. But that examination must be in open court with a fair and full opportunity given petitioner to point out in the record the matters that he claims show the arbitrary action of the board. The petitioner, however, is not entitled to offer evidence, nor submit to the court anything which was not before the board. If the board improperly excluded evidence, and the court, having in mind that the petitioner must affirmatively prove rehabilitation, determines that such evidence was necessary to a complete determination by the board of the application, then the case would have to be returned to the board to consider that evidence. It could not be received by the court. In Patterson v. Board of Supervisors, 79 Cal.App.2d 670, at page 675, 180 P.2d 945, 948, the court said: "There is nothing to indicate that a fair and proper hearing was not accorded the appellant." Rule 52, Rules on Appeal, provides: "If a record on appeal does not contain all of the papers, records and oral proceedings, but is certified by the judge or the clerk, or stipulated to by the parties, in accordance with these rules, it shall be presumed in the absence of proceedings or augmentation that it includes all matters material to a determination of the points on appeal." In view of the record before us, the fact that the proceedings on the order to show cause do not appear to have been reported, indicating that the emphasis was on the claim that the board record should be considered on the hearing of the demurrer rather than as a part of the application for an alternative writ, and the statement by the judge in his memorandum opinion that he had read, considered and studied the record several times, indicates, as petitioner claims, that the court considered the record in his chambers, and that the petitioner was denied the type of

hearing to which he was entitled. The right to a review of the proceedings by which he was denied restoration of his license is a substantial right which a citizen has, and is not met by a hearing or trial at which the record of the proceedings is handed to the judge to consider at his leisure, and in the absence of the party most interested. Whether it be on the hearing of an order to show cause for an alternative writ or at a trial on issue joined, an opportunity must be given the petitioner to point out and argue in open court the matters in the record which he claims show that he was denied a fair hearing, even though he is not entitled, under the decisions, to a trial de novo, or to introduce into evidence the matters which he claims the board improperly decided.

Petitioner claims that he did not receive such a hearing. The record fails to disclose that he did, and it is practically conceded that the examination made by the judge was in the privacy of his chambers. Such is not the hearing contemplated by the law, even though (and this we cannot determine from the record) the points and authorities he was allowed to file after submission may have included his points concerning the alleged abuse of discretion of the board.

Section 1094.5 of the Code of Civil Procedure provides that in mandate proceedings of this character "All or part of the record of the proceedings before the inferior tribunal, corporation, board or officer may be filed with the petition, may be filed with the respondent's points and authorities or may be ordered to be filed by the court. * * * (b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. (c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." However, this section in providing that the record may be filed with the petition, or respondent's points and authorities, or may be ordered to be filed by the court, does not mean that such record may be considered by the court without a full and complete hearing of petitioner's objections to and claims concerning all portions of that record. Here the order to show cause ordered the record to be produced, and had there been a full and fair hearing of that record, petitioner could not complain of the failure of the court to grant a peremptory writ. The record fails to show that such hearing was had.

[23] Inasmuch as the case must be returned to the trial court for further consideration, it is proper to call attention to the fact that it was not necessary for the board to prove that petitioner was not rehabilitated. The burden at all times rests on petitioner to prove that he had rehabilitated himself.

We are expressly not passing on, nor have we considered, the record in the respondent board, nor the claim of arbitrary action by that board. Nor have we considered the question as to whether hereafter, if the trial court should find in favor of appellant, that court should order the board to grant another hearing or should order his reinstatement. These matters are primarily for the trial court to determine.

The court properly sustained the demurrer without leave to amend the first cause of action, but improperly as to the second cause of action, and failed to grant appellant the hearing contemplated by law. The judgment is reversed and the matter is remanded to the trial court with instructions to overrule the demurrer to the second cause of action in the amended petition, giving respondent the right to plead, and to hold a hearing, either on the order to show cause or after issue joined, such hearing to be along the lines herein expressed.

PETERS, P. J., and FINLEY, J., pro tem., concur.

82 Cal.App.2d 315

**NEILSEN v. HOLMES et al.**

**Civ. 3476.**

District Court of Appeal, Fourth District, California.

Nov. 6, 1947.

Rehearing Denied Dec. 3, 1947.

Hearing Denied Dec. 30, 1947.

**1. Appeal and error 🔑1011(1)**

Conflicts in evidence are settled in trial court and are no concern of appellate court.

**2. Principal and agent 🔑178(1)**

Agent's knowledge within scope of his employment is principal's knowledge.

**3. Evidence 🔑66**
**Partnership 🔑311(3)**

A partner, signing contract providing that she approved partnership account attached as exhibit, was charged with knowledge of such account, though she did not read exhibit, and entries in account of words "balance salary" before two other partners' names, put her and her attorney on notice that salaries had been paid and were claimed to have been earned and unpaid for other partners' services to firm, so as to bind her by agreement to pay such salaries.

**4. Partnership 🔑83**

Generally, a partner is not entitled to compensation for services to partnership, in absence of contract provision therefor.

**5. Partnership 🔑83**

A contract allowing partner compensation for services to partnership need not be in writing and may be either express or implied.

**6. Evidence 🔑417(9)**
**Partnership 🔑83**

Where partners' written contract is silent on question of compensation to one partner for services to partnership, agreement to pay such compensation may be established by parol evidence or parties' conduct.

**7. Partnership 🔑83**

Evidence supported trial court's conclusion that two partners were entitled to salaries for services to partnership as manager and bookkeeper.

**8. Partnership 🔑99**

A partner may engage in any other business than that of partnership without being accountable to firm for profits therefrom, except as bound by statutory provisions declaring partners trustees of each other respecting firm property and business, requiring them to act in highest good faith toward each other in conduct of such business, and prohibiting general partner, who agrees to give personal attention to partnership business, from engaging in other business giving him interest adverse to that of firm or preventing him from giving firm business all attention advantageous thereto.

**9. Partnership 🔑68(1)**

Evidence supported finding that lands purchased by managing partner with monies loaned to him personally by banks and repaid by partnership belonged to him and his wife, a copartner, with partnership having no interest therein.

**10. Partnership 🔑315**

A partner was not entitled to accounting by copartners for amount of taxes paid by partnership on its realty and that of such copartners without segregation on partnership books, where tax bills were produced and segregations made at trial and evidence indicated that taxes paid on copartners' property were credited on partnership's indebtedness to them.

**11. Partnership 🔑315**

A partner was not entitled to accounting by copartners for amount paid by partnership to purchase packing house, where such amount was treated as payment to copartner on account for commissions due him from partnership.

**12. Partnership ⚷311(5)**

Evidence supported finding that partnership accounts, listing as partnership liabilities mortgage indebtedness and unsecured indebtedness to one partner, correctly reflected partnership's indebtedness to such partner for money loaned by her to partnership, with interest.

**13. Partnership ⚷311(5)**

Evidence supported finding that there was no fraud, misrepresentation, concealment or mistake in connection with partnership account or execution of partners' contract providing that one partner approved such account.

**14. Eminent domain ⚷152(1)**

A partner owning land independently of partnership, which conveyed some of it to such partner as bonus for extension of loans made by her to partnership, was entitled to share of compensation awarded in eminent domain proceedings for taking of such land and partnership's lands by water district.

**15. Partnership ⚷94, 315**

Contracts between managing partner and others to pool their lands, of which some, listed as such partner's property, were partnership assets, for purpose of condemnation actions, and to share proportionately in compensation awards, were not improper or detrimental to partnership's interest, so that another partner was not entitled to accounting by managing partner for profits from such contracts, in absence of showing that he profited directly and personally therefrom.

**16. Partnership ⚷315**

A managing partner, contracting to purchase land for amount payable from money received by him in proceedings to condemn partnership and other lands, was not liable to account to copartner for profit made by managing partner individually from such contract, in absence of provisions in partnership agreement requiring him to devote all his time to partnership affairs or preventing him from engaging in private business.

Appeal from Superior Court, Riverside County; R. A. Moore, Judge.

Action by Thor H. Neilsen against Lawrence Holmes and others to set aside a contract and require accounting of a partnership's affairs. Judgment for defendants, and plaintiff appeals.

Affirmed.

Raymond E. Parr and Caroline R. Kellogg, both of Los Angeles, for appellant.

Oliver O. Clark and Robert A. Smith, both of Los Angeles, for respondents.

MARKS, Justice.

Plaintiff brought this action to set aside an agreement and for an accounting of the affairs of a partnership which operated under the name of California Carob Plantations. Judgment was rendered for defendants and this appeal followed.

Under date of April 20, 1920, an equal partnership was formed between the F. D. Cornell Company, a California corporation, and Lawrence Holmes for the purpose of developing, planting to Carob trees, and subdividing and selling a large tract of land in Riverside County, California. Some years later, part of this property was taken in eminent domain proceedings by the Metropolitan Water District of Southern California as a reservoir and dam site. Counsel for defendants now characterize this transaction as producing "a real pot of gold at the end of the rainbow of their dreams", and credits these great and unexpected profits as the principal cause of the present litigation. See Metropolitan Water Dist. v. Adams, Cal.App., 99 P.2d 659.

Under date of January 10, 1922, a partnership agreement was entered into between the F. D. Cornell Company, Lawrence Holmes and Neilsen and Harris, a partnership composed of Thor H. Neilsen, the plaintiff here, and Gertrude E. Harris, now the defendant Gertrude E. Harris Holmes. Under this agreement Neilsen and Harris acquired a one-third interest in the partnership and its assets for $5,000.

On July 7, 1922, Mary Taylor bought a 1/6 interest in the partnership from the F. D. Cornell Company. An exhibit to the contract of purchase specified the real estate belonging to the partnership as five tracts, one of 480 acres, another of 105 acres less 30 acres, the third of 220 acres, the fourth of 80 acres, and the fifth of 320 acres.

There were other transfers of interests in the partnership which it is not necessary to detail. It is not disputed that on November 24, 1936, Lawrence Holmes had a ⅖ interest, Gertrude E. Harris Holmes a ⅕ interest, Marie O. Holmes a ⅕ interest and Thor H. Neilsen, or her assignee, a ⅕ interest in the partnership. There was no subsequent change in these percentages except the elimination of the assignee of Thor H. Neilsen from the transaction.

Plaintiff gave notice of dissolution of the partnership about April 13, 1936, and she also demanded an accounting of its affairs. In response to the demand for an accounting there was prepared what is referred to as the "Northrop Account", which purported to be a complete accounting of the affairs of the partnership from January 10, 1922, to July 31, 1936. It contained a detailed list of the assets of the partnership.

Under date of November 24, 1936, Lawrence Holmes and Gertrude E. Harris Holmes, as first parties, and Thor H. Neilsen, as second party, executed a contract to which were attached numerous exhibits including a copy of the Northrop Account. At that time Thor H. Neilsen was represented by at least one of the attorneys who is appearing for her here.

One paragraph of the contract provides in part as follows: "That the first parties claim and represent that the accounting, a copy of which is attached hereto and marked Exhibit G, is a true, correct, and just accounting of the affairs of the California Carob Plantations partnership and of their management of the same, and of the interests of the respective partners therein, and of all of the partnership holdings, and second party hereby accepts, ratifies and approves it as such, and waives all right to hereafter dispute its correctness, and accepts said accounting and statement thereof as contained in said Exhibit G as full, true and correct and as a final accounting to July 31, 1936, and agrees that paragraph marked 1 of this agreement sets forth correctly the respective interests of the members of said partnership on November 28, 1935 * * *."

This action was filed on July 10, 1943. It sought, among other things, a rescission of the contract of November 24, 1936, and an accounting of all the affairs of the California Carob Plantations from January 10, 1922.

Defendants stood upon and asserted the legality, binding effect, fairness and correctness of the Northrop Account and the contract of November 24, 1936. They realized that plaintiff was entitled to an accounting of the affairs of the partnership after July 31, 1936, when large sums of money had been collected from the Metropolitan Water District under a compromise of the judgment in the eminent domain proceedings. They employed Ralph G. Ritchie, a certified public accountant, who prepared a detailed accounting of the affairs of the partnership from July 31, 1936, the date of the conclusion of the Northrop Account. Among many other things it shows that plaintiff had been paid in cash $31,182.37 and that there was "Impounded by order of court to cover disputed claims: In re Thor Nielsen claim $65153.32". Some of the impounded money has been withdrawn with the consent of the court based on stipulations.

After a lengthy trial, findings were made to the effect that there had been no fraud, concealment or mistake in the Northrop Account; that there had been no fraud, coercion, concealment, misrepresentation or mistake in executing the contract of November 24, 1936, from which we have quoted; that plaintiff was bound by its provisions; that the management of the affairs of the partnership by Lawrence Holmes had been fair, equitable and just and in accordance with the rules of law governing a managing partner; that he had not personally profited from his position of managing partner; that the accountings already made were, as slightly modified by evidence, correct, and correctly reflected the condition and affairs of the partnership; that plaintiff had been paid more than she was entitled to as a partner, so that there was no further occasion for further accounting, there being nothing to account for. Judgment was entered for defendants and the impounded moneys were ordered released. No judgment was rendered against plaintiff for return of the overpayments to her which the evidence indicates amounted to $1,542.

Plaintiff presents three grounds for a reversal of the judgment against her, which are as follows:

"First: To the right of plaintiff to an accounting for the period from July 31, 1936, forward;

"Second: To the proposition that all the properties for which an award was made to any of the defendants herein in either of said eminent domain proceedings are partnership assets; and

"Third: To the right of plaintiff to set aside said agreement of November 24, 1936, and said purported accounting as of July 31, 1936, and to obtain an accounting of the affairs of the partnership from its inception."

The arguments presented under the three headings are numerous and varied. They all gather around an attack on the correctness of the Northrop Account and the Ralph G. Ritchie Account which were approved by the trial court and taken as final and conclusive, except as to the exact amount of the overpayment to plaintiff which was reduced by the testimony of Mr. Ritchie from $6,828.27, as shown in his account, to $1,542. It appears from his testimony that this adjustment was made necessary not so much from errors in the account as by the settlement of disputes and withdrawals from the impounded funds between the date of his accounting of February 22, 1943, and the time of trial.

[1] In many particulars the evidence is sharply and flatly conflicting. The trial took several weeks and the reporter's transcript contains 982 pages and does not contain copies of many of the well over one hundred exhibits which are before us. It is obvious that to attempt to summarize the evidence on both sides of a disputed question of fact would be a useless consumption of both time and space, as conflicts in the evidence are settled in the trial court and are no concern of ours. It should be sufficient to state that we have studied the entire record, including those exhibits which seem to bear even remotely on the questions to be decided and will here summarize the evidence which tends to sustain the findings and judgment and, although we have it in mind, will give little attention to conflicting evidence.

The books of account were kept, except for a relatively brief period, by Gertrude E. Harris Holmes upon the suggestion and at the request of plaintiff. That Mrs. Holmes was not an experienced bookkeeper is admitted by her and is obvious from her records. Her accounts were kept in books called journals in which, as she testified, are entries of all transactions of money received and expended by the partnership and correctly reflect its financial transactions. In addition there are bank books issued by the banks through which all money of the partnership passed and the checks withdrawing those funds together with the check stubs. With the help of Mrs. Holmes, who stoutly maintained the correctness and completeness of these records, they furnished the chief basis for the Northrop and Ritchie accounts.

The partnership between the F. D. Cornell Company and Lawrence Holmes was organized under the name of the "Carob Syndicate" by an agreement dated April 20, 1920. It provided that F. D. Cornell and Lawrence Holmes were each to draw a salary of $200 per month.

As we have observed, the partnership of the F. D. Cornell Company, Lawrence Holmes and Neilsen and Harris, was formed by a contract dated January 10, 1922, under the name of California Carob Plantations. It placed on the F. D. Cornell Company and Lawrence Holmes the duty of conveying to Neilsen and Harris, third party in the contract, "in trust for the benefit of all the parties hereto, the title to all of the partnership property including lands, contracts, nursery stock, farming implements and equipment of every kind, to be held and handled by said trustees for and on account of the partnership. 3. To nominate third party as the partner in charge of accounts and authorized to receive and disburse all funds, and handle all matters of detail with reference to the conduct of the business of selling and developing said lands." Neilsen and Harris agreed "to hold the property of the said partnership, formed hereby, in trust for the said partnership; and to convey, release, mortgage, lease, sell, transfer or assign any or all of the said property so held in trust at the request of the majority vote of the said partnership."

The partnership real property was conveyed to Neilsen and Harris who held title for several years. Finally, record title was placed in Lawrence Holmes.

The contract authorized the partners to act as selling agents with commissions to be paid them on the selling prices. It is silent on the question of a partner drawing a salary.

When it became known that the Metropolitan Water District was proposing to acquire a large tract of land for its Cajalco Reservoir and dam (now Lake Matthews) some one conceived the idea that it would be most advantageous to all landowners, including California Carob Plantations, to place title in one person so that it could be shown that the highest and best use of the entire tract was as a reservoir site and dam site which would be very much more valuable than the combined value of the several smaller tracts which could be used only for farming or tree culture. To this end Holmes acquired the record title to several parcels not owned by the partnership. We will have to consider later, transactions concerning four of these parcels. The soundness of this idea was demonstrated when the Metropolitan Water District was compelled to pay a maximum of over $700 per acre for land that had cost the partnership not much more than $50 per acre, and some of it less.

Many of the arguments of plaintiff revolve around and are settled by the answer to the question of whether or not Holmes was entitled to draw a salary of $200 per month. Also, the right of Mrs. Holmes to receive $50 per month for her services is involved.

The partnership agreement is silent on the question of salaries. Mrs. Holmes testified on these matters to the effect that it was agreed, with Miss Neilsen's express consent, that Mr. Holmes was to receive $200 per month for his services and that Mrs. Holmes was to receive $50 per month for her services as bookkeeper. While this was emphatically denied by Miss Neilsen, there is considerable evidence in the record tending to corroborate Mrs. Holmes.

Under the partnership agreement of April 20, 1920, F. D. Cornell and Holmes were each entitled to a salary of $200 per month, and evidently some question was raised about this salary for under date of March 22, 1922, the attorney for Neilsen and Harris wrote to F. D. Cornell Company and Lawrence Holmes in part as follows: "Furthermore, my clients are entitled to an accounting for the $31,000.00 that has been paid in on contracts since June 1920 to Jan 1922. (a period of about 18 months). We have been asking for these things for some time past, but they don't seem to be forthcoming. Mr. Holmes has furnished us with an accounting of $11,000.00 that he has spent for development work, or rather that was incurred because of the development work. He also stated that he had received no salary at all and put in a claim for $200.00 per month from April 1920 to Jany 1922, or a period of about 21 months or $4200.00. Of course, the C. C. P. Co has no objections to this and neither have my clients. But it leaves $20,000.00 still unaccounted for. We understand that Mr. Cornell paid a salary to himself of $4200.00 (which we have no objection to, of course) and which accounts for some of the $20,000.00 but leaving $16,000.00 still unaccounted for."

Of course, as counsel for plaintiff point out, the salary referred to in the letter accrued before Neilsen and Harris entered into the partnership agreement, but it at least shows knowledge of past salary transactions.

Miss Neilsen purchased the interest of Mrs. Mary Taylor in the California Carob Plantations. Under date of January 31, 1924, and before the purchase, Miss Neilsen wrote Mrs. Taylor in part as follows: "I am perfectly satisfied with the way the books of the California Carob Company are being kept, and I do not wish to ask for an audit."

The first entry in the partnership books showing salary paid to Lawrence Holmes is under date of September 12, 1922, and shows salary of $200 paid to Lawrence Holmes for one month. Between that date and January 31, 1924, there are sixteen other entries showing salary paid to Holmes as either $200 for one month or a multiple thereof for more than one month.

Miss Neilsen denied having examined any of the items in any of these account books and there is nothing to contradict her. However, she saw the books and had an opportunity to examine the entries and her blanket endorsement of the accounts in her letter to Mrs. Taylor may have influenced the trial court in its conclusion that Mr. and Mrs. Holmes were entitled to salaries.

A copy of the Northrop Account was attached as an exhibit to the contract of November 24, 1936, from which we have already quoted the blanket endorsement of the Northrop Account by Miss Neilsen. The evidence indicates that this contract was given Miss Neilsen by one of her attorneys in his office, where she signed it.

Under the heading of liabilities, we find the following entries: "Mortgage in favor of Marie O. Holmes $9210.00. Note to Marie O. Holmes $2139.53 * * * Loans to Co. by G. and L. Holmes $1726.00. Balance salary, L. Holmes $17,174.96. Balance Commissions, L. Holmes $5,625.10 * * * Balance Salary G. Holmes $1872.-95." The real estate owned by the partnership was also listed and did not include property claimed to belong to Mr. and Mrs. Holmes individually.

[2, 3] Miss Neilsen admitted signing the contract but denied having read any of the exhibits attached to it. She thought the contract was delivered to her by one of her then attorneys and signed on his advice. It is inconceivable that an attorney would advise his client to sign a contract that he had not carefully inspected, including all exhibits attached to it. The knowledge of the agent within the scope of his employment is the knowledge of the principal, so Miss Neilsen should not rightly brush aside her approval of the Northrop Account on the ground that she had not read it. She must be charged with knowledge of it when she approved it. The words "Balance Salary" clearly indicates that there was a prior salary charged and paid and a not inconsiderable amount was claimed as salary earned and due. These entries should have put the attorney and Miss Neilsen on notice that salaries had been paid and also that salaries were claimed to have been earned and were unpaid. With this knowledge and notice she should not have signed the blanket approval of the Northrop Account if she intended to contest the matter of salaries for Mr. and Mrs. Holmes. She should be bound by her agreement unless it could be avoided for some legal reason. No salary was asked or charged after the Northrop Account.

[4-7] As a general rule a partner is not entitled to compensation for his services to the partnership in the absence of a contract allowing it to him. Such a contract need not be in writing and may be either express or implied, and its existence is usually a question of fact to be determined in the trial court. Where the written contract is silent on the question of compensation to a partner an agreement to pay compensation may be established by parol evidence or by the conduct of the parties. Dugan v. Forster, 104 Cal.App. 117, 285 P. 384; Parigian v. Phillips, 138 Cal.App. 702, 33 P.2d 426. Under these rules, the evidence we have outlined amply supports the conclusion that both Mr. and Mrs. Holmes were entitled to the salaries claimed by them.

Plaintiff seeks to avoid her blanket approval of the Northrop Account in the contract of November, 1936, by claiming fraud and concealment on the part of Mr. and Mrs. Holmes and glaring mistakes to her disadvantage in the Northrop Account. One of her complaints is based on the payment of salaries to Mr. and Mrs. Holmes which we have already considered and disposed of.

[8] Another ground of complaint is the acquisition of land in the neighborhood of the partnership property as the property

of Mr. and Mrs. Holmes and not as partnership property. The duties of a partner towards the partnership and his right to engage in a business of his own is discussed in Dennis v. Gordon, 163 Cal. 427, 125 P. 1063, 1065, as follows: "The law governing partnerships is settled by the Civil Code. The relation between partners is confidential. With respect to the firm property and business, each is trustee of the other. Section 2410. In the conduct of the business, each must act in the highest good faith toward the other, and may not obtain any advantage over him by the slightest misrepresentation or concealment. Section 2411. A general partner, who agrees to give his personal attention to the partnership business, may not engage in any other business which gives him an interest adverse to that of the firm, or which prevents him from giving to the firm business all the attention which would be advantageous to it. Section 2436. Except as thus bound, he may engage in any other business without being accountable to the firm for the profits thereof. Sections 2437, 2438."

[9] Plaintiff points out that Mr. Holmes made personal loans from banks with which he purchased land now claimed as his, some of which loans were paid with partnership funds and another which was secured by a pledge of partnership securities.

The loan last referred to was in the sum of $6,000. Mrs. Holmes, the bookkeeper, testified that this loan was made for the benefit of the partnership and she showed where Mr. Holmes had paid $5,981 of the amount borrowed into the partnership bank accounts from which it was withdrawn by the partnership. She said that the $19 shortage between the $6,000 borrowed and the $5,981 returned to the partnership was undoubtedly interest paid on the bank loan by Mr. Holmes personally.

It should be observed that the evidence indicates that up to the time of the settlement of the judgment in the Metropolitan Water District case the partnership was usually short of funds and resorted to various expedients to pay its expenses.

Mr. Holmes did make personal bank loans that were repaid by the partnership. Mrs. Holmes testified and the books of account show that the partnership was almost continuously indebted to Mr. Holmes on his salary and commission accounts. (This indebtedness had grown to $17,174.96 back salary and $5,625.10 unpaid commissions, as shown in the Northrop Account.) She also testified that whenever the partnership paid a note for Mr. Holmes it took credit for the payment made on the salary due him.

While this may have been an awkward and unusual method of accounting that might and evidently did lead to serious misunderstanding, the partnership suffered no injury from it. If the partnership checks had been made direct to Mr. Holmes and credited on the salary due him there would have been no cause to complain. The method adopted achieved the same result in another manner. Thus this money, if used by Mr. Holmes to purchase additional land for himself and Mrs. Holmes, was his money and not funds of the partnership.

There is nothing to show that at the time of these purchases the partnership had the available funds to make the purchases or desired to do so, so it cannot be said that these purchases by Mr. Holmes gave "him an interest adverse to that of the firm" or prevented "him from giving to the firm business all the attention advantageous to it". Dennis v. Gordon, supra. Therefore, we conclude that the finding to the effect that the property claimed by Mr. and Mrs. Holmes was theirs, with the partnership having no interest in it, finds evidentiary support.

Further, the partnership property was conveyed to Neilsen and Harris, who held title to it for a number of years. Neither this conveyance nor the several writings signed or approved by Miss Neilsen, which contained descriptions of the partnership property, included descriptions of the Holmes property. It was not until after the Metropolitan Water District appeared on the scene that Miss Neilsen made claim to an interest in any of that land.

The loans made by Mr. Holmes personally and secured with partnership assets reached a high of $16,738 on May 11, 1938, during the expensive litigation with the Metropolitan Water District. According to Mrs. Holmes, supported by certain documentary evidence, the funds were used for the benefit of the partnership.

[10] Plaintiff raised the question of taxes paid by the partnership on its real property and that of Mr. and Mrs. Holmes without segregation on the partnership books. The tax bills were produced at the trial and the segregations made. The evidence of Mrs. Holmes indicates that the taxes paid by the partnership on Mr. and Mrs. Holmes' property were credited on the indebtednesses of the partnership to them.

[11] Plaintiff complains of a payment by the partnership to purchase a packing house at Arlington for use of the Carob Growers Products Company which was a corporation organized by Carob Growers to process their products. Ownership of its stock was limited to growers of carobs. Mrs. Holmes testified that this $1,000 was treated as a payment to Mr. Holmes on his commission account so in fact the payment was made by Mr. Holmes instead of the partnership.

Many other transactions are criticized by plaintiff with explanations similar to those already outlined, so there should be no need of detailing each one of them here.

[12] Plaintiff attacks the indebtedness to Marie O. Holmes, which is shown in both the Northrop and Ritchie Accounts as $9,210, secured by a mortgage and $2,139.53 evidenced by a note. The Northrop Account lists as liabilities due to Miss Holmes on January 10, 1922, a mortgage indebtedness of $4,500 and an indebtedness of $1,000 on an unsecured note. The evidence shows several payments of interest to Miss Holmes and the payment in full of the original unsecured note which payments Miss Holmes admitted. She testified that she had loaned the partnership additional sums evidenced by unsecured notes. The evidence supports the inference drawn by the trial judge that both accounts correctly reflected the total indebtedness to Miss Holmes, consisting of money actually loaned by her to the partnership with unpaid accrued interest. Further, as these items appeared in the Northrop Account, they were approved by the contract of November 24, 1936.

[13] Plaintiff produced Frederick A. Pike, a certified public accountant, as a witness in her behalf. He testified at considerable length and found much fault with the Northrop Account, and pointed out what he believed to be many mistakes and inaccuracies. On the other hand, Mrs. Holmes and Mr. Northrop testified to the correctness of the accounting. Also, Mr. Pike reviewed the apportionments made by Mr. Northrop from which the final account was made. He also made spot checks with the books of the partnership. He testified that he found the account substantially correct with his totals only varying between $2,000 and $3,000 from the Northrop totals. Mr. Pike did not make a detailed accounting for the period covered by the Northrop Account. In view of the fact that the Northrop Account covered a period of over fourteen years and six months, involving several hundred thousand dollars, the relatively slight variance in the figures is not surprising.

The testimony of Mr. Pike merely created a conflict with the testimony of other witnesses produced by defendants which was resolved against plaintiff and in favor of defendants. As we have had to remark with monotonous regularity, conflicts in the evidence are addressed to and settled by the trial court. It follows that the finding that there was no fraud, misrepresentation, concealment or mistake in connection with the Northrop Account nor in connection with the execution of the contract of November 24, 1936, finds evidentiary support and cannot be disturbed here.

It follows that the blanket approval of the Northrop Account contained in that contract still binds plaintiff and bars her from contesting the items of that account. Estate of Withington, 60 Cal.App.2d 87, 140 P.2d 482.

Plaintiff also attacks the Ritchie Account and the findings approving it. That account assumed the correctness of the Northrop Account and was a detailed accounting of the affairs of the partnership after July 31, 1936. The assumption of Mr. Ritchie of the correctness of the Northrop Account furnishes one of the principal grounds of complaint of plaintiff as to the correctness of the Ritchie Account. What we have already said disposes of this argument which does not need to be pursued further.

Plaintiff also attacks the Ritchie Account and the apportionment of the moneys received from the Metropolitan Water District in the condemnation cases. She argues that all of the awards to any of the defendants in this action for any of the lands taken were partnership assets and should have been apportioned among the partners in proportion to their partnership interests.

She argues, as we have already observed, that the property claimed as theirs by Mr. and Mrs. Holmes was partnership property. We have already disposed of this question.

[14] Marie O. Holmes also owned property independent from the partnership. The evidence is clear that the partnership had no interest in this land. At least some of it was conveyed to her as a bonus for extension of loans to the partnership which it could not pay. Her right to her share of the awards for this property cannot be questioned.

One of the chief arguments made by plaintiff revolves around substantial profits made by Mr. Holmes under four contracts, one with Paul and Lillie Dale, dated April 8, 1935, two with Arthur S. Holden, dated March 8, 1935, and the fourth, dated March 8, 1935, with John Chambers. We will refer to these respectively as the Dale contract, the Holden contracts, and the Chambers contract. As we have already pointed out, the effort was made to get under one ownership as much of the property as possible in the reservoir and dam site desired by the Metropolitan Water District so as to collect from the district the highest possible price for the land taken. The four contracts were taken in furtherance of this plan.

Mr. and Mrs. Dale owned about sixty acres of land. They agreed to sell this property to Holmes for $10,000, to be paid by him out of any money received by him in the condemnation proceedings, with the further proviso, "that the obligation to purchase said property is binding on said second party" (Holmes) who also agreed to assume all costs, expenses and attorneys' fees in defending the condemnation proceedings. Mr. Holmes performed his part of the contract with a substantial profit remaining, which he claimed as his own.

[15] One Holden contract recited that Holden owned thirty acres and Holmes one hundred sixty acres in section 11; that each party would defend the action as affecting his own land; that the net proceeds received by each party, after paying all costs, expenses and attorneys' fees, should be added together, each party receiving his proportionate share thereof. The other Holden contract was to the same effect except that it recited that Holden owned eighty acres and Holmes 460 acres in section 12. The division in both instances was to be made on the basis of proportionate acreage.

The Chambers contract was similar to the Holden contracts except that it was recited that Chambers owned forty acres and Holmes 120 acres in the northwest quarter of section 7.

Perhaps all, but certainly part of the property described in the Holden and Chambers contracts as belonging to Holmes, was an asset of the partnership. As we have pointed out, these contracts were part of the general plan to unite the several landowners in a common front in the condemnation proceedings. We have been able to find nothing indicating that Holmes profited directly and personally from them. All landowners, including the partnership, received indirect benefits in the increased value placed on their properties and the partnership received its proportionate share. We can see nothing improper in them as the parties merely pooled their described properties for the purpose of the condemnation actions and agreed to share proportionately in the awards. There was nothing in either transaction that was detrimental to any interest of the partnership. In fact, it benefited from them by enabling evidence to be introduced to the effect that the highest and best use of all the land, including partnership property, was for a reservoir and dam site.

[16] The Dale transaction presents a closer question. Holmes individually made a substantial profit. However, as we have already seen, a partner may engage in business other than that of the partnership when the other business does not give him an interest adverse to the partnership nor prevent him from giving its business all the attention that would be advantageous to it, neither of which is made to appear here. The partnership agreement did not require Holmes to devote all of his time to the partnership affairs nor did it prevent him from engaging in private business. The Dale contract bound him individually to pay $10,000 for the land. If Holmes could buy land for himself, as we have held, certainly he could agree to purchase the Dale property as, in purchasing it, he was not acting adversely to the partnership, but in its favor by enabling it to get a high price for its property.

Many other questions are argued by plaintiff which are covered in a general way by what we have already said. We will not further extend this opinion by considering each of them. It should be sufficient to say that the trial judge had a difficult problem before him. It involved an accounting of transactions running over a period of twenty-one years, during which time many hundreds of thousands of dollars were received and disbursed. On an investment of $2,500 the plaintiff received a cash net return of $31,182.27, after there was paid from the gross returns in the condemnation action, total trial expenses and attorneys' fees of over $220,000, not including unliquidated claims in considerable amounts for added attorneys' fees and expenses of litigation. The money to pay these claims was impounded.

Plaintiff's claim that she was entitled to an accounting for the period after the date of the Northrop Account is admitted by defendants. It is satisfactorily met by the Ritchie Account, by the evidence indicating that she has received $1,542 more of partnership funds than she was entitled to, so, as far as she is concerned, there is nothing further to account for. The findings of the trial court based on these facts which it accepted as true, must be regarded as final here.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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82 Cal.App.2d 340

**JENSEN v. LEONARD et al.**

**Civ. 15785.**

District Court of Appeal, Second District, Division 1, California.

Nov. 10, 1947.

Rehearing Denied Nov. 28, 1947.

Hearing Denied Dec. 30, 1947.

**1. Trial 🔑165, 178**

On motion for nonsuit or for directed verdict, trial court cannot weigh the evidence which must be viewed in light most favorable to party against whom nonsuit or directed verdict is sought, and every inference or presumption that may legitimately be drawn from evidence must be accepted by court in favor of such party, and such motion may be granted only when on such consideration of evidence the result is a determination that there is no evidence sufficient to support verdict in favor of that party if one were given.

**2. Malicious prosecution 🔑15**

The primary question to be considered in action for malicious prosecution is the want of probable cause for prosecution complained of.

**3. Malicious prosecution 🔑23, 25(1)**

While malice may be inferred from want of probable cause, want of probable cause may not be implied from the most express malice, and term "probable cause" in law of malicious prosecution means a suspicion founded upon circumstances sufficiently strong to warrant a reasonable person in belief that the charge is true.

See Words and Phrases, Permanent Edition, for all other definitions of "Probable Cause".

**4. Malicious prosecution** ⚷25(3)

The existence of probable cause as defense to malicious prosecution action is not negatived by merely showing that accused was successful at trial of proceedings in securing an exoneration, and not even a conflict on issue of probable cause is created by such result.

**5. Malicious prosecution** ⚷56

The burden of proving malice and want of probable cause in action for malicious prosecution rests upon plaintiff.

**6. Malicious prosecution** ⚷32, 64(2)

Malice as basis for malicious prosecution action may be proved by direct evidence or may be inferred from circumstances, and while malice is not presumed as result of want of probable cause, lack of probable cause is a circumstance from which malice may be inferred.

**7. Malicious prosecution** ⚷25(1)

In determining existence of probable cause for instituting insanity proceedings, measure of knowledge of prosecutor must be applied as of time that proceeding was instituted. Welfare and Institutions Code, §§ 5040, 5047.

**8. Malicious prosecution** ⚷25(1)

In determining existence of probable cause for institution of insanity proceeding, it must be considered whether prosecutor at time he verified petition actually believed plaintiff to be mentally ill and in need of supervision, care or treatment. Welfare and Institutions Code, §§ 5040, 5047.

**9. Malicious prosecution** ⚷71(2)

In action against psychiatrist for damages for allegedly, maliciously and without probable cause filing a verified petition that plaintiff was mentally ill and in need of supervision, care or treatment, evidence established that psychiatrist had probable cause to believe that plaintiff was mentally ill, warranting nonsuit. Welfare and Institutions Code, §§ 5040, 5047.

**10. Trial** ⚷139(1)

Defendant's motion for nonsuit was properly granted, where if verdict against defendant had been found such verdict would have had no support in the evidence and hence would have been against law.

**11. Malicious prosecution** ⚷18(1)

"Probable cause" as defense to action for malicious prosecution does not depend upon possession of facts which satisfactorily prove guilt of accused person, but it is adequate proof of existence of probable cause that one is possessed of information or facts which are sufficient to cause a reasonable person to honestly believe charge is true.

**12. Trial** ⚷139(1)

Jurors are sole judges of the facts, but question whether there is substantial evidence in support of plaintiff's case is a question of law for court.

**13. Malicious prosecution** ⚷71(2)

In action for damages for allegedly maliciously and without probable cause filing verified petition that plaintiff was mentally ill and in need of supervision, care or treatment, plaintiff's testimony was inherently improbable and did not amount to that substantial evidence required to create a conflict on issue of probable cause, and hence defendant's motion for directed verdict was properly granted. Welfare and Institutions Code, §§ 5040, 5047.

**14. Trial** ⚷139(1)

Defendant's motion for directed verdict was properly granted where had verdict been rendered against defendant trial court would have been compelled to set it aside as being without support in the evidence and hence contrary to law.

◆

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Beatrice Jensen against Dr. Thomas H. Leonard and Mantle L. Hood to recover damages for allegedly maliciously and without probable cause filing in the superior court a verified petition that plaintiff was mentally ill and in need of supervision, care or treatment. From a judgment entered upon nonsuit granted as to first named defendant and from a judgment entered upon verdict directed in favor of last named defendant, plaintiff appeals.

Affirmed.

Hector P. Baida and J. Leroy Irwin, both of Santa Monica, for appellant.

Alfred E. Cate and Russell K. Lambeau, both of Los Angeles, for respondents.

WHITE, Justice.

Plaintiff instituted this action to recover damages against defendants for allegedly maliciously and without probable cause, filing in the Superior Court of Los Angeles County a verified petition that she was mentally ill and in need of supervision, care or treatment (Welfare & Institutions Code, secs. 5040, 5047). That pursuant to said petition a warrant was issued for the apprehension and detention of plaintiff in the psychopathic ward of the Los Angeles General Hospital. The complaint further alleges that following such detention for several days in the psychopathic ward, plaintiff was brought before the Superior Court, where after proceedings had in accordance with the law, "Judgment was rendered therein declaring that plaintiff was not insane and was not so far disordered in mind as to endanger the health, person and/or property of herself or others" (Welfare & Institutions Code, sec. 5040). That "said proceedings were thereupon terminated and the plaintiff discharged from custody".

By their answers, defendants denied that in procuring the issuance of process against plaintiff as aforesaid they were actuated by malice or acted without probable cause. Defendant Dr. Leonard also interposed two separate and affirmative defenses, in the first of which he alleged that plaintiff's complaint did not state facts sufficient to constitute a cause of action, and, secondly, that he is a physician-surgeon, licensed to practice his profession in the state of California, specializing in psychiatry and setting forth further facts upon which he based his claim that he "did each and every one of the things herein set forth in good faith * * * and having reasonable cause by reason of said facts and his examination of said plaintiff to believe that she was mentally ill and insane and that it was to the best interest of herself and the community that legal proceedings be instituted."

The cause proceeded to trial before a jury and at the conclusion of plaintiff's case, a motion for a nonsuit was granted as to defendant Dr. Leonard and denied as to defendant Mantle Hood. After both sides had rested the court directed a verdict in favor of defendant Hood. Plaintiff appeals from the judgment entered upon the nonsuit granted as to defendant Dr. Leonard and also from the judgment entered upon the verdict directed by the court in favor of defendant Hood.

[1] We deem it unnecessary to here set forth in detail the rules governing the power of a trial court in granting a motion for a nonsuit or to direct a verdict, as the same has been before the courts of this state on many occasions and is firmly established by a long and harmonious list of cases. Suffice it to say that these limitations include the denial to the court of the right to weigh the evidence and requires that it must be viewed in the light most favorable to the party against whom the nonsuit or directed verdict is sought, and every legitimate inference or presumption that may legitimately be drawn from the evidence must be accepted by the court in favor of such party. It is only when on such a consideration of the evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of that party if one were given, that the aforesaid motions may properly be granted. Gish v. L. A. Ry. Corp., 13 Cal.2d 570, 573, 90 P.2d 792; Newson v. Hawley, 205 Cal. 188, 190, 270 P. 364; Wiswell v. Shinners, 47 Cal.App.2d 156, 159, 163, 117 P.2d 677; Barty v. Collins, 109 Cal.App. 94, 96, 292 P. 979.

The question presented to us for decision is whether on the facts we shall mention the court should have granted a nonsuit as to one defendant and directed a verdict for the other.

The record reveals testimony that plaintiff was an unmarried woman, aged 39 years at the time of her detention. About nineteen years prior thereto she came to live with respondent Mantle Hood, then aged eight or nine years, and his mother Claudia Hood, in Springfield, Illinois. Plaintiff continued to reside with them until 1938 when the Hoods came to California. With the exception of a visit with them in California during December, 1941, plaintiff remained in Illinois until August, 1942, when she came to Santa Monica, California, to reside permanently.

Plaintiff had been employed in the Auditor's Office of the State of Illinois for twelve years prior to coming to California. Shortly after her arrival in this state she obtained employment at North American Aviation Company, which employment continued until November 4, 1943, about a week prior to her detention on the aforesaid charges of being mentally ill and in need of supervision, care or treatment.

In April, 1941, defendant Hood and his mother purchased an unimproved lot in the city of Santa Monica, California, and caused to be erected thereon an apartment house. At that time the Hoods wrote plaintiff concerning her obtaining an interest in the Santa Monica property. She then held a mortgage in the sum of $1,000 against defendant Hood's Springfield property. The Hoods were having "a great deal of financial trouble, having no rents coming in", while financing the apartment house project. During her residence in Illinois plaintiff had forwarded some $4,500 or $5,000 to the Hoods as payment for a one-fourth interest in the property.

Plaintiff became apprehensive and considerably perturbed about the money she had invested with the Hoods, and between January and August, 1943, consulted a firm of attorneys at Santa Monica concerning her interest in the property; was advised by them that in addition to the deed she possessed, she should obtain a bill of sale to a one-fourth interest in the furniture and that she and the Hoods should enter into a definite agreement relating to the joint management of the apartment house and that a proper accounting of its receipts and expenditures should be had. Up to the time of plaintiff's arrest no apartment house income was either paid her or accounted for by the Hoods. Subsequent to her arrest, plaintiff brought an action for partition of said property and for an accounting of the income.

In September, 1943, Mrs. Hood left for a vacation and remained away until after appellant's detention in the psychopathic ward. Before going she had promised to execute the bill of sale, place the management of the house on a businesslike basis and follow other suggestions made by plaintiff's attorney. According to plaintiff's testimony, none of these promises had been fulfilled before Mrs. Hood's departure on vacation.

Defendant Hood remained at the apartment until the Sunday immediately prior to November 12, 1943. On that Sunday plaintiff was crying and defendant Hood asked the reason for it. She replied that his mother had gone away without giving her the bill of sale and further that it appeared to her that she was not likely to get it. To this defendant Hood replied, "Surely, you don't think mother and I would gyp you?" whereupon plaintiff said, "Well, I'm beginning to wonder * * *."

On November 11, 1943, defendant Dr. Thomas A. Leonard whose services had been engaged by defendant Hood and for which Hood paid $30 or $35, called at plaintiff's apartment and stated he was a representative of the firm of attorneys whom plaintiff had consulted. With reference to defendant Dr. Leonard's visit, plaintiff testified: "He said, 'Miss Jensen * * * can I talk to you for a few minutes? You have been to Mr. Taft (plaintiff's attorney) in regard to getting title insurance and a bill of sale. Do you know when they will do that?' Then he asked my age and if my father was alive. I said that had nothing to do with title insurance and bill of sale; I don't think you are what you are supposed to be, you get out of here. I opened the door. He continued to write in his book. I reached over and snatched the page out of the book. I picked up a stool and he backed out of the apartment."

At the trial, plaintiff produced several witnesses including tenants of the apartment house, fellow employees, and other acquaintances who testified that at or about the time of her arrest they "noticed nothing unusual about her conversation, dress or actions", that "there was nothing abnormal about plaintiff's conversation or actions." That plaintiff "was a normal, well-balanced person. That she seemed worried about her interest in the property not being properly protected and that she was going to see a lawyer." A witness who was in charge of the department at North American Aviation in which plaintiff worked, testified that for some fourteen months prior to the time she left such employment, about a week before her detention, "he would see her at least once a day; that plaintiff's work was excellent; that in his opinion she was a normal person". Another witness and mutual friend of plaintiff testified that she had known plaintiff for some three years and that the latter "was absolutely of sound mind and seemed to be perfectly normal."

Defendant Dr. Leonard, called by plaintiff as a witness under section 2055 of the Code of Civil Procedure, testified that he filed the petition under section 5047 of the Welfare and Institutions Code, pursuant to which plaintiff was detained in the psychopathic ward as a person who was "mentally ill and in need of supervision, care, or treatment". That he was a physician-surgeon specializing since 1912 in nervous and mental diseases; that he was licensed to practice his profession in California since 1930. That he came to California to serve as Superintendent of the Pacific Colony at Spadra, a mental institution; in 1931 he became County Psychiatrist for the County Charities of Los Angeles and served in that capacity for twelve years, at which time he entered private practice, specializing in neurological and psychiatric work exclusively. He holds a certificate from the California Department of Institutions appointing him as medical examiner in cases of alleged insanity. That under that certificate he has filed petitions such as the one in the instant case in many proceedings, the number thereof averaging from thirty-five to sixty per month since 1939. That he had never seen the plaintiff or his codefendant Hood until the Tuesday preceding November 11, 1943. That his codefendant Hood was referred to him by the Los Angeles County Psychiatric Department. When the defendant Dr. Leonard first talked to defendant Hood the latter furnished him a case history to the effect that he had known plaintiff herein since he was a boy of eight or nine years; she had lived in his family until he had moved to California; that plaintiff herein had acquired by purchase an interest in the aforesaid apartment building at Santa Monica; that on many occasions while she was in the home of defendant Hood plaintiff had moody spells when she would become melancholy; about six weeks prior to this conversation, plaintiff had told defendant Hood that people were following her about and that she believed defendant Hood "was the cause of it all". Defendant Hood advised defendant Dr. Leanard that he had moved out of the apartment next to plaintiff. That defendant Hood had gone north on a vacation and on his return plaintiff appeared to be considerably disturbed, that he became alarmed and asked her to see a psychiatrist which she refused to do. That defendant Hood advised the witness that he consulted the Los Angeles Psychopathic Department, after which he contacted defendant Dr. Leonard. Defendant Hood also told defendant Dr. Leonard that Mrs. Manuel, one of the tenants in the apartment house, had been called on the phone about 12:30 o'clock in the morning by plaintiff who complained that a "Mr. Bob" was being kept locked up in the garage of the apartment house. Defendant Hood stated to Dr. Leonard that he was afraid of plaintiff; that her attorneys had told her that her title to the Santa Monica property was satisfactory, but that plaintiff continued to ask defendant Hood "when this game of hide and seek was going to stop", and had further charged him with letting "Mr. Bob in by way of a bedroom window".

On November 11, 1943, following his conversation with defendant Hood and after interviewing Mrs. Manuel, defendant Dr. Leonard called at plaintiff's living quarters and was admitted by her. He talked with her some forty-five minutes. That as the interview was drawing to a close he began writing in a notebook information supplied him by the plaintiff, whereupon she grabbed the leaves of the notebook and tore them up. Then she picked up a metal stool and raised it over her head as though to strike him, whereupon he grabbed the stool, put it down on the floor and left the apartment.

Upon the foregoing facts, defendant Dr. Leonard diagnosed plaintiff's condition as a form of dementia præcox and concluded that she was dangerous. Thereupon he filed the foregoing petition. That for the professional services rendered by him he received $30 or $35 from his codefendant.

During the testimony of this witness there was introduced into evidence, without objection, the file in case numbered 76474, entitled, "The People of the State of California, for the best interest and protection of Beatrix Jensen, as a mentally ill person". This file contained the petition filed by defendant Dr. Leonard pursuant to section 5047 of the Welfare and Institutions Code; the certificate of the two medical examiners at the psychopathic ward, one of whom was a member of the Lunacy Commission of Los Angeles County, and the other, Chief Psychiatrist at the Los Angeles General Hospital, who therein certified to the court in the psychopathic hearing that they had examined plaintiff herein on November 13, 1943, and with reference to her "General Physical Condition and Present Mental Status", stated "Says she seems to be having hallucinations and has since last Saturday night. I keep thinking there is someone being chased off the place by a friend of mine. They say there's no such person. Says she had no transportation to work so she didn't go. Says she was under the impression that Mr. Hood was at the bottom of a conspiracy. Someone came up to her at the beach and talked to her and she made something out of it. She heard them order Bob off the place. She freely reveals her mental content in examination and gives a fairly good account of herself". With reference to their "tentative diagnosis" of plaintiff herein, said medical examiners certified that such diagnosis was "Dementia Precox, Paranoid type". The court file also contained a "Psychopathic Department Social Report", signed by G. Dodge, Chief Psychopathic Probation Officer of Los Angeles County, which, among other things, stated that in an interview with plaintiff herein at the psychopathic ward, the latter stated that "She states that she has noticed for the past two months, at work, that there have been notes passed, implications in the conversation, and laughter at times directed apparently towards her, which she believes was due to the belief that she was in love with her boss. She is of the opinion that Mr. Hood told this at the plant, although she has no verification. She believes she has been followed and watched. * * * She is not too convinced that her ideas are correct; believes that she may have let her imagination control her, but realizes that she needs rest and possible care." The recommendation of the Chief Psychopathic Probation Officer was, "Believe patient would be benefited by a period of sanitarium care".

The foregoing presents the state of the record at the conclusion of plaintiff's case in the instant proceeding, at which time the motion for a nonsuit was granted as to defendant Dr. Leonard and denied as to defendant Hood.

During the presentation of his defense by defendant Hood there was introduced into evidence by stipulation the reporter's transcript of proceedings had at the psychopathic hearing before the superior court, from which it appears that on November 17, 1943, pursuant to the foregoing petition filed by defendant Dr. Leonard, the matter came on for hearing in Department 16 of said court, at which time the aforesaid medical examiners and the Chief Psychopathic Probation Officer testified to the facts contained in the foregoing medical certificate and psychopathic department social report. Thereupon the attorney appearing for plaintiff herein at the psychopathic hearing addressed the court, stating that the plaintiff desired "to have this matter dismissed and go voluntarily to some rest home and have care and treatment, * * * she has the insight to recognize that she has something that ought to be taken care of. * * * I have talked to these folks who are her employers and people who worked with her, and while they recognize she has some thoughts that possibly are not so, it seems to me the recognition of that would entitle her to the chance to go voluntarily and if she did not, she could be brought here again and I do feel either the matter should be off calendar or that she, upon her promise to take this treatment—that certainly is satisfactory to Mr. Hood, I think, with whom I talked."

After some discussion participated in by the court, the medical examiners and the Chief Psychopathic Probation Officer concerning the advisability of plaintiff going to Rest Haven Sanitarium, her attorney again addressed the court, saying, "In other words, I would like her to promise the judge that she would go and do this." Her counsel then asked plaintiff herein, "Do you want to do that and will you do that?" to which she responded, "Yes". Thereupon the court stated, "All right, Miss Jensen, I think we will do it that way, we will dismiss the case and you go out with the understanding that you are going to Rest Haven and remain there until you get well. The case will be dismissed with that understanding."

There was testimony that thereafter plaintiff herein did go to Rest Haven Sanitarium, did take treatments and remained there from November 17, 1943, to January 7, 1944. That on March 25, 1945, plaintiff herein sought the professional services of Dr. Thomas J. Cummins, a psychiatrist, visiting him on five occasions, spending an hour and a half on each occasion. This physician testified that she was then suffering from psycho-neurosis, "that is, it is a psycho-neurosis which is characteristic, or, so far as she is concerned, social adjustment. She is fully aware of environment and conditions which she has explained to myself."

Without repeating evidence hereinbefore narrated, the testimony of defendant Hood may be summarized by saying that about May, 1943, he first noticed that plaintiff herein was not careful of her personal appearance, was excitable and would cry without provocation; that "her hair was not well kept, as it has been before, and she was not as well dressed as in the past when she came out here on a vacation." That on one occasion when the witness spoke of a girl with whom he was keeping company, plaintiff herein said, "If you bring that girl back here again I will kill her."

Defendant Hood testified that there had been discussions between his mother, plaintiff and himself concerning the management of the apartment house property, the financial difficulties in connection therewith, and the need of securing additional funds through the medium of a second mortgage on the property "in order to carry it". That the apartment house was opened in February, 1942, and plaintiff arrived in California about August of that year. That plaintiff herein was "very unsatisfied about the whole thing", and was "in a high state of excitement about the building". That about September 12, 1943 plaintiff herein accused defendant Hood of plotting against her and some two or three days later when making a similar accusation, warned him that he "should be careful". A few days later and on a subsequent occasion plaintiff herein accused defendant Hood of having her "shadowed". She again warned him to be careful or he would be sorry. Defendant Hood testified that these accusations were unfounded and he suggested that plaintiff should see a psychiatrist, to which she replied that "if anyone needed a psychiatrist, I did". Defendant Hood then testified concerning his meeting with his codefendant Dr. Leonard and corroborated the doctor's testimony with reference to what he related to the doctor. Defendant Hood testified that he met Dr. Leonard after he had called on Mrs. Dodge, Chief Psychopathic Probation Officer, who recommended defendant Hood to Mr. Gormley, Clerk of the Psychopathic Department of the Superior Court, who in turn referred defendant Hood to Dr. Leonard. Defendant Hood did not recall saying anything to his codefendant Dr. Leonard about filing a petition in reference to plaintiff herein.

Defendant Hood's mother, Mrs. Claudia M. Hood, testified with reference to the financial dealings had between plaintiff herein, herself and her son. That prior to leaving on her vacation about September 7 or 9, 1943, she noticed plaintiff's "unusual conduct". This witness also testified that on an occasion when she was talking with plaintiff herein about defendant Hood bringing a lady friend of his to the house, plaintiff said, "Well, he better not bring that * * *; I won't repeat what she said—bring her here again, or I will kill her." This witness also testified as to an occasion when plaintiff herein picked up an ashtray and "started to throw it at my son and myself". The witness conceded that there was considerable discussion with plaintiff herein concerning the latter's investment in the apartment house project.

In addition to the testimony hereinbefore narrated as given by plaintiff, she testified that in so far as her meeting a man at the beach was concerned, she simply told defendant Hood that a man had approached her and asked for a match but that she did not tell defendant Hood that she was being followed, nor did she tell him that people at the plant where she worked were laughing at her, or that they looked at her when she was walking by. She denied saying anything uncomplimentary about defendant Hood's lady friend and further denied that she had at any time threatened to kill her, stating that all she said was that "I did not want to be nice to her around the house; that he should take her out once in a while instead of bringing her to the house every Sunday, my day of rest." Plaintiff further testified that she had stated to defendant Hood that she did not approve of the way he was managing the place, that she was never informed what the income was, what the outgo was, and never received any money from her investment in the apartment house project. With reference to her meeting with defendant Dr. Leonard, plaintiff testified that he told her he was a representative of the law firm of Tanner, Odell and Taft and asked if he could talk with her for a few moments. After some conversation with reference to her dealings with defendant Hood and his mother concerning the apartment house deal, she testified that defendant Dr. Leonard asked her what was her age and if her father was alive, to which she said, "that had nothing to do with title insurance or a bill of sale; I don't think you are what you are supposed to be, you get out of here. I opened the door. He continued to write in his book. I reached over and snatched the page out of the book. I picked up a stool and he backed out of the apartment." In her testimony plaintiff denied that she told either defendant Hood or defendant Dr. Leonard that she heard voices but that she did tell defendant Hood that she heard some one in the garage. With reference to her conversation with Mrs. Manuel, one of the tenants in the apartment house, plaintiff testified she told her, "I thought I heard someone prowling around the garage. We were not on very good terms and the conversation wasn't very long."

[2-4] The primary question to be considered in an action for malicious prosecution is the want of probable cause for the prosecution complained of. Grant v. Moore, 29 Cal. 644, 648; Bealmear v. Southern California Edison Co., 22 Cal.2d 337, 340, 139 P.2d 20. While malice may be inferred from the want of probable cause, want of probable cause may not be implied from the most express malice. In so far as it is applicable to the law of malicious prosecution, the term "probable cause" has been defined to be a suspicion founded upon circumstances sufficiently strong to warrant a reasonable person in the belief that the charge is true. Haydel v. Morton, 8 Cal.App.2d 730, 48 P.2d 709; Richter v. Neilson, 11 Cal.App.2d 503, 54 P.2d 54; Johnson v. Southern Pacific Co., 157 Cal. 333, 107 P. 611; Lee v. Levison, 173 Cal. 166, 159 P. 438; Selvester v. Kennedy, 137 Cal.App. 250, 30 P.2d 63, and cases therein cited. Nor is the existence of probable cause negatived by merely showing that the accused was successful at the trial of the proceedings in securing an exoneration. Not even a conflict on the issue of probable cause is created by such favorable termination of the prosecution which gave rise to the malicious prosecution action. Haydel v. Morton, supra; Dunlap v. New Zealand F. & M. Ins. Co., 109 Cal. 365, 42 P. 29; Moore v. Durrer, 127 Cal.App. 759, 16 P.2d 676; McKenna v. Heinlen, 128 Cal. 97, 60 P. 668.

[5-8] We shall first give consideration to the motion for a nonsuit which was granted as to respondent Dr. Leonard. The burden of proving malice and want of probable cause in an action for malicious prosecution rests upon the plaintiff. And like any other fact in issue, malice may be proved by direct evidence, or may be inferred from all the circumstances of the case. While malice is not presumed as a result of the want of probable cause, yet lack of probable cause is a circumstance from which malice may be inferred. In the case at bar there was no direct evidence

of malice on the part of respondent Dr. Leonard. Malice, if any, must therefore be inferred from a lack of probable cause or from other circumstances of the various conversations and acts of the parties surrounding the filing of the petition against appellant. The measure of the knowledge of the prosecutor must be applied as of the time that the proceeding was instituted under section 5047 of the Welfare and Institutions Code, which in the case now before us was November 12, 1943. There is also a further requirement to be considered, and that is whether the prosecutor, at the time he verified the foregoing petition, actually believed appellant to be "mentally ill and in need of supervision, care, or treatment" (secs. 5040, 5047, Welfare and Institutions Code).

[9, 10] We fail to find in the record before us sufficient evidence to have justified the jury in finding, had the question been submitted to it, that respondent Dr. Leonard did not in fact believe that appellant was "mentally ill", as that term is defined by section 5040 of the Welfare and Institutions Code. Therefore, the question of his belief was properly determined by the court on the basis of what, under the circumstances, was sufficient to cause a reasonable person to entertain a suspicion of the mental illness of appellant. The burden was cast upon appellant of proving the negative fact of want of probable cause and the existence of malice. The facts upon which respondent Dr. Leonard relied are hereinbefore set forth. True, appellant offered evidence that she was not mentally ill on or before November 12, 1943, and denied statements attributed to her by respondent Hood. But the question before the court was not whether appellant was in fact mentally ill at the time of her detention, but whether or not Dr. Leonard had probable cause to believe that appellant was mentally ill at the time he verified the petition which resulted in her detention, as that term is understood by judges and the legal profession. Jones v. Jones, 71 Cal. 89, 91, 11 P. 817; Good v. French, 115 Mass. 201. Appellant's denial of the truth of statements made by respondent Hood to respondent Dr. Leonard did not create any conflict in the testimony that the latter had such statements before him at the time he interviewed appellant, and that he honestly believed that such statements as to appellant's condition were confirmed by her conduct toward him at the time he personally talked with her. We are, therefore, convinced that in the record before us there is an abundance of evidence, without substantial conflict, to justify a reasonable person, situated as respondent Dr. Leonard was, in assuming there was probable cause to believe that appellant was mentally ill. Such being the case, it was for the trial court to determine, as a matter of law, whether an inference of probable cause was warranted and whether respondent Dr. Leonard did or did not in fact believe that appellant was mentally ill. The action of the trial court in granting a nonsuit as to respondent Dr. Leonard must therefore, under familar rules, be upheld because if a verdict for appellant had been found against respondent Dr. Leonard on the state of the record here presented, such verdict would have had no support in the evidence and consequently would have been against law.

[11] Appellant's contention that the disposition of the proceedings instituted against her creates a conflict in the evidence regarding the existence of probable cause is unavailing because, as heretofore pointed out, even though it be conceded that the proceeding was dismissed and the appellant discharged at the psychopathic hearing, a conclusion which under the record here present is extremely dubious, nevertheless the law is well settled that "probable cause does not depend upon the possession of facts which satisfactorily prove the guilt of an accused person. It is adequate proof of the existence of probable cause that one is possessed of information or facts which are sufficient to cause a reasonable person to honestly believe the charge is true." Moore v. Durrer, supra, 127 Cal. App. page 765, 16 P.2d 676, 679, and cases therein cited.

[12-14] Coming now to a consideration of the directed verdict granted as to respondent Hood, we are confronted with a situation where the case had proceeded beyond the point of a nonsuit and presumably, therefore, appellant had made out a prima

facie case. Respondent Hood was sworn and testified as a witness for appellant in her case in chief. In so doing he testified to statements made and conduct on the part of appellant which generated his belief that she was mentally ill. Other witnesses testified, as hereinbefore narrated, as to the mental illness of appellant. The record of the psychopathic proceeding was also received in evidence. Appellant, however, denied the truth of respondent Hood's testimony concerning her conversations with and actions towards him. Nevertheless, we are persuaded that such denials cannot, in the face of the overwhelming evidence, both oral and documentary, to the contrary, be held to constitute proof of that *substantial* character required to justify the submission of a question of fact to the jury. Estate of Bryson, 191 Cal. 521, 541, 217 P. 525. As was said by this court in Neblett v. Elliott, 46 Cal.App.2d 294, 305, 306, 115 P.2d 872, 879, hearing denied by the Supreme Court: "We are not unmindful of the fact that jurors are the sole judges of the facts, but the question as to whether there is *substantial* evidence in support of the plaintiff's case is in all instances a question of law for the court". We must not be understood as holding that the trial judge, when ruling upon a motion for a directed verdict, is entitled to pass upon the credibility of witnesses, but are merely holding that under the evidence in the record now engaging our attention, the negative testimony of appellant, given to sustain the burden imposed upon her of showing want of probable cause, "is so inherently improbable that it was not entitled to consideration as evidence in the case, and that, if a verdict for the plaintiff should have been founded on it, such verdict would have no support as being against the law." Neblett v. Elliott, supra, 46 Cal.App.2d page 305, 115 P.2d page 879. Whatever may be said concerning appellant's testimony as to business difference between herself and respondent Hood on the question of malice, in so far as the primary question of probable cause is concerned, it must be held that her testimony is inherently improbable and does not amount to that *substantial* evidence required to create a conflict on the issue of probable cause. Had a verdict been rendered in favor of appellant herein against respondent Hood the trial court would have been compelled to set it aside as being without support in the evidence and therefore contrary to law. The motion for a directed verdict in favor of respondent Hood was, therefore, properly granted.

The judgments, and each of them, are, therefore, affirmed.

YORK, P. J., and DORAN, J., concur.

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82 Cal.App.2d 415

**COSBY v. RIMMEL.**

**Civ. 15838.**

**District Court of Appeal, Second District, Division 1, California.**

**Nov. 17, 1947.**

**1. Trial 🔑127**

In action for injuries arising out of automobile collision at intersection, defendant's statement, allegedly made to plaintiff at scene of accident, that defendant was covered by insurance, was properly excluded as against contention that the statement was admissible as an admission that accident occurred through defendant's fault.

**2. Automobiles 🔑244(11)**

In action for injuries arising out of automobile collision at intersection when defendant making a left-hand turn collided with automobile in which plaintiff was a passenger approaching from opposite direction, evidence sustained verdict for defendant.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by Evelyn Cosby against William Elmer Rimmel, also known as W. E. Rimmel, for injuries arising out of an automobile collision at insection. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

Benjamin Lewis, of Los Angeles, for appellant.

Parker, Stanbury & Reese and Richard E. Reese, all of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal by plaintiff from the judgment following the verdict in a personal injury action.

The record reveals that defendant was driving south on Alameda Street in Los Angeles and made a left-hand turn at 134th Street. At the time the turn was made defendant's car was in low gear; the proper signal was given; no violations of the motor vehicle laws were committed. At the same time, "An automobile of a third person, Mrs. Anderson, was in the intersection of 134th Street prior to making a left turn into a gas station at the northwest corner of 134th Street, and was between plaintiff's and defendant's cars"; Mrs. Anderson's car was traveling north on Alameda. The car in which plaintiff was a passenger was driven by Mrs. Laseter and was also traveling north on Alameda. The defendant's car and Mrs. Laseter's car collided at the intersection. Defendant was traveling 5 or 7 miles per hour; Mrs. Laseter about 25 miles per hour. At the time defendant made the turn, Mrs. Laseter's car was 175 or 180 feet from the intersection. The accident occurred about 8 a. m. Plaintiff suffered a broken rib.

Appellant's contention on appeal that, "The judgment is against the law" and "is not supported by the evidence," is without merit.

[1] It is also contended that the trial court erred in "excluding defendant's admission that the accident occurred through his fault." The alleged error refers to the exclusion of defendant's statement said to have been made to plaintiff at the scene of the accident, namely, "I have insurance, I am covered." In the light of the many decisions on the subject of insurance in connection with actions for damages, the ruling was proper. The instructions on the subject about which appellant complains, were not misleading in the circumstances.

[2] The only evidence of the collision consisted of the testimony of plaintiff and defendant; Mrs. Laseter did not testify. The question of fact for the jury's determination was not complicated and the verdict is supported by the evidence as a matter of law. The record presents no prejudicial errors.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

30 Cal.2d 871

## In re PEARSON.

Cr. 4788.

Supreme Court of California, in Bank.
Nov. 14, 1947.

**1. Criminal law 🔑622(2)**

Defendant could not complain of refusing him separate trials under charges of committing 17 offenses on six victims during a single month, all while armed with pistol, comprising kidnaping, kidnaping for robbery, robbery, assault with deadly weapon and violation of Vehicle Code. Vehicle Code, § 503; Pen.Code, §§ 209, 644, 954.

**2. Indictment and Information 🔑130**

Joinder of distinct offenses is proper if there is a common element of substantial importance in their commission. Pen. Code, § 954.

**3. Habeas corpus 🔑30(1)**

Consolidation or severance for trial is a "procedural" and not a "jurisdictional question" and hence error therein is not ground for habeas corpus. Pen.Code, § 954; Const. art. 1, § 7.

See Words and Phrases, Permanent Edition, for all other definitions of "Jurisdictional Question" and "Procedural Question".

**4. Jury 🔑31(11)**

Allegedly improper joinder of numerous offenses for trial did not deprive defendant of jury trial. Pen.Code, § 954; Const. art. 1, § 7.

**5. Criminal law 🔑1202(1)**

The offense of "feloniously taking, stealing and driving away" automobile under Oregon statute is substantially equivalent to California offense of grand theft, committed by taking automobile, for purpose of determining habitual criminality. Pen.Code, § 484, as amended by St.1927, p. 1046; § 487, as amended by St.1929, p. 365.

**6. Criminal law 🔑1202(1)**

Under Washington statute condemning entry of dwelling house "with intent to commit some crime therein," the least adjudicated elements of the offense are not equivalent to elements of the similarly denominated California offense of burglary, requiring intent to commit grand or petit larceny or felony, and hence conviction under Washington statute would not support determination of habitual criminality under California statute. Pen.Code, §§ 459, 644, and subd.(c).

**7. Habeas corpus 🔑85(1)**

Evidence in habeas corpus proceeding did not establish that habitual criminal statute had been administered capriciously or in such a way as to discriminate against defendant individually or as member of the class of those who plead not guilty. Pen. Code, § 644; Const. art. 1, § 7.

**8. Habeas corpus 🔑30(3)**
**Kidnapping 🔑6**

One convicted of kidnaping for purpose of robbery was legally imprisoned for life without possibility of parole, so that his status as habitual criminal could not affect term of his imprisonment, and hence error in determining habitual criminality was not ground for habeas corpus. Pen. Code, §§ 209, 644.

◆

Habeas corpus proceeding on the application of Clarence M. Pearson, for release from conviction of substantive offenses and determination that petitioner was an habitual criminal.

Writ discharged and petitioner remanded.

Clarence M. Pearson, in pro per.

Fred N. Howser, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

By application for the writ of habeas corpus petitioner attacks the validity of judgments of conviction of eight substantive offenses and the determination that he is an habitual criminal. We have concluded that the judgments of conviction of the substantive offenses are valid but that one of the three prior convictions recited therein is not competent to support a determination of habitual criminality. One of the substantive judgments is upon a verdict by which a jury found that petitioner was guilty of kidnaping for the purpose of robbery and had inflicted bodily harm upon his victim, and fixed punishment as imprisonment in the state prison for life without possibility of parole. (Pen.Code, § 209.) Since petitioner is legally confined under this judgment we have concluded, further, that the fact that he is an habitual criminal previously twice, rather than three times, convicted of offenses enumerated in section 644 of the Penal Code cannot affect the term of his imprisonment.

I

Petitioner first contends that he was, in effect, deprived of the right to trial by jury[1] because he was tried at the same time on 13 assertedly unrelated felony counts, and that if section 954 of the Penal Code permits such joinder it is unconstitutional. That section provides that an indictment "may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts * * *. The prosecution is not required to elect between the different offenses or counts * * * but the defendant may be convicted of any number of the offenses charged * * *; provided, that the court in the interest of justice and for good cause shown, may, in its discretion, order that the different offenses or counts * * * be tried separately * * *." This court has rejected the contention that the section violates either the federal or the state Constitution by making possible the deprivation of the right to trial by jury as such right existed at common law. (People v. Kelly (1928), 203 Cal. 128, 129, 133-135, 263 P. 226; see Ashe v. United States ex rel. Valotta (1926), 270 U.S. 424, 46 S.Ct. 333, 70 L.Ed. 662.)

[1-4] The information upon which petitioner was brought to trial charged four offenses committed against one Oferman on November 15, 1939,[2] five offenses committed against four other victims on November 18, 1939,[3] and four offenses committed against one Afornin, a sixth victim, on December 8, 1939,[4] all committed while petitioner was armed with a deadly weapon, a pistol. Petitioner's objections to such joinder, originally presented by motion for a separate trial on each group of charges, were rejected by the trial court and, on appeal, by the District Court of Appeal. (People v. Pearson, supra, pages 618, 619 of 41 Cal.App.2d, 107 P.2d 463.) His present objections (which, as appears from what already has been stated, are not precisely those that he made before the District Court of Appeal) must also be rejected. Even on appeal, it appears, they would not have been cause for reversal. Joinder of distinct offenses is proper "if there is a common element of substantial importance in their commission." (People v. Scott (1944), 24 Cal.2d 774, 778, 151 P.2d 517, 519. The consolidation of a group of charges similar to those against petitioner was upheld in People v. Duana (1942), 21 Cal.2d 71, 74-77, 130 P.2d 123, where the "common element" was a plan to rob managers of Safeway Stores. In any event the question of consolidation or severance

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[1] It is not disputed by respondent, and we assume for the purpose of this proceeding, that the question of deprivation of this right, guaranteed by the state Constitution (Art. I, § 7), can be raised by application for the writ of habeas corpus.

[2] Kidnaping for the purpose of committing robbery and that the victim was shot by petitioner; robbery; assault with a deadly weapon with intent to commit murder; violation of section 503 of the Vehicle Code. Petitioner was acquitted of these charges.

[3] Robbery; two charges of kidnaping; two charges of assault with a deadly weapon. One of these assault charges was dismissed. Petitioner was convicted of the remaining four offenses in this group. It appears from the opinion on appeal (People v. Pearson (1940), 41 Cal.App.2d 614, 617, 107 P.2d 463) that such four offenses were committed at the same time and place.

[4] Kidnaping for the purpose of committing robbery and that the victim was shot by petitioner; robbery; assault with a deadly weapon with intent to commit murder; violation of section 503 of the Vehicle Code. Petitioner was convicted of the first and last mentioned offenses in this group and of lesser offenses included within the assault and robbery charges.

is procedural and not, as petitioner contends, jurisdictional (Id., page 78 of 21 Cal.2d, 130 P.2d 123), and, as stated above, joinder does not deprive a defendant of the right to jury trial (Id., page 77 of 21 Cal.2d, 130 P.2d 123).

II

The information alleged, petitioner admitted, and the trial court found, that petitioner had suffered three previous convictions of felony for each of which he had served a term of imprisonment in a state prison. Petitioner (relying upon such cases as In re Seeley (1946), 29 Cal.2d 294, 176 P.2d 24; In re McVickers (1946), 29 Cal.2d 264, 176 P.2d 40; In re Harincar (1946), 29 Cal.2d 403, 176 P.2d 58; and In re Wolfson, (Cal.Sup. (1947), 180 P.2d 326) contends that two of these prior convictions are not competent to support the trial court's determination that he is "an habitual criminal under section 644 Penal Code." The last-cited cases establish that "a petitioner may attack and secure relief in habeas corpus from an erroneous adjudication of habitual criminal status where the facts appearing, either from the face of the record or by satisfactory proof, show that as a matter of law the prior conviction is of a crime which does not meet the definition of an offense included in said section 644." (In re Seeley, supra, 29 Cal.2d 294, 176 P.2d 28.)

[5] The first attacked prior conviction, according to the judgments of conviction of the substantive offenses, was of "larceny of auto, a felony," in Oregon in 1931. It appears from copies of the Oregon indictment and commitment [5] that the conviction was upon petitioner's plea of guilty to the charge that he did "feloniously take, steal and drive away" an automobile. In California the pertinent statutes provided that "Every person who shall feloniously steal, take * * * or drive away the personal property of another * * * is guilty of theft" (Pen.Code § 484 [Stats.1927, p. 1046]) and that grand theft is committed "When the property is taken is an automobile" (Pen.Code, § 487 [Stats.1929, p. 365]). The Oregon offense, therefore, is substantially equivalent to the California offense of grand theft. Petitioner urges that here, as in Re Connell (1946), 68 Cal.App.2d 360, 156 P.2d 483, 484, the foreign offense of which he was convicted was equivalent only to the California offense, not enumerated in section 644 of the Penal Code, which is denounced by section 503 of the Vehicle Code; i. e., the taking of a vehicle without the consent and in the absence of the owner "with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle, whether with or without intent to steal the same." The Connell case does not support petitioner's contention, for the foreign crime there considered was the offense (not substantially equivalent to grand theft in California) of "depriving" an owner of an automobile "by taking possession and driving away," an offense of which intent to steal was not an element.

[6] The second attacked prior conviction, according to the judgments of conviction of the substantive offenses, was of "burglary, second degree, a felony," in the State of Washington in 1925.[6] Among the manners in which, under the Washington statute, such offense could be committed was by entry of the dwelling house of another "with intent to commit some crime therein." (Rem.Comp.Stat. § 2579.) A certified copy of the Washington information shows that the burglary was alleged to have been committed in this manner. In California to constitute the offense of burglary there must have been an entry with intent "to commit grand or petit larceny or any felony." (Pen.Code, § 459 [Stats.1913, p. 228].) Therefore, the least adjudicated elements of the Washington offense are not equivalent to the elements of the similarly denominated California offense enumerated in section 644 of the

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[5] The Attorney General, on oral argument, conceded that such copies, which are attached to the petition as exhibits, are correct.

[6] It appears from a copy of the Washington judgment and commitment, attached to the petition as an exhibit and conceded by the Attorney General to be correct, that the conviction was upon petitioner's plea of guilty to the charge of "Second Degree Burglary."

Penal Code and the Washington conviction is not competent to support a determination of habitual criminality under that section. (People v. Richardson (1946), 74 Cal.App.2d 528, 540, 169 P.2d 44.)

### III

Section 644 provides that persons within its purview "shall" be adjudged habitual criminals but (par.(c) "that in exceptional cases * * * the court may, in its discretion, provide that the defendant is not an habitual criminal." Petitioner contends that he has been denied the constitutional right to equal protection under the law because the trial courts of this state assertedly apply paragraph (c) of section 644 either "upon mere whim and caprice" or discriminatively against defendants who stand trial rather than plead guilty. To show that the statute was so administered petitioner presents certain evidence outside the record of conviction. (See In re Bell (1942), 19 Cal.2d 488, 501, 122 P.2d 22, and cases there cited, holding that such evidence will be received in a habeas corpus proceeding where it is material to the determination of whether the convicted petitioner has been deprived of a fundamental constitutional right; cf. People v. Keilly (1942), 54 Cal.App.2d 764, 768, 129 P.2d 939, holding that such evidence, in support of a contention substantially similar to petitioner's, may not be received on appeal.)

Petitioner presents copies of judgment rolls of nine other convicts sentenced by the judge who sentenced petitioner. Examination of these judgment rolls does not disclose, as petitioner contends, that such judge applied his power under subdivision (c) of section 644 capriciously or that he discriminated against defendants such as petitioner because they pleaded not guilty. Of the ten convicts whose judgment rolls are before us only one, petitioner, was convicted of a primary offense constituting a crime of violence and only one, petitioner, was convicted of more than one primary offense. These facts, no doubt, were considered by the trial court when it determined petitioner's status. Furthermore, there is nothing to show that the determinations as to the habitual criminal status of these ten men[7] were representative of the determinations as to all defendants sentenced by this judge.

[7] Petitioner also presents copies of certain charts prepared by a classification and parole officer as part of a report to the warden of Folsom State Prison, where petitioner is confined. Such charts were compiled after examination of the judgment rolls of the 2,676 convicted persons sentenced during the period from 1927 through 1944 who could have been determined to be habitual criminals. Of these persons, according to Chart 1, only 382 were "sentenced as habitual criminals"; the remainder were "not so sentenced." From this it does not appear whether such remainder were expressly found by the trial courts to be *not* habitual criminals. If there are not such express findings, and if there are findings that such remaining convicts suffered competent prior convictions or if such prior convictions were alleged and admitted, then those convicts are punishable as habitual criminals just as are the 382 convicts whose habitual criminal status was expressly found. (In re Boatwright (1932), 216 Cal. 677, 683, 684, 15 P.2d 755; People v. Vaile (1935), 2 Cal.2d 441, 444, 42 P.2d 321; see In re Basuino (1943), 22 Cal.2d 247, 138 P.2d 297.) Thus it does not appear from Chart 1 how many persons among those eligible are in fact being punished as habitual criminals. The same is true of Charts 3 and 5. Furthermore, although petitioner is one of the men whose cases are tabulated in Charts 1 and 3, Charts 2, 4 and 5 have nothing to do with the legality of his imprisonment. Therefore, petitioner has failed to show that section 644 has been

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[7] Of those who apparently could have been sentenced as habitual criminals, five who pleaded guilty and one who pleaded not guilty were found not to be habitual criminals; there was no express finding as to another who pleaded guilty. There was no finding as to two who, the judgment rolls disclose, could not properly have been found to be habitual criminals. Petitioner alone was expressly found to be an habitual criminal.

capriciously administered or that he, either individually or as a member of the class of those who pleaded not guilty, has been discriminated against. As stated in respondent's brief, "All that the petitioner has shown in this case is that others whom he believes to have been more guilty than he have received less punishment. This does not show such inequality in the administration of the law as will justify a court in setting aside the judgment. (Howard v. Fleming, 191 U.S. 126 [24 S.Ct. 49], 48 L.Ed. 121.) The fact that persons convicted of crime may be subjected to different degrees of punishment for the same offense, in the exercise of a limited discretion, does not affect the validity of the law. (In re Mulholland, 97 Cal. 527 [32 P. 568].)"

IV

[8] Petitioner's status as an habitual criminal cannot affect the term of his imprisonment. Among the substantive offenses of which he was convicted was violation of section 209 of the Penal Code. Such section provides, as it did when petitioner committed the substantive offenses, that one who kidnaps another to commit robbery "upon conviction thereof shall suffer death or * * * imprisonment in the State prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person" kidnaped suffered bodily harm. Petitioner is legally imprisoned for life without possibility of parole under a judgment upon a jury verdict which so fixes his punishment.

For the reasons above stated the writ is discharged and petitioner is remanded to the custody of the warden of the state prison at Folsom.

GIBSON, C. J., and SHENK and CARTER, JJ., concur.

SPENCE, Justice.

I concur in the judgment for the reasons stated in the majority opinion under headings numbered I and IV. In view of the conclusions reached under those headings, I am of the opinion that the discussion in the majority opinion under headings numbered II and III is wholly unnecessary to the decision.

EDMONDS and TRAYNOR, JJ., concur.

30 Cal.2d 879

## PEOPLE v. ISBY et al.

Cr. 4803.

Supreme Court of California.

Nov. 18, 1947.

Hearing Denied Dec. 15, 1947.

**1. Homicide 🔑253(1)**

Evidence authorized conviction of first-degree murder.

**2. Homicide 🔑18(1, 3, 4, 5), 22(2)**

Where homicide occurs in course of commission of arson, rape, robbery, burglary or mayhem, intent need not be proved, but where death otherwise results, willfulness, deliberation and premeditation must be established in order to constitute the crime first-degree murder. Pen.Code, §§ 187, 189.

**3. Homicide 🔑152, 282**

In prosecution for first-degree murder, direct evidence of a deliberate purpose to kill is not required, and necessary elements of deliberation and premeditation may be inferred from proof of such facts as will furnish a reasonable foundation for such an inference, and where evidence is not in law insufficient, matter is exclusively within province of jury for determination. Pen.Code, §§ 187, 189.

**4. Homicide 🔑152**

Vicious form and long duration of assault, type of weapon employed and manner of its use, nature of multiple wounds inflicted, fact that attack was unprovoked and that deceased apparently was unarmed, furnished justification for inference that defendants were possessed of a willful, deliberate and premeditated purpose to kill deceased necessary to support conviction for first-degree murder. Pen.Code, §§ 187, 189.

**5. Homicide 🔑233**

In murder prosecution, the presence or absence of a motive is only one factor to be considered by jury in connection with other factors. Pen.Code, §§ 187, 188.

**6. Homicide 🔑233, 269**

In murder prosecution, motive is essentially a question of fact, and is not necessary to be proved if crime can otherwise be established by sufficient competent evidence. Pen.Code, § 187.

**7. Homicide 🔑233**

Strong and convincing evidence that defendant committed a willful, deliberate and premeditated killing nullified any benefit to defendants from absence of a motive. Pen.Code, § 187.

**8. Homicide 🔑145**

Where one assaults another violently with a dangerous weapon and takes his life, assailant is presumed to have intended death or other great bodily harm. Pen. Code, § 187.

**9. Homicide 🔑268**

In murder prosecution, conflicts in defendants' testimony regarding their relative participation in and responsibility for actual killing merely presented questions for jury. Pen.Code, §§ 187–189.

**10. Homicide 🔑28**

The fact that defendants had been drinking beer and wine during afternoon and evening preceding their fatal assault upon deceased did not establish that defendants were incapable of forming malicious intent essential as an element of first-degree murder. Pen.Code, §§ 22, 187–189.

**11. Homicide 🔑253(1)**

Evidence that defendants' blood lust had been stirred and that they were willing to kill and did kill without provocation indicated malice requisite to sustain a charge of first-degree murder. Pen.Code, §§ 187–189.

**12. Homicide 🔑270**

Under evidence indicating malice and consciousness of guilt, whether defendants, by reason of their voluntary intoxication, were incapable of forming the specific criminal intent essential to sustain first-degree murder, conviction was for jury. Pen.Code, §§ 22, 187–189.

**13. Homicide 🔑308(2)**

In prosecution for murder, instructions were adequate where court instructed on every phase of murder and gave appropriate emphasis to matter of deliberation and premeditation necessary to constitute murder in the first degree as differentiated from murder in the second degree. Pen. Code, § 187.

**14. Criminal law 🔑834(2)**

Where jury was fully and fairly informed on point in question, defendants could not complain because court did not adopt particular phraseology of their refused instruction on such points.

**15. Criminal law 🔑438**

In prosecution for murder occurring at a railroad labor camp, admission of an enlarged photograph showing the locale of the camp with deceased's body in the foreground was not error because some of the cars had been moved when the photograph was taken, where court expressly informed jury that the railroad cars had been moved.

**16. Criminal law 🔑663**

Permitting a gruesome photograph showing locale of killing with decedent's body in foreground, to stand on an easel in view of jury throughout trial, rather than having photograph removed from sight at all times when not used by witnesses for identification of particular points, was not error, particularly where photograph was admitted so as to be available for examination by jury as need therefor arose.

**17. Criminal law 🔑636(1)**

In a felony prosecution, the accused must be personally present at trial to validate a conviction. Pen.Code, § 1043.

**18. Criminal law 🔑636(1, 3)**

In a felony prosecution, a defendant need not be present at proceedings which are merely preliminary or formal and at which matters affecting his guilt are not presented but determinative question is whether defendant suffered any damage by reason of absence at particular stage of proceedings. Pen.Code, §§ 1043, 1148; Const.Cal. art. 1, § 13; U.S.C.A.Const. Amends. 5, 14, § 1.

**19. Constitutional law** ⚷268

In murder prosecution, where gruesome photograph of deceased was admitted over defendants' objection, withdrawal of photograph from evidence upon motion of prosecution made in chambers out of defendants' presence but in the presence of their counsel was not a denial of due process of law on the ground that a portion of the trial was held in their absence. Pen.Code, §§ 1043, 1148; Const.Cal. art. 1, § 13; U.S.C.A.Const. Amends. 5, 14, § 1.

**20. Criminal law** ⚷1168(2)

In murder prosecution, where gruesome photograph of deceased had been admitted in evidence, withdrawal of the photograph from evidence by the prosecution in the judge's chambers in the absence of the jury was not prejudicial to defendants where the jury had not seen the photograph. Pen.Code, §§ 1043, 1148.

**21. Criminal law** ⚷855(1)

In murder prosecution, evidence did not establish "misconduct" of jury because two or three jurors from first trial which resulted in a disagreement stated to the prosecuting attorney that they were there to help him and to root for him, where there was no showing that the remarks were heard by the jury which rendered the verdict. Pen.Code, § 1181, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

**22. Criminal law** ⚷1119(5)

General assignments of misconduct by jury, in absence of some proof in record, merits no consideration on appeal. Pen. Code, § 1181.

**23. Criminal law** ⚷728(2, 5)

Remarks of prosecuting attorney in opening statement to jury consisting of a recital of facts which it was his purpose to establish by evidence during progress of trial, in absence of objection by defendants to statement at the time and in absence of a request for an instruction admonishing jury that opening statement did not constitute evidence, were not "misconduct" on part of prosecuting attorney.

**24. Criminal law** ⚷730(2)

Instruction that prosecuting attorney's opening statement did not constitute evidence was not necessary where court instructed that statements and arguments of counsel were not evidence and any statements made by counsel, either during trial or arguments which were not supported by evidence or which were inconsistent with instructions as to law were to be disregarded.

**25. Criminal law** ⚷1144(15)

Jurors are presumed to have been true to their oath and to have followed various admonitions and instructions of court.

**26. Criminal law** ⚷622(1)

A defendant jointly charged with one or more other defendants is not entitled to a separate trial as a matter of right, but the matter is one within sound discretion of trial court. Pen.Code, § 1098.

**27. Criminal law** ⚷622(1), 673(4)

Refusal to grant separate trials is not an abuse of discretion because damaging testimony, admissible against one defendant and not against other, may be received, but it is then incumbent upon court to limit such evidence in its application to defendant to whom it is referable. Pen.Code, § 1098.

**28. Criminal law** ⚷736(2), 741(3)

Where defendant's plea of insanity had, in effect, been withdrawn and defendant did not dispute that he knew difference between right and wrong, on evidence that defendant's actual age was 26 years but his mental age was 8 years and 8 months and that he had an intelligence quotient of 58, whether confession should have been excluded on ground that defendant did not have sufficient mentality to understand its purport was for trial court, and court having exercised its discretion to admit confession, weight and effect to be given defendant's statement by reason of his asserted mental deficiency was for jury. Code Civ.Proc. §§ 1879, 1880.

Appeal from Superior Court, Alameda County; A. J. Woolsey, Judge.

George Isby and Robert Shorts were convicted of first-degree murder and, the death penalty having been imposed, an appeal was automatically taken under Pen.Code, § 1239, subd. (b), from the judgment and from the order denying defendants' motion for new trial.

Judgment and order affirmed.

Willard W. Shea, Public Defender, and Thomas E. Srednik, Asst. Public Defender, both of Oakland, John T. Williams, Asst. Public Defender, of San Francisco, and George W. Norris and C. Stephen Casalina, both of Oakland, for appellants.

Fred N. Howser, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Ralph E. Hoyt, Dist. Atty., and Folger Emerson, Asst. Dist. Atty., both of Oakland, for respondent.

SPENCE, Justice.

Defendants George Isby and Robert Shorts were jointly charged with the murder of Jerome Willingham. Upon arraignment, each of the defendants pleaded "not guilty" and "not guilty by reason of insanity" but before trial, each withdrew the latter plea. Respective motions of defendants for a separate trial were denied. In the course of the ensuing joint trial the question of the present sanity of defendant Shorts arose, the jury was excused, and the matter was determined by the court sitting without a jury. The court found defendant Shorts sane. Defendants' joint trial then continued and the jury returned against each defendant a verdict of murder of the first degree, without recommendation. Separate motions by defendants for a new trial were made and denied. Judgment was thereafter pronounced, and each of the defendants was sentenced to suffer the extreme penalty. The cause comes to this court upon an automatic appeal. Pen. Code, sec. 1239, subd.(b).

The principal point to be considered is the contention that the evidence was not sufficient to support the verdicts and judgments in that there was no proof of deliberation and premeditation essential to justify a conviction of murder of the first degree; that there was no showing of motive or intent in the commission of the killing to warrant its classification as other than "a crime of passion," the outgrowth of a quarrel following a card game when "all the parties involved were under the influence of alcohol to some extent"; that the offense could not be regarded as more than murder of the second degree; and that unless this court remands the case for a new trial, it should so modify the judgments in pursuance of its statutory authority. Pen. Code, sec. 1181, subd. 6. The following points are also urged: error in the instructions on the elements of deliberation and premeditation; error in the admission in evidence of a certain photograph of the locale of the killing; conduct of a portion of the trial in the absence of defendants; improper influence of and misconduct of the jury; misconduct of counsel; and error in the denial of separate trials. In addition, defendant Isby claims that the court erred in receiving in evidence his confession over the objection that he had "insufficient mentality" to "understand [its] nature and quality and possible consequences." Careful examination of the record impels the conclusion that defendants were accorded a fair and impartial trial, and that the evidence sustains their conviction of murder of the first degree.

From the evidence adduced at the trial, it appears that on the morning of November 10, 1946, the lifeless body of Jerome Willingham was found near a railroad labor camp maintained by the Santa Fe Railroad at Emeryville in Alameda County. The autopsy disclosed "many wounds over the [deceased's] entire body," including "nineteen stab wounds," particularly in the region of the lungs, and numerous "contusions, lacerations and abrasions"; a "comminuted fracture" of the skull; "second and third degree burns" of the head, face and neck, both arms and hands, the chest and back; a "burned" condition of the "mucous membrane inside of the nose," discovered upon the removal of certain "black burned material protruding from the nostrils"; and a "torn and macerated" liver. The autopsy surgeon testified that it was his opinion that this latter condition "could have been caused by a kick in the abdomen or any heavy blunt blow" and that the "death was due to shock from multiple injuries and burns." Each of the defendants, who are colored men, admitted that he was present at the commission of the crime and that he had inflicted some of the wounds upon the deceased, a white man, but each sought to place the blame for the actual killing upon the other.

The labor camp consisted of a number of bunk cars, commissary cars, and a kitchen maintained by the railroad for the quartering of its employees. Defendant Shorts and Willingham, the deceased, worked for the railroad and lived at the camp. Shorts and one Mack Hughes, also a colored man and a railroad employee, shared the same bunk car. Defendant Isby had formerly worked for the railroad and had then become acquainted with Shorts and Hughes, but his first meeting with Willingham occurred but a few hours prior to the commission of the crime in question.

At the trial Isby gave his version of the crime and the surrounding events as follows: On the evening of November 9, 1946, at about 10:30 or 11 o'clock, Isby went to the railroad labor camp for the purpose of collecting from Hughes a small loan. Hughes was not in his bunk car when Isby arrived, so Isby "went down to another car," where he saw Willingham and some other men talking. Isby, who had drunk "four bottles of beer during the day," joined them for a drink of wine and then left when Willingham began arguing with a "Merchant Marine fellow." Isby returned to Hughes' car, where he found Shorts. Within a few minutes Willingham and "three colored boys" joined them in the car. They all "got down on the floor and commenced shooting craps"; later the "three colored boys" left.

In a few minutes Shorts asked Willingham to leave also, to "go over to [his own] bunk car," but Willingham refused. Thereupon Shorts "walked over behind" Willingham, "hit him with [a] stool" and "knocked him on the floor." Willingham still persisted in his refusal to leave the car, although Isby, too, had begun to urge him to go. Then Isby took a knife out of his pocket and opened it. Shorts took the knife from Isby, "hit Willingham again and knocked him down again," and then putting both his hands against the side of the car, Shorts jumped up and down on Willingham's stomach, "stomping and screwing his heels around." Isby pulled Shorts off of Willingham. Then Shorts "got a piece of paper," "twisted it up," "lit it at the stove," and "put it down in his [Willingham's] nose," saying, "This is the way to kill him quick." Isby claimed that he took the paper out of Willingham's nose. (The autopsy surgeon testified that "black burned material [was] protruding from the nostrils" of Willingham at the time he examined the decedent's body.) Shorts then poured gasoline from a jug on Willingham, lit a match and set him on fire. Willingham managed to "get up on the floor," pulling off his burning coat and shirt, when Isby finally smothered the fire. Thereupon Shorts hit Willingham with a lamp, "stabbed him twice," and then threw "the knife in the heater." Shortly thereafter (about 2 o'clock on the morning of November 10), Mack Hughes "came in" and asked, "What's going on?" Not receiving a reply, Hughes said, "You-all better do something with that man before the other fellows come in." Then Hughes, at Shorts' request, got a towel. Shorts tore it in half, gave one piece to Isby, and the two of them, using the towel, proceeded to carry Willingham out of the car to the railroad track. Shorts wanted to "lay [Willingham] on the track where the train will cut his head off" but Isby refused on the ground that "we already done him bad enough as it was, we will lay him 'side the track." Isby and Shorts returned to the car, and Shorts started scrubbing it. At Shorts' suggestion, Isby changed his "bloody" trousers, putting on a pair that belonged to Hughes, and Shorts threw Isby's trousers in the stove along with Willingham's coat and shirt. After the car was cleaned, Isby, Shorts and Hughes drank some whiskey and played cards for a while; and then they went to bed.

Shorts testified at first that Isby "told the truth" when on the witness-stand, but then he proceeded to give an account which varied in several particulars from Isby's story. Shorts stated that in the early part of the evening of November 9, 1946, he went to town and visited "three beer gardens," where he drank "some beer and wine," "got drunk" but "not too drunk." He then returned to the camp, went to his bunk car, found the door closed and Isby opened it for him. Willingham was lying on the floor. Shorts claimed he then saw Isby kick Willingham, stab him "in the back" and slam him against the floor. Shorts admitted that he hit Willingham with a stool and also stabbed him "a few times" with "Isby's knife," which he then returned to Isby. Shorts agreed with Isby in his statement that after the fracas had progressed that far, Hughes came into the car and told them that they "better get [Willingham] out of there"; but Shorts insisted that as he and Isby carried Willingham outside, it was Isby who suggested that they "put him on the railroad track." Shorts said that he then cleaned up the car.

Mack Hughes was called as a witness on behalf of the prosecution. He testified that he arrived at the bunk car about 2 o'clock on the morning of November 10, 1946; that he knocked on the door, which was closed, and that Isby opened it. Inside the car he saw Shorts and "a white man sitting on the floor * * * bleeding," whom Hughes did not then know but who was later identified as Willingham. Hughes said he asked, "What's going on here?" and Isby replied, "I caught this man messing up, so I messed him up." According to Hughes, Isby thereupon "kicked the man side the head," "picked him up and slammed him back to the floor" while "he was bleeding" and "groaning." Then stating that "we going to take him out of here," Isby took a towel, tore it in half, gave a piece to Shorts, and then they "took him outside the car." Hughes did not "go out." After a few minutes, Isby and Shorts returned and "started cleaning up the blood, sweeping it up." There was a fire in the stove, and Isby tossed his knife in there, saying: "I am throwing this in here to keep the law from seeing it." The knife was recovered later from the ashes by the police officers in the course of their search of the stove and other parts of the bunk car.

Following their arrest at the camp on the morning of November 10, 1946, each of the defendants made several statements in response to separate questioning by the police and the district attorney on successive occasions. After the usual proof as to the voluntary character of such statements, testimony as to their content was admitted in evidence. It appears that each of the defendants at first denied having any knowledge at all of the crime but that each later admitted that he had taken an active—though subordinate—part in a so-called "fight" with Willingham. Thus after "the fight started," Isby admitted that "he had drawn [his] knife across the throat of the deceased Willingham, and had cut the man's throat just a little bit"; and Shorts confined "his part in the fight" to kicking "the man [Willingham] up the side of the head." Both defendants admitted to having "assisted in moving the body out of the car over to the next car track near where the body was found." Neither defendant claimed, either at the trial or in extra-judicial statements, that he acted in self-defense or that Willingham made any attack or threat of any kind. During the trial the court carefully admonished the jury that "the statement of either of these parties, made either in the way of an admission or confession, is binding only on the man that makes that admission or confession, and not on the other."

[1-3] In this state of the record defendants unavailingly argue that the evidence was insufficient to sustain their conviction of murder of the first degree. Murder is defined as "the unlawful killing of a human being, with malice aforethought." Pen.Code, sec. 187. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature, and it is implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart. Pen.Code, sec. 188. All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which is committed in the perpetra-

tion or attempt to perpetrate arson, rape, robbery, burglary or mayhem, is murder of the first degree; and all other kinds of murder are of the second degree. Pen. Code, sec. 189. Thus, where the homicide occurs in the course of the commission of any of the above statutorily enumerated crimes, intent need not be proved; but where death otherwise results, willfulness, deliberation and premeditation must be established in order to constitute the crime of first-degree murder. However, direct evidence of a deliberate and premeditated purpose to kill is not required. The necessary elements of deliberation and premeditation may be inferred from proof of such facts and circumstances in the case as will furnish a reasonable foundation for such an inference, and where the evidence is not in law insufficient, the matter is exclusively within the province of the jury for determination. 13 Cal.Jur., sec. 14, p. 597; People v. Mahatch, 148 Cal. 200, 202, 82 P. 779; People v. Machuca, 158 Cal. 62, 64, 109 P. 886; People v. Bennett, 161 Cal. 214, 218, 118 P. 710; People v. Bellon, 180 Cal. 706, 710, 182 P. 420; People v. Erno, 195 Cal. 272, 279, 232 P. 710; People v. Smith, 15 Cal.2d 640, 647, 104 P.2d 510.

[4-8] In the instant case the circumstances that were shown to have surrounded the homicide—the vicious form and the long duration of the assault, the type of weapon employed and the manner of its use, the nature of the multiple wounds inflicted, the fact that the attack was unprovoked and that the deceased apparently was unarmed at the time—furnished ample justification for the indulgence by the jury in the inference that defendants were possessed of a willful, deliberate and premeditated purpose to kill the deceased. 13 Cal. Jur., sec. 73, p. 684; People v. Cook, 15 Cal.2d 507, 516, 102 P.2d 752; People v. Smith, supra, 15 Cal.2d 640, 647, 104 P.2d 510; People v. Campos, 10 Cal.App.2d 310, 316, 52 P.2d 251. It does not aid defendants in their attack upon their conviction to argue that there was no proof of a motive for the killing. The presence or absence of a motive is only one factor to be considered by the jury in connection with the other factors in the case. 13 Cal. Jur., sec. 74, p. 685; People v. Durrant, 116, Cal. 179, 208, 48 P. 75; People v. Weston, 169 Cal. 393, 397, 146 P. 871; People v. Larrios, 220 Cal. 236, 251, 30 P.2d 404. It is "essentially a question of fact, and, like any other fact, is not necessary to be proved, if the crime can otherwise be established by sufficient competent evidence. * * * the absence of proof of motive is a fact to be reckoned on the side of innocence; but, if the proof of guilt is nevertheless sufficient to overthrow the presumption of innocence, the [defendants] must stand convicted, nowithstanding no motive has been shown." People v. Tom Woo, 181 Cal. 315, 328, 184 P. 389, 394. The proof in this case that defendants committed a willful, deliberate and premeditated killing is so strong and convincing that any benefit defendants could seek to allocate to themselves by reason of the absence of a motive is entirely nullified. The evidence as to the terrible means employed by defendants in their prolonged brutal mistreatment of the deceased —their kicking, pummeling, burning and stabbing attacks upon him as he lay bleeding and groaning in the bunk car—undoubtedly weighed heavily against defendants in the jury's estimation of their guilt. While both defendants attempted to shift the blame for the actual killing upon the other, each admitted to having stabbed the deceased with Isby's knife. Such admission by defendants is significant because where "one assaults another violently with a dangerous weapon, and takes his life, the presumption is that the assailant intended death, or other great bodily harm." 13 Cal.Jur., sec. 71, pp. 682, 683. So in this case where "the assault was made in a manner that was reasonably certain to produce death, and which actually did cause death, the only rational presumption to be drawn therefrom is that the assailant[s] intended to take the life of the person assailed." People v. Fleming, 218 Cal. 300, 312, 23 P.2d 28, 33; People v. Owens, 27 Cal.App.2d 606, 610, 611, 81 P.2d 429. The conflicts in defendants' testimony regarding their relative participation in and responsibility for the actual killing merely presented questions for the jury's determination. Their admitted joint acts—incident to their assault upon the deceased in

the bunk car, their subsequent removal of his body to the side of the nearby railroad track, their burning and destroying of physical evidence of their attack upon their victim as they cleaned up the scene of the "fight"—were sufficient to warrant the jury in believing that there was a concert of action between defendants, which would render each of them equally chargeable with the crime. People v. Erno, supra, 195 Cal. 272, 278, 232 P. 710.

[9-12] Nor does the fact that both defendants had been drinking—beer and wine for the most part—during the afternoon and evening preceding their assault upon the deceased determine that they were incapable of forming the malicious intent essential as an element of murder. It may well be that defendants' passions were aroused by the liquor which they voluntarily drank and that they were in a quarrelsome mood at the time of their "fight" with the deceased. But voluntary intoxication would not excuse their crime. Pen. Code, sec. 22. There was no evidence of personal enmity or hostility on the part of defendants against the deceased, but there was evidence that their blood lust had been stirred and that they were willing to slay, and did slay, without provocation. Such evidence clearly indicated malice, which "may always be inferred from the circumstances in the case—the evidence presented and considered by the jury." People v. Glover, 141 Cal. 233, 243, 74 P. 745, 749; People v. Cook, supra, 15 Cal. 2d 507, 514, 102 P.2d 752; People v. Campos, supra, 10 Cal.App.2d 310, 315, 52 P.2d 251; People v. Owens, supra, 27 Cal.App. 2d 606, 611, 81 P.2d 429. Not only did "the circumstances attending the killing show an abandoned and malignant heart" on the part of defendants (Pen. Code, sec. 188) but, in addition, there was persuasive evidence of their consciousness of guilt—such, for example, would be the matter of defendants' placing of their victim by the railroad track, an act apparently conceived in an effort to establish that the deceased was killed by a passing train, and their cleaning up the bunk car before retiring for the night. In the light of such record, it was for the jury to determine, under proper instructions, which the court gave, whether defendants, by reason of their voluntary intoxication, were incapable of forming the specific criminal intent essential to sustain their conviction; and it cannot be said from the evidence that the jury was not justified in deciding the question against defendants. People v. Sainz, 162 Cal. 242, 245, 121 P. 922; People v. Burkhart, 211 Cal. 726, 731, 297 P. 11; People v. Yeager, 194 Cal. 452, 474, 229 P. 40; People v. Murphy, 1 Cal.2d 37, 40, 32 P.2d 635; People v. Lami, 1 Cal.2d 497, 501, 36 P.2d 192.

As was recognized in the case of People v. Wells, 10 Cal.2d 610, 616, 617, 76 P.2d 493, 498, when an unlawful killing and "*nothing further* is shown, the presumption of law is that it was malicious and an act of murder; but in such a case the verdict should be murder of the second degree, and not murder of the first degree." (Emphasis ours.) But here *much more* than the isolated fact that the deceased was unlawfully killed by defendants was thoroughly established; and considering the law, together with the evidence that hereinbefore has been summarized, the conclusion is inescapable that the jury was warranted in its implied finding that defendants committed a "willful, deliberate, and premeditated killing" within the statutory definition of murder of the first degree. Pen. Code, sec. 189. So pertinent to this point is the well-established rule of law as declared in People v. Mahatch, supra, 148 Cal. 200, 203, 82 P. 779, 780, that "it is exclusively the province of a jury to determine the degree of crime when there is any evidence in the case which will support the determination." See, also, People v. Wells, supra, 10 Cal.2d 610, 626, 76 P.2d 493; People v. Cook, supra, 15 Cal.2d 507, 515, 102 P.2d 752.

[13-14] Nor in connection with defendants' challenge of the propriety of their conviction of first-degree murder is there merit in their claim that the court erred in refusing to give an instruction offered by the defense on the subject of "premeditation." The court very carefully instructed the jury on every phase of murder, and in giving appropriate emphasis to the matter of the deliberation and premeditation necessary to constitute murder in the first

degree as differentiated from murder in the second degree, it embodied in its charge not only the substance, but much of the language approved by this court in the recent case of People v. Bender, 27 Cal.2d 164, 178, 163 P.2d 8. Since the jury was thus fully and fairly informed on this essential point, defendants cannot complain because the court did not adopt the particular phraseology of the refused instruction. 24 Cal.Jur. sec. 79, p. 806; People v. Donnelly, 190 Cal. 57, 59, 210 P. 523; People v. Rowland, 207 Cal. 312, 313, 277 P. 1041; People v. Addington, 43 Cal.App.2d 591, 593, 594, 111 P.2d 356.

[15, 16] Taking up the other abovementioned contentions urged by defendants, the first is the alleged error of the court in receiving in evidence an enlarged photograph showing the locale of the railroad labor camp, with the deceased's body lying in the foreground. Defendants maintain that the photograph was not admissible because it was taken after the police had taken charge of the situation at the camp and had moved certain railroad cars on the track, thus reflecting "a change in the view" of the premises from the condition prevailing when the deceased's body was found. But at the trial in the process of identifying the photograph, the camp steward, a witness for the prosecution, testified that "with the exception of the * * * cars"—which had been "cut and moved * * * a couple of car lengths" but which had "nothing to do with the camp set-up at all"—the photograph correctly portrayed the "whole set-up, the camp situation entirely," as well as the position of the deceased's body, as he saw the scene early on the morning of November 10, 1946, before the police arrived. In thereupon admitting the photograph in evidence as the foundation therefor had been laid (People v. Ah Lee, 164 Cal. 350, 352, 128 P. 1035), the court expressly stated that "the jury will understand that the railroad car[s] had been moved." Thereafter various witnesses made correlating references to the location of pertinent objects at the scene of the crime, and the photograph, consistent with the purport of its representation as limited by the court, manifestly had evidentiary value in tending to clarify that testimony. 13 Cal.Jur., sec. 87, p. 710; People v. Clapp, 26 Cal.App. 523, 527, 147 P. 469; People v. Spraic, 87 Cal. App. 724, 727, 728, 262 P. 795; People v. Glab, 15 Cal.App.2d 120, 124, 59 P.2d 195. In these circumstances, the admission in evidence of the photograph was within the trial court's discretion, and clearly was not erroneous. 23 C.J.S., Criminal Law, § 852; People v. Smith, supra, 15 Cal.2d 640, 649, 104 P.2d 510. Nor was it improper, as defendants argue, for the court to permit the photograph to stand on an easel in view of the jury throughout the trial rather than to have it removed from sight at all times when not used by the witnesses for the identification of particular points in the course of their testimony. Such display of the photograph during the entire period of the trial, so as to be available for study and examination by the jury as the need therefor arose, was consistent with the premise of its admission as an appropriate illustrative aid to the jury's better understanding of the facts in evidence. 8 Cal.Jur., sec. 223, p. 136; People v. Durrant, supra, 116 Cal. 179, 213, 48 P. 75. The alleged gruesome appearance of the photograph would not affect the propriety of its continued exposure at the trial, readily accessible for inspection by the jury as properly admissible evidentiary matter in the case. People v. Balestieri, 23 Cal.App. 708, 711, 139 P. 821; People v. Saenz, 50 Cal.App. 382, 386, 195 P. 442.

Defendants' next contention rests on the claim that a portion of the trial was held in their absence, in violation of their constitutional rights under the due process of law guaranty. U.S.Const. Amend. XIV, sec. 1; Amend. V; Calif.Const. art. I, sec. 13. They refer to the following proceedings in support of their position. A photograph of the deceased was admitted in evidence, over objection of defendants that "it was prejudicial, served no useful purpose, and * * * there [was] no foundation for [its] admission." Thereafter the photograph was withdrawn upon motion of counsel for the prosecution made in the judge's chambers when counsel for both defendants were present, but in the absence of defendants and the jury. The withdrawal occurred during the arguments to the jury and on the occasion of a recess taken in the course of the argument of defendant Isby's counsel. The record discloses this discussion between court and counsel incident to the ruling in question:

"Mr. Emerson (counsel for the prosecution): I would like to move to withdraw Exhibit 1 (the photograph) from evidence. I intended to do it this morning.

"The Court: I thought you said something about it.

"Mr. Norris (counsel for defendant Shorts): I certainly have no objection.

"Mr. Williams (counsel for defendant Isby): It's in over our objection now.

"Mr. Emerson: If there is no objection, I will withdraw it from evidence.

"Mr. Williams: I don't see how we can very well object to it, seeing we objected to it going in. It is just a question if it can be withdrawn now, after the arguments are started.

"Mr. Emerson: It hasn't been referred to by anybody or seen by the jury yet.

"The Court: Yes, it hasn't exerted any prejudice for or against anyone so far. I didn't even look at it myself.

"Mr. Emerson: At any rate, I will move that it be withdrawn from evidence.

"The Court: Motion is granted."

Thereafter, counsel for defendant Isby resumed his argument, counsel for defendant Shorts made his argument, and counsel for the prosecution made his closing argument.

[17-19] Defendants rely on the well-settled rule that if the prosecution be for a felony, the accused must be personally present at the trial to validate a conviction. 14 Am.Jur. sec. 189, p. 898; 7 Cal. Jur. sec. 75, p. 928; Pen.Code, sec. 1043. Accordingly, it has been held in this state, as defendants properly note, that in the trial of a felony the accused must be personally present during the presentation of evidence before the jury (People v. Kohler, 5 Cal. 72), or when the verdict is returned. People v. Beauchamp, 49 Cal. 41; People v. Higgins, 59 Cal. 357; see, also, Pen. Code, sec. 1148. And as further illustration of the rule, defendants cite cases holding that the accused was entitled to a new trial where it appeared that in his absence his objection to the introduction of evidence (State v. Snider, 81 W.Va. 522, 94 S.E. 981) or his motion to exclude evidence (State v. Sutter, 71 W.Va. 371, 76 S.E. 811, 43 L.R.A.,N.S., 399) was argued by the attorneys and decided against him by the judge. But in such instances the required presence of the accused bore a relation, reasonably substantial, to the fullness of his opportunity to protect himself on the criminal charge. In considering this point in relation to the constitutional guaranty of due process, Mr. Justice Cardozo in the case of Snyder v. Massachusetts, 291 U.S. 97, at pages 106–108, 54 S. Ct. 330, 332, 78 L.Ed. 674, 90 A.L.R. 575, aptly observed: "Nowhere in the decisions of this court is there a dictum, and still less a ruling, that the Fourteenth Amendment assures the privilege of presence when presence would be useless, or the benefit but a shadow. * * * [Rather] the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." Thus, it is not necessary for a defendant to be present at proceedings which are merely preliminary or formal and at which matters affecting his guilt are not presented. 23 C.J.S., Criminal Law, § 974, subd. b; Mooney v. Superior Court, 130 Cal.App. 521, 522, 20 P.2d 106. The determinative question is whether or not the accused suffered any damage by reason of absence at a particular stage of the proceedings. State v. Terrall, 79 W.Va. 358, 92 S.E. 127, 129; Strong v. People, 80 Colo. 284, 250 P. 857, 859. Manifestly, such was not the case here. The withdrawal of the photograph from evidence upon motion of the prosecution conformed precisely with the position of defendants' counsel in the first place incident to their opposition to its admission. Defendants' personal presence would have availed them no more than that which they actually received, a favorable ruling on the exclusion of evidence which they deemed objectionable. In such circumstances there can be no valid argument that defendants suffered the slightest, or any, injustice by reason of their absence on the

occasion in question. Their constitutional claim cannot prevail upon the basis of a barren technicality, without the remotest shadow of substance to support it. Snyder v. Massachusetts, supra, 291 U.S. 97, 109, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575.

[20] Nor can it be said from the record that the withdrawal of the photograph from evidence in the absence of the jury operated to defendants' detriment. The presence of the jury during the proceedings in question was discretionary with the court. 8 Cal.Jur., sec. 412, p. 381. But defendants argue that since the photograph was introduced in evidence over their objection, "there unquestionably rested in the minds of the jurors the idea that a piece of evidence detrimental to" defendants "had been admitted" and the ruling on "the offer of withdrawal in chambers outside the presence of the jury * * * failed to give the jury the necessary notice that the [photograph] should never have been introduced." Such argument rests upon pure speculation and conjecture, and is advanced by defendants for the first time on appeal. The jury had not seen the photograph, a fact which the court, in granting the withdrawal, expressly recognized by stating that "it hasn't exerted any prejudice for or against anyone so far." Under the circumstances the photograph was a negative factor in the case, and its ultimate withdrawal cannot be presumed to have influenced the deliberations of the jury. 2 Cal.Jur., sec. 499, p. 852.

[21, 22] Defendants further contend that the jury was guilty of misconduct "by which a fair and due consideration of [their] case [was] prevented." Pen.Code, sec. 1181, subd. 3. Defendants' conviction here is the outcome of a second trial; the first trial ended in a disagreement. Defendants now claim that two or three jurors from the first trial visited the courtroom in the present trial and there in the presence of the jury, stated to the prosecuting attorney: "We are here to help you. * * * We came to root for" you. Classifying such remarks as an improper influence on the acting jury to bring in verdicts against them, defendants cite the general rule that it is "the duty of the court to see that public sentiment is not expressed to, or in the presence of, the jury in such a way as to be likely to influence their determination." 23 C.J.S., Criminal Law, § 970. But the record does not contain the slightest proof in substantiation of defendants' complaint. Their reference to certain portions of the reporter's transcript relating to the argument of opposing counsel on defendants' motions for a new trial only emphasizes the lack of evidence on the point, assuming that the alleged remarks were in fact made. Thus it appears that one of defense counsel, in correlating his successive contentions with the statutory grounds for a new trial (Pen. Code, sec. 1181), asserted the occurrence of the remarks in question, and in response to that unsupported claim, counsel for the prosecution pertinently stated: "There is no showing at this time that such remarks were heard by any member of the last jury which rendered this verdict, nor any showing that if they did, it affected the jury in any way. And I will submit that insufficient evidence has been produced * * * in connection with that point." As so challenged, defendants apparently did not deem the matter worthy of further pursuit, for they neither filed affidavits nor offered other evidence in support of the contested point. The same situation prevails with respect to other general assignments of misconduct by the jury made by defendants, and they need not be here detailed, for in the absence of some proof in the record they merit no consideration on appeal. 2 Cal.Jur. sec. 499, p. 852; 8 Cal. Jur. sec. 446, p. 420; sec. 457, p. 434.

[23-25] Nor is there any force to defendants' specification of misconduct on the part of the prosecuting attorney by reason of his remarks in his opening statement to the jury. The record discloses such statement to be no more than a recital of the facts which it was his purpose to establish by evidence during the progress of the trial, "to the end that the jury [might] more clearly sift and digest" the case before it. 8 Cal.Jur. sec. 322, p. 259. Moreover, defendants made no objection to the statement at the time (People v. Tedesco, 1 Cal.2d 211, 221, 34 P.2d 467), and they neither offered nor requested

from the trial court an instruction admonishing the jury that said "opening statement * * * did not constitute evidence." People v. Chilcott, 18 Cal.App.2d 583, 588, 64 P.2d 450. Nevertheless, they now claim that the court should have so instructed the jury on its own motion, but they cite no authority in support of their position. Disregarding the tardiness of defendants' complaint, and in answer thereto, it need only be said that the trial court did cover the subject in its instruction to the jury that "the statements and arguments of counsel * * * are not evidence in this case and * * * any statements made by counsel either during the trial or argument which are not supported by evidence or which are inconsistent with my instructions as to the law, are to be disregarded by you." As was said in People v. Burkhart, supra, 211 Cal. 726, at page 733, 297 P. 11, 14: "It will be presumed that the jurors were true to their oaths and followed the various admonitions and instructions of the court." See, also, People v. Green, 13 Cal.2d 37, 45, 87 P.2d 821.

[26, 27] There is likewise no merit to defendants' position that the court erred in refusing to grant their respective motions for a separate trial. The code section bearing upon this subject provides that when two or more defendants are jointly charged with a public offense, whether felony or misdemeanor, "they must be tried jointly, unless the court order separate trials." Pen.Code, sec. 1098. And it has been held repeatedly that a defendant so charged is not entitled as a matter of right to a separate trial (People v. Rocco, 209 Cal. 68, 73, 285 P. 704; People v. Eudy, 12 Cal.2d 41, 45, 82 P.2d 359), but that the question of severance is one that must be left necessarily to the determination of the trial court in the exercise of its sound discretion. People v. Bringhurst, 192 Cal. 748, 753, 221 P. 897; People v. Goold, 215 Cal. 763, 766, 12 P.2d 958; People v. Tinnin, 136 Cal.App. 301, 317, 28 P.2d 951; People v. King, 30 Cal.App.2d 185, 206, 85 P.2d 928. It is not an abuse of discretion to refuse to grant a demand for separate trials because damaging testimony, admissible against one defendant and not against the other, may be received in the case, but it is then incumbent upon the court to limit such evidence in its application to the defendant to whom it is referable. People v. Erno, supra, 195 Cal. 272, 277, 232 P. 710; People v. Perry, 195 Cal. 623, 633, 234 P. 890; People v. Booth, 72 Cal.App. 160, 165, 236 P. 987. As above noted in the recital of the evidence in the forepart of this opinion, defendants' respective rights in this regard were carefully preserved throughout their joint trial.

[28] The final point to be considered is defendant Isby's claim that the court erred in admitting in evidence his confession because he did not have sufficient mentality to understand its purport. He bases his argument upon the testimony of a psychologist, a witness on his behalf, that he was "well down the scale of feeblemindedness * * * near the imbecile classification," according to her use of a Stanford-Binet intelligence test on him, showing that while "his actual age was given * * * as 26 years, his mental age was found to be 8 years and 8 months * * * and * * * his intelligence quotient was 58." But defendant does not dispute the fact that he knew "the difference between right and wrong," nor does he make any claim of insanity, his plea to that effect having been withdrawn. It was for the trial court to determine the competency of defendant in the light of his ability to "perceive, and, perceiving, * * * make known [his] perceptions to others" (Code Civ.Proc. sec. 1879) and his capacity for "receiving just impressions of the facts * * * or * * * relating them truly" (Code Civ.Proc. sec. 1880); and its ruling in favor of defendant Isby's qualification appears from the record to be well within the limits of judicial discretion. 27 Cal.Jur. sec. 24, p. 35; People v. Ives, 17 Cal.2d 459, 476, 110 P.2d 408; In re Mazuran, 88 Cal.App. 272, 277, 263 P. 339; People v. Crandall, 43 Cal.App.2d 238, 242, 110 P.2d 682. The weight and effect to be given his statements by reason of his asserted mental deficiency was then properly left to the jury. People v. Mendez, 193 Cal. 39, 49, 233 P. 65; People v. Tyree, 21 Cal.App. 701, 706, 132 P. 784.

The judgment of conviction of each defendant and the order denying the motion of each defendant for a new trial are, and each is, affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

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30 Cal.2d 861

**BURNAND v. IRIGOYEN et al.**

**IRIGOYEN v. BURNAND.**

**L. A. 20038.**

Supreme Court of California, in Bank.

Nov. 14, 1947.

Rehearing Denied Dec. 11, 1947.

**1. Infants** 🔑**47, 58(1)**

A contract relating to realty or any interest therein, or personalty not in his immediate possession or control, entered into by a minor under 18 years is void and requires no act of disaffirmance. Civ.Code, § 33.

**2. Infants** 🔑**58(2)**

Restoration must accompany disaffirmance of a contract made by a minor when over 18 years, but restoration is not a requirement upon disaffirmance of a contract made when minor is under that age. Civ. Code, § 35.

**3. Infants** 🔑**58(1)**

Upon disaffirmance of contract, minor may recover all benefits paid under the contract. Civ.Code, §§ 34–36.

**4. Infants** 🔑**47**

One deals with infants at his peril, since the right of infant to avoid his contracts is one conferred by law for his protection against his own improvidence and designs of others, and policy of the law is to discourage adults from contracting with infant. Civ.Code, §§ 34–36.

**5. Infants** 🔑**98**

Where conditional sales contracts for sale of realty and personalty were made with minor's parents who obtained possession of the premises, and payments under contracts were made by them, minor seeking to recover payments allegedly made on her behalf had burden of showing that she made payments under the contract executed by her. Civ.Code, §§ 34–36.

**6. Infants** 🔑**50**

The law implies an obligation on part of infant to pay for necessaries furnished to him and his family on his own credit, where not otherwise prohibited. Civ.Code, § 36.

**7. Infants** 🔑**50**

Lodging is included as a "necessary", and if shelter or lodging be furnished an infant under such circumstances that promise to pay therefor is implied, he will be liable for reasonable value unless statutory prohibitions apply. Civ.Code, § 36.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary".

**8. Infants** 🔑**50**

The policy of the law to protect minors against their own improvidence does not extend to depriving others of reasonable value of necessaries furnished minors having capacity to contract for them, since the law recognizes that minors must have their needs provided for. Civ.Code, § 36.

**9. Infants** 🔑**50**

Invalidity does not inhere in contract of a minor to pay for necessaries actually furnished to him, whether contract be express or implied. Civ.Code, § 36.

**10. Infants** 🔑**55**

Estoppel to disaffirm a contract to pay for necessaries furnished to minor may be created by acts done after disability of nonage has been removed. Civ.Code, §§ 33, 36.

**11. Infants** 🔑**55**

Where conditional sales contracts were entered into with minor's parents, if a portion of moneys paid under contracts were traceable to proceeds from sale of properties in Mexico in which minor owned an interest, minor's acts after incapacity was removed under Mexican law upon reaching age of 18 estopped minor from disaffirming implied agreement to pay reasonable rental for occupancy of the home. Civ.Code, §§ 33, 36.

**12. Appeal and error** ⚿1008(1)

Whether joining of minor's parents as principals on conditional sales contract was a ruse adopted by vendor to cover up a void contract entered into with minors so as to entitle minor to recover payments made under contract was for trial court.

EDMONDS and TRAYNOR, JJ., dissenting.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Clara Kuhrts Burnand against Juan J. Irigoyen and others to quiet title to certain realty subject to a conditional sales agreement, wherein defendant Marie Antoinette Irigoyen cross-complained to recover certain sums paid under the conditional sales contract. The complaint was dismissed and the action was tried on the cross-complaint. From a judgment for plaintiff and cross-defendant, cross-complainant appeals.

Affirmed.

Prior opinion, 174 P.2d 17.

Saul Ruskin and Harold Epstein, both of Los Angeles, for appellant.

Albert W. Leeds, of Los Angeles, for respondent.

SHENK, Justice.

The plaintiff, Clara Kuhrts Burnand, commenced an action to quiet title to a parcel of land in Los Angeles. The action grew out of a defaulted conditional contract of purchase of real and personal property executed by Juan J. Irigoyen and Marie Antoinette Irigoyen, minors, and others. Marie Antoinette Irigoyen filed a cross-complaint, based on her disaffirmance of the contract, whereby she sought recovery of payments made on the purchase price. The complaint filed by the plaintiff was dismissed by consent, and the trial proceeded on the issues framed by the cross-complaint and answer thereto. At the close of the evidence introduced on behalf of the cross-complainant, the cross-defendant (referred to herein as plaintiff) moved for judgment. The motion was granted and judgment was entered in her favor. The cross-complainant (herein referred to as defendant) appealed from the judgment.

In 1925 Ana Maria Irigoyen, a widow, and her two minor children, Juan J. Irigoyen and Marie Antoinette Irigoyen, came to California from Mexico City. In 1926 the widow, who had inherited some $40,000 in cash from her late husband, married Norman Rankow, and thus became Ana Maria Rankow. In 1933 the paternal grandfather of the children died in Mexico, leaving some property in or near Mexico City in which the children shared an interest. On September 7, 1937, a conditional contract of sale of a residence and furnishings located in Los Angeles was entered into between the plaintiff and her husband (since deceased) as sellers, and "Juan J. Irigoyen, Marie Antoinette Irigoyen, and Ana Maria Rankow as Guardian of the Persons and Estates of Juan J. Irigoyen and Marie Antoinette Irigoyen, Buyers", for a purchase price of $33,500. On August 7, 1937, $300 of the purchase money had been paid to the sellers as rent for one month. The balance was to be paid in monthly installments of varying amounts until January 7, 1940, when the sum of $12,000 became due; then in installments of $150 on the 7th day of each month until the full purchase price was paid; with interest at six per cent on deferred payments. On the date of the contract, Juan J. and Marie Antoinette were respectively 19 and 17 years of age. Contemporaneously with the execution of the conditional sales contract, the sellers entered into a "Supplemental Contract" with Norman Rankow and Ana Maria Rankow, as buyers, whereby the latter became personally and primarily liable as principals, jointly and severally with Juan J. and Marie Antoinette Irigoyen, and Ana Maria Rankow as their guradian, to fulfill the terms and conditions of the conditional contract of sale including payment to the seller of the moneys becoming due thereunder. Ana Maria Rankow was not the legally appointed guardian of the persons and estates of the minors, and there was no court proceeding or approval of the contract.

The mother, stepfather, and the two children entered the premises at the time of the execution of the contracts, and thereafter occupied them until June, 1941. Defaults occurred in the buyers' performance of their obligations from the inception of the contracts. Payments were made by the Rankows but not in accordance with the contracts and never in sufficient sums to bring the contracts to good standing. Burnand v. Irigoyen, 56 Cal.App.2d 624, 625, 133 P.2d 3. The mother and son, after the latter attained his majority, executed a note for $4,000 to cover the sums in default. Thereafter, pursuant to Mexican judicial approval and decree of emancipation of the defendant, then over 18, properties in Mexico in which the children owned an interest were sold, and proceeds of the sale to the amount of $5,979 were, about June, 1940, paid in Mexico to one Enciso as agent of the plaintiff. This sum was applied by the plaintiff first to the satisfaction of the $4,000 note, and the balance to other arrearages.

After the commencement of an action in ejectment, and in June, 1941, the family surrendered possession. They had occupied the premises as a home for a period of three years and nine months. The history of prior litigation between the parties, including an action in unlawful detainer, a suit on the promissory note for $4,000, a suit for damages to the house and furniture, in addition to the action in ejectment, is set forth in Burnand v. Irigoyen, supra, 56 Cal.App.2d 624, 133 P.2d 3. In that case a judgment for the defendants based on a plea in abatement was reversed.

The only issue tried herein were those tendered by the cross-complaint. The trial court found that possession of the real property and furnishings was given to Norman and Ana Maria Rankow, and that the premises were occupied by them and the children for the period stated; that the defendant did not pay to the plaintiff any sums on account of the purchase price mentioned in the contract, and that any portion of the sum of $5,979 remitted to the plaintiff by Enciso and claimed as having originated from properties in Mexico in which ownership was shared by the minors was paid after the defendant had attained the age of eighteen and had been duly emancipated pursuant to Mexican law; also that the property was necessary for the support of the defendant and her brother as a home and shelter, and that the parents were unable to and did not provide for the defendant from their own funds. The court concluded that the defendant was not entitled to recover anything paid under the contracts.

The trial court made no specific finding as to the age of the defendant at the time of the execution of the contracts, when admittedly she was 17. The defendant contends that the omission is material to her rights, and that its inclusion must result in a reversal with directions to enter judgment in her favor on the cross-complaint.

[1] A contract relating to real property or any interest therein, or personal property not in his immediate possession or control, entered into by a minor under 18 years is void and requires no act of disaffirmance. Section 33, Civil Code; Hakes Inv. Co. v. Lyons, 166 Cal. 557, 137 P. 911.

[2] Section 34 of the Civil Code permits other contracts by minors, but subject to their power of disaffirmance. By section 35 disaffirmance of a contract made by a minor under 18 must occur either before reaching majority or within a reasonable time thereafter. That section also provides that restoration must accompany disaffirmance of a contract made by a minor when over 18 years; but restoration is not a requirement upon disaffirmance of a contract made when the minor was under that age. Hakes Investment Co. v. Lyons, supra, 166 Cal. at page 559, 137 P. at page 912; Cummings v. Strobridge Land Syndicate, 150 Cal. 209, 88 P. 901, 119 Am.St. Rep. 189; Tracy v. Gaudin, 104 Cal.App. 158, 160, 285 P. 720; Maier v. Harbor Center Land Co., 41 Cal.App. 79, 182 P. 345.

Section 36 of the Civil Code provides that a minor cannot disaffirm a contract, otherwise valid, to pay the reasonable value of things necessary for his support, or that of his family, entered into by him when not under the care of a parent or guardian able to provide for him, provided that such necessaries have actually been furnished to him or to his family.

Restoration to the plaintiff of the real and personal property purportedly purchased by the minors under the conditional sale contracts involved in this case is not the crux of the matter. The incidents of termination of the contracts and restoration of the property to the plaintiff resulted from the defaults of the buyers. The defendant's notice of disaffirmance, also found by the court to have been given, if deemed essential, could serve only as a basis for recovery from the plaintiff of amounts claimed by the defendant to have been paid by her under the contracts.

[3, 4] Upon disaffirmance the minor is entitled to recover all benefits paid under the contract, and, as noted, where the minor was under 18, restoration of benefits received is not required. One deals with infants at his peril. Pollock v. Industrial Accident Commission, 5 Cal.2d 205, 211, 54 P.2d 695, and cases cited. The right of the infant to avoid his contracts is one conferred by law for his protection against his own improvidence and the designs of others. The policy of the law is to discourage adults from contracting with an infant and they cannot complain if as a consequence of violating the rule they are injured by the exercise of the right of disaffirmance vested in the infant. Flittner v. Equitable Life Assur. Soc., 30 Cal.App. 209, 216, 157 P. 630.

[5] If it were established in this case as in other cases, such as Maier v. Harbor Center Land Co., supra, 41 Cal.App. 79, 182 P. 345, that the transaction was with the minors the problem might be simplified. In the last cited case a judgment cancelling a contract for the purchase of a lot of land made by the plaintiff when under 18 years of age and for the return of moneys paid thereunder was affirmed. In the present case the parents were principals in the transaction. All of the negotiations and dealings were with them. Possession of the premises and property was given to them, and the payments under the contracts were made by them. It was incumbent upon the defendant to show that she made payments under the contract executed by her before she could recover. On the record this proof failed. Documentary evidence introduced by the defendant showed that the initial and subsequent payments were made by the parents. It may therefore be said that the judgment is supported by the finding that no dealings were had with the defendant and no payments made by her.

However, the court made further findings to the effect that if a portion of the moneys paid under the contract could be traced to proceeds from the sale of properties in Mexico in which the children owned an interest, the acts of the defendant in this respect occurred at a time when she had attained the age of capacity, and created an estoppel to avoid an implied agreement of liability for the rental value of the premises during occupancy. In Maier v. Harbor Center Land Co., supra, 41 Cal.App. at page 81, 182 P. at page 346, it was said that the mere payment of installments after the minor reached the age of 18 did not remake the old contract or make a new one for the purchase of the property, and hence did not amount to an estoppel to assert the invalidity of the contract of purchase. Here the estoppel found by the court does not relate to the contract of purchase. The plaintiff is not seeking to enforce that contract. As the trial court viewed it the acts of the defendant after her incapacity had been removed operated to estop a disaffirmance of an implied agreement to pay a reasonable rental for the occupancy of the home.

[6-11] The law implies an obligation on the part of an infant to pay for necessaries furnished to him and his family on his own credit, where not otherwise prohibited. 43 C.J.S., Infants, § 78, and cases cited; sec. 36, Civil Code. Lodging has been included as a necessary, and if shelter or lodging be furnished an infant under such circumstances that a promise to pay therefor is implied he will be liable for the reasonable value, unless statutory prohibitions apply. Hayward v. Montero, 13 Ohio App. 414; Ragan v. Williams, 220 Ala. 590, 127 So. 190, 68 A.L.R. 1182, 1185, and cases cited; 43 C.J.S., Infants, § 78; 27 Am.Jur. pp. 758, 761, and cases cited. The policy of the law of this state to protect minors

against their own improvidence does not extend to depriving others of the reasonable value of necessaries furnished minors having capacity to contract for them, since the law recognizes that minors must have their needs provided for. Section 36, Civil Code. The trial court also found in effect on sufficient evidence introduced by the defendant that the parents of the minors were unable to provide shelter and that the home which they occupied and the reasonable rental value thereof were necessary for the support of the minors. There is no invalidity inherent in the contract of a minor to pay for necessaries actually furnished to him whether that contract be express or implied. Aubel v. Sosso, 72 Cal. App. 57, 60, 236 P. 319. Estoppel to disaffirm such a contract, assuming original invalidity due to non-age (section 33, Civil Code), may be created by acts done after the disability of non-age was removed, in this case after the minor arrived at the age of 18. Hakes Inv. Co. v. Lyons, supra, 166 Cal. 557, 561, 137 P. 911; Lee v. Hibernia Savings & Loan Society, 177 Cal. 656, 660, 171 P. 677; Dool v. First Nat. Bank of Calexico, 209 Cal. 717, 725, 290 P. 15; Dool v. First Nat. Bank of Calexico, 107 Cal.App. 585, 589, 290 P. 478; Merry v. Garibaldi, 48 Cal.App.2d 397, 403, 119 P. 2d 768. The record further shows that the rental value of the property exceeded the amounts paid under the contracts. There is no showing that a home of the class occupied by the members of the family was not in accord with their station and requirements, or that the amounts paid to the plaintiff did not represent the reasonable rental value for the period of occupancy.

[12] The defendant attempted to show that the parents were unable to buy the home and therefore that the contract was that of the minors. She asserts that the joining of the parents as principals on the contract was a ruse adopted by the plaintiff to cover up a void contract, and the plaintiff urges that the evidence supports the trial court's conclusion that the contract was in reality with the parents, who for some purpose of their own desired it also to be in the names of the minors. Whether such a device was employed by the parties in this case was for the trial court to determine. The court on sufficient evidence found against the defendant on this issue. Assuming the inclusion of an appropriate finding of the defendant's age, the record supports the findings which in turn support the judgment.

The judgment is affirmed.

GIBSON, C. J., and CARTER, SCHAUER, and SPENCE, JJ., concur.

EDMONDS, Justice (dissenting).

I cannot agree with the conclusion that the findings and judgment are supported by the evidence, nor with the holding that "the acts of the defendant after her incapacity had been removed operated to estop a disaffirmance of an implied agreement to pay a reasonable rental for the occupancy of the home." The seller's asserted right to retain money which she had received on account of the purchase price of the real property was not placed upon the ground of consideration for an implied contract, and, in my opinion, the findings have no evidentiary support whatever.

As a defense to the cause of action for recovery of the amount paid by Miss Irigoyen during minority, Mrs. Burnand asserted that she had furnished necessaries to an infant, and also justified acceptance of payments made before Miss Irigoyen was twenty-one years of age upon the ground that the minor had been emancipated by the Mexican decree. The seller neither pleaded nor proved facts which would constitute an implied contract, and the case was not tried upon that theory.

Although Miss Irigoyen obtained an emancipation decree in Mexico and judicial approval to sell the property owned by her in that country, those determinations did not validate a contract made by her in California which was void under the laws of this state because of her minority. Deason v. Jones, 7 Cal.App.2d 482, 45 P.2d 1025; Beauchamp v. Bertig, 90 Ark. 351, 119 S.W. 75. A contract relating to real property situated in California must be construed according to its laws. Civil Code, sec. 755; Pickering

Lumber Co. v. Whiteside, 54 Cal.App.2d 200, 210, 128 P.2d 899; Launer v. Griffen, 60 Cal.App.2d 659, 668, 141 P.2d 236; Taylor v. Taylor, 192 Cal. 71, 76, 218 P. 756, 51 A.L.R. 1074. There is no evidence whatever, other than the Mexican decree, as to emancipation or loss of status as a minor in California, and all of the acts of Miss Irigoyen relied upon to support the judgment against her occurred in this state while she was under the age of twenty-one and had the status of an infant.

The finding as to the amounts received by Mrs. Burnand upon the purchase price of the property declares "* * * that during the year 1940, the sum of approximately $5,979.00 was paid to cross-defendant by Guillermo A. Enciso, cross-defendant's agent. That the source of such payments by Enciso has not been proved by any evidence introduced in this cause; * * *" But the infant's uncontradicted testimony was to the effect that a substantial part of this amount came from the property which she and her brother inherited in Mexico. This testimony is in exact accordance with the allegations made by Mrs. Burnand in one of her separate defenses to Miss Irigoyen's cross-complaint. The facts pleaded are that the payments required by the contract were in default; Mrs. Burnand then went to the City of Mexico to inspect the properties owned by the Irigoyen family; and a contract was there made to which one Enciso, Mrs. Burnand's agent, was a party, providing that Miss Irigoyen should obtain a decree of emancipation and authorization to sell her interest in the property inherited by her from her grandfather and apply the proceeds to the Burnand indebtedness. The answer further declares that the necessary decrees were obtained, the property sold and $5,979 paid to Enciso, as Mrs. Burnand's agent, and credited by her on the purchase price of the California property.

Furthermore, Miss Irigoyen testified that she and her brother received an income of between $150 and $200 a month from property in Mexico which they had inherited from their grandfather, and which they shared equally. She also testified that after the purchase of the Burnand property, this income "went to pay for the house", and that the down payment of $300 was made from funds belonging to her brother and herself equally. These statements stand uncontradicted. And although the trial judge may have disbelieved the testimony of Miss Irigoyen, the finding that "it is not true that under and in pursuance of said contract * * * the cross complainant paid to the cross defendant on account of the purchase price * * * any sum whatsoever", is directly contrary to the facts pleaded by Mrs. Burnand and her own admission as to payment made in the verified answer to the cross-complaint. It is also inconsistent with the allegation of Mrs Burnand that Miss Irigoyen's mother "was unable to provide from her own resources, support or maintenance for said cross-complainant."

No finding was made as to the age of Miss Irigoyen when the contract was executed, although there is uncontradicted testimony showing that she was under eighteen at that time. Moreover, Mrs. Burnand herself pleaded that Miss Irigoyen was under eighteen at the time the contract was made. One of the exhibits made a part of the answer of Mrs. Burnand to the cross-complaint is a certified copy of the birth certificate of Miss Irigoyen showing that she was born on June 11, 1920. The cross-complainant is, therefore, entitled to a finding upon the evidence submitted by the cross-defendant, as well as her own uncontradicted testimony, that on September 7, 1937, the date when she executed the conditional sales contract for the purchase of the real and personal property, she was a minor under eighteen years of age. Art. VI, sec. 4¾, Calif.Const.; sec. 956a, Code Civ.Proc.

For these reasons I would reverse the judgment.

TRAYNOR, J., concurs.

82 Cal.App.2d 620

**CUNNINGHAM v. DE MORDAIGLE et al.**

**Civ. 15899.**

District Court of Appeal, Second District, Division 2, California.

Nov. 26, 1947.

**1. Joint adventures 🔑4(1)**

The rights and liabilities of joint venturers as between themselves are governed by the same rules as those which apply to partnerships.

**2. Partnership 🔑108**

Partners cannot sue one another at law in respect to any of the business of the partnership or to recover damages from one or the other of the copartners for a breach of a partnership agreement, since the remedy is by a suit in equity for a dissolution of partnership and an accounting and settlement of partnership affairs.

**3. Joint adventures 🔑5(1)**

Where a joint adventure had not been terminated and neither party sought to do so, plaintiff, could not maintain an action against his joint adventurers to recover an amount allegedly due him by reason of the joint adventure agreement, since an accounting could not be had until dissolution, when it could be known whether assets would be exhausted by joint venture debts or whether plaintiff was in fact himself indebted to the venture or to other members thereof.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Herbert J. Cunningham, joint venturer, against Rodolphe De Mordaigle, Roland R. Speers, and Robert G. Loraine, individually and doing business as R. L. M. Laboratories, to recover an amount allegedly due him by reason of a joint venture agreement. The trial court entered an interlocutory judgment finding plaintiff and defendants joint venturers and ordered a reference for the purpose of an accounting. From a judgment for the plaintiff, defendants appeal.

Judgment reversed.

Ben Koenig, of Los Angeles (Aaron B. Rosenthal and George W. Nilsson, both of Los Angeles, of counsel), for appellants.

Joseph Friedman, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury decreeing that he is entitled to $3,900 to be paid "only out of funds on deposit or other assets of" a joint venture, defendants appeal.

The conceded facts are these:

On February 25, 1946, the trial court entered an interlocutory judgment finding that plaintiff and defendants were joint venturers. A reference was ordered for the purpose of an accounting. An accounting was had and when returned to the court objections were filed thereto. After a hearing of the proposed accounting and objections thereto the trial court without terminating the joint venture made a finding that plaintiff was entitled to $3,900.00 out of the assets of the joint venture because of the agreement between the parties. A judgment was entered accordingly.

Defendants urge reversal of the judgment on the proposition:

*That in the absence of a termination of the joint venture and a final settlement of its affairs, plaintiff, a joint venturer, may not maintain an action to recover an amount allegedly due him by reason of the joint venture agreement.*

This proposition is tenable and is governed by the following pertinent rules of law:

[1] First: The rights and liabilities of joint venturers as between themselves are governed by the same rules as those which apply to partnerships. (Zeibak v. Nasser, 12 Cal.2d 1, 12, 82 P.2d 375; Shearer v. Davis, 67 Cal.App.2d 878, 881, 155 P.2d 708.)

[2] Second: Partners cannot sue one another at law in respect to any of the business of the partnership or to recover damages from one or the other of the copartners for a breach of a partnership

agreement. The remedy is by a suit in equity for a dissolution of the partnership and an accounting and settlement of the partnership affairs. (Dukes v. Kellogg, 127 Cal. 563, 564, 60 P. 44; Zeibak v. Nasser, 12 Cal.2d 1, 12, 82 P.2d 375.)

[3] Applying the foregoing rules to the present case it is evident that since plaintiff and defendants were joint venturers it was necessary to have a dissolution of the joint venture and an accounting of their joint venture transactions prior to plaintiff's being able to maintain an action to recover a sum allegedly due him under the joint venture agreement. Since neither party sought termination of the joint venture, and the trial court did not find that it had been terminated, the judgment in the present case was erroneous. The reason for this rule is that until an accounting is had it cannot be known whether the joint venturer suing may not in fact be indebted to the joint venture, or to the other members of the venture, or that there may not be outstanding joint venture debts sufficient to exhaust the joint venture assets.

The judgment is reversed.

MOORE, P. J., and WILSON, J., concur.

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82 Cal.App.2d 382

## McGANN v. McGANN.

No. 13451.

District Court of Appeal, First District, Division 1, California.

Nov. 14, 1947.

**1. Divorce 🔑184(10)**

Where the evidence is conflicting in action for divorce, the finding of trial court, including finding of the infliction of grievous mental suffering by one party upon the other, is binding if supported by sufficient evidence.

**2. Divorce 🔑27(5)**

In action for divorce in determining whether one party has inflicted grievous mental suffering upon the other party, the trial court must consider all the circumstances including the intelligence and refinement of the party charging cruelty.

**3. Divorce 🔑184(10)**

In action for divorce, conclusion reached by trial court will not be reversed on appeal unless evidence is so slight as to indicate an abuse of discretion.

**4. Divorce 🔑27(7)**

Coldness of one spouse toward another is included in the term "extreme cruelty" and, depending upon its degree, is one of the matters which may militate against a successful marriage.

See Words and Phrases, Permanent Edition, for all other definitions of "Extreme Cruelty".

**5. Divorce 🔑127(4)**

Where a number of charges of cruelty have been made, corroboration of a single act of cruelty may be sufficient.

**6. Divorce 🔑127(4)**

The rule requiring corroboration is not so strictly applied in hotly contested divorce actions as it is in actions where decree is demanded on default of opposing party.

**7. Divorce 🔑127(4)**

The principal object of the corroboration rule in divorce cases is to prevent collusion between the parties, and, where it is clear from the evidence in a contested action that there is no collusion, court is justified in granting decree upon evidence which is only slightly corroborated if otherwise court is satisfied that prevailing party is entitled to decree.

**8. Divorce 🔑127(4)**

In action for divorce on ground of extreme cruelty, husband's evidence was sufficiently corroborated to entitle him to a divorce.

**9. Divorce 🔑127(3)**

There is no requirement in the law that, where acts of cruelty occur and the injured spouse is willing to try to make the marriage last and the acts continue, such later acts must be corroborated.

**10. Divorce** ⚷184(12)

In divorce action, any error in court's statement that he would pay no attention to preliminary evidence was error without prejudice, where the subject was then abandoned by appellant but the subject was subsequently covered by appellant's testimony.

**11. Appeal and error** ⚷884

Appellant could not complain of ruling that question called for immaterial matter when appellant withdrew the question.

**12. Divorce** ⚷240(2)

In divorce cases allowances for support may be based on husband's earnings or his ability to earn money.

**13. Divorce** ⚷286

In action for divorce, court's statement that court was only interested in husband's gross income, and not in the expenditures he made nor his net income, was error in wife's favor of which she could not complain on appeal.

**14. Divorce** ⚷308

In action for divorce, allowance of $40 per month for support of child was not an abuse of discretion under the evidence.

**15. Divorce** ⚷309

In divorce action, allowance made for support of child may be modified at any time that conditions justify such action.

◆

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Zona McGann against William R. McGann for divorce, wherein the defendant filed a cross-complaint for divorce. From a judgment for defendant and cross-complainant, the plaintiff appeals.

Judgment affirmed.

Charles Bagby, of San Francisco, for appellant.

Charles McLaughlin, of San Francisco (A. J. Harwood, of San Francisco, of counsel), for respondent.

BRAY, Justice.

There are three points made on this appeal from a judgment awarding defendant upon his cross-complaint a divorce on the grounds of extreme cruelty: (1) Lack of corroboration of defendant's testimony; (2) refusal of the court to admit certain testimony; and (3) abuse of discretion by the court.

*Corroboration.*

The parties were married in 1942 while defendant, a dentist by profession, was an officer in the United States Army. The next year a son was born to them, who, at the time of the trial, was approximately three years of age. The parties lived together until the defendant was sent overseas in October, 1943. On October 18, 1945, defendant returned, and except for a short stay in Brookdale, the parties lived with plaintiff's mother in San Francisco until their separation. On December 13, 1945, defendant left plaintiff and the child and went to live with his parents. Through the intercession of a minister, whose help plaintiff had sought, defendant returned to plaintiff for a period of ten days, and then left finally.

Plaintiff, shortly thereafter, complained for divorce on the grounds of extreme cruelty and the defendant cross-complained on the same ground.

At the trial, plaintiff testified that on the day defendant left home he told her that his father had told him to leave her, and that he had to obey his father; that later, in a telephone conversation, defendant stated that he did not love her and never had. Defendant admitted telling her that he no longer loved her, but denied that he stated he never had loved her. Plaintiff's mother testified defendant was quiet and would sit around the house moping with his head in his hands, and that on the day the parties separated she heard defendant state that he had to obey his father. On this testimony the court denied plaintiff's prayer for a divorce, stating that there was not sufficient evidence to justify a finding of extreme cruelty; that if anything, the evidence showed desertion, which, however, had not existed for the statutory period. Plaintiff does not complain of this ruling. In fact, at argument, plaintiff contended that neither party should have been granted a divorce.

Defendant, under his cross-complaint, testified that plaintiff was cold toward him, nagged him, wrote him whining letters while overseas, turned her back on him while in bed, attempted to regulate his life and refused to permit him to go bowling with his father, invited him to leave home, made it difficult for him to practice dentistry, and attempted to have him arrested. Plaintiff contends that these acts do not constitute cruelty, especially as plaintiff denied them and explained that the so-called whining letters were written at defendant's request that she write him about everything that was going on at home, even the unpleasant things, and that the arrest incident was due to defendant taking the family automobile without her knowledge, and her reporting it to the police as having been stolen.

[1-3] As said in Serns v. Serns, 70 Cal. App.2d 527, at page 528, 161 P.2d 417, 418: "The evidence in the case is conflicting and in an action for divorce, like other actions, a finding of the trial court is binding if supported by sufficient evidence. This includes the finding of the infliction of grievous mental suffering by one party upon the other. In passing upon this particular finding the trial court must consider all the circumstances of the case, including the intelligence and refinement of the party charging cruelty. The conclusion reached by the trial court will not be reversed on appeal unless the evidence is so slight as to indicate an abuse of discretion. Keener v. Keener, 18 Cal.2d 445, 116 P.2d 1. The evidence outlined above is ample to give support to the findings of the trial court."

In Blanchard v. Blanchard, 10 Cal.App. 203, 101 P. 536, the court held that while incompatibility of temperament furnishes no grounds for divorce in California, it may properly be taken into consideration as explaining the course of conduct of a party. "Incompatibility of temperament is disclosed by the record also, and that mutual confidence and affection essential to conjugal happiness and the proper maintenance of the marriage state seem to have been entirely wanting." Page 205 of 10 Cal.App., page 536 of 101 P.

[4] Plaintiff cites Dahnke v. Dahnke, 55 Cal.App. 12, 202 P. 894, as authority for her contention that coldness of a spouse towards the other is not included in the term extreme cruelty. There is nothing in that case to that effect. While perhaps coldness alone is not sufficient to constitute extreme cruelty, it is included in the term, and, depending upon its degree, is one of the matters which may militate against a successful marriage.

Defendant's corroboration consisted principally in the testimony of his father that prior to the time defendant went overseas, he observed that plaintiff had ordered defendant around and would create a scene if he did not do as ordered, that she was cold and indifferent toward defendant, that she objected to him and his wife seeing the child, that she was mercenary, her conversations running to money, defendant's army allotment and insurance; that she showed no interest in the fact that defendant's army chaplain had written witness that defendant was worried about things at home (apparently referring to the fact that plaintiff's refusal to allow the grandparents to see the child had been communicated to defendant), and intimating that such worries were affecting defendant's health; that she told him the defendant was a "heel." Defendant's mother testified that plaintiff never expressed any love or affection for, nor said anything kind about him, and was cold and indifferent toward him and did not show any concern or worry about him going overseas. The testimony of both of the corroborating witnesses was based on their observation of the parties prior to the time defendant went overseas. Because of friction between them and plaintiff, they did not visit the parties after defendant's return.

Plaintiff contends that the testimony of defendant's parents did not constitute corroboration of any acts of cruelty, and that, if it did, as there was no corroboration of defendant's testimony as to what occurred in the brief time he and plaintiff lived together after his return from service (less than two months), it was not sufficient.

[5-7] "No divorce can be granted * * * upon the uncorroborated statement, admission, or testimony of the parties * * *." Sec. 130, Civil Code. "The extent of the corroboration necessary for the granting of a decree of divorce is not defined in any of our statutes. It is not necessary to corroborate all of the acts of cruelty charged by the party to whom the decree is granted. Where a number of charges of cruelty have been made, corroboration of a single act of cruelty may be sufficient. Ungemach v. Ungemach, 61 Cal.App.2d 29, 142 P.2d 99; Keener v. Keener, supra, [18 Cal.2d 445, 116 P.2d 1]. Moreover, the rule requiring corroboration is not so strictly applied in hotly contested divorce actions as it is in actions where a decree is demanded upon the default of the opposing party. The principal object of the corroboration rule is to prevent collusion between the parties, and where it is clear from the evidence in a contested action that there is no collusion the court is justified in granting the decree upon evidence which is only slightly corroborated if otherwise the court is satisfied that the prevailing party is entitled to a decree. Minnich v. Minnich, 127 Cal.App. 1, 15 P.2d 804; Ungemach v. Ungemach, supra." Serns v. Serns, supra, 70 Cal.App.2d page 529, 161 P.2d page 418.

[8] Tested by the foregoing rules the corroboration here was sufficient.

[9] Plaintiff contends that the corroborated acts of cruelty all occurred before defendant went overseas, and his return to plaintiff constituted a condonation of those acts, and therefore any new acts required additional corroboration. Whether defendant actually condoned these acts does not appear in the record. It is apparent, however, that such condonation, if it existed, was based on the hope of the parties being able to get along and the plaintiff treating defendant differently than she had. This hope was not fulfilled, nor did plaintiff act differently. There is no requirement in the law that where acts of cruelty occur and the injured spouse is willing to try to make the marriage last, and the acts continue, such later acts must be corroborated. There can be no question in this case of collusion between the parties as to divorce and hence, as stated in the Serns case, supra, the defendant's evidence needed but slight corroboration.

*Rejection of Evidence.*

Plaintiff contends the court refused to admit certain testimony (1) bearing on the merits of the divorce action, and (2) bearing on the amount of support to be awarded for the child. The second point will be considered later in connection with the contention that the court abused its discretion as to the amount awarded.

[10] The plaintiff was testifying that defendant's parents refused to spend with plaintiff and defendant the last days before defendant went overseas, and that defendant told her that his parents had broken up his first marriage and that they were trying to do the same with this marriage, and begged her not to let them interfere. Thereupon defendant's counsel broke in with an objection to the relevancy of this testimony. Plaintiff stated that it was preliminary to and for the purpose of showing the later actions of defendant with regard to the attitude of his parents. The court then said: "All right, just skip the preliminaries, then, because I would not pay any attention to what she says now. They had a discussion about the parents, and he begged her not to let the parents interfere with his marriage. There is nothing cruel about that." Just what the court meant by the statement "I would not pay any attention to what she says now" cannot be determined. Assuming that it was error for the court to make this statement, it was error without prejudice, first, because plaintiff was not then asked what were the later actions of the defendant towards his parents, but seemed to abandon the subject; and secondly, because later in the case plaintiff did testify that defendant was influenced by the attitude of his parents, even to the extent of obeying the father's instructions to leave plaintiff and the child.

[11] The court ruled immaterial a question concerning the parents' attitude towards the young couple bearing children. Inasmuch as plaintiff stated, after the court ruled, "Very well, your Honor. I will

abide by your Honor's ruling *and withdraw it,*" plaintiff thereby waived any error in the ruling. (Emphasis added.)

*Abuse of Discretion.*

[12] The claim that the court abused its discretion in granting defendant a divorce is answered by the fact, as we have hereinbefore shown, that there is substantial evidence to support the court's findings in that respect. But a more serious question arises when we consider the fact that the court awarded plaintiff only the sum of $40 monthly for the support of the three year old child. Defendant had left the service, and at the time of the trial had been practicing his profession of dentistry for only a week over six months. He was sharing offices with the dentist with whom he had practiced before the war and who had taken over his practice when he went into the service. Ruling on an objection to a question asked plaintiff by her counsel, evidently intended to bring out an answer to the effect that plaintiff claimed that the defendant played golf when he ought to have been in his office, the court said: "I am not interested in his earning ability. I am only interested in what he is really making. * * * I cannot order a payment upon the basis of his ability. I can only order it upon the basis of what he actually receives." In the early case of Eidenmuller v. Eidenmuller, 37 Cal. 364, the rule was laid down that allowances for support may be based on the husband's earnings or "his ability to earn money." Page 366 of 37 Cal. The rule was reaffirmed in Peyre v. Peyre, 79 Cal. 336, 21 P. 838.

Defendant's father kept the books for defendant and prepared a profit and loss statement for the first five months, approximately, that defendant had been practicing, which statement was admitted in evidence. It showed an increasing gross income: for February, $446; for March, $588; for April, $672; for May, $1057; and for the first twenty-four days in June, $734; and an average monthly net income of $292.60.

[13] While plaintiff was examining defendant concerning an item of expense for a cabinet, a colloquy developed between plaintiff and the court, in which the court made the statement that it was only interested in the defendant's gross income and not in the expenditures he made, nor his net income, and that a lot of time was being wasted in examining concerning the latter. Plaintiff complains of this as error. However, it was error in her favor. The defendant is the only one who could object to the court's apparent impression that support allowances must be based upon gross rather than net income.

[14, 15] The sum awarded was unquestionably low, but it is doubtful if under all the circumstances we can hold that the court abused its discretion in awarding it. Defendant was granted the right to have the child with him on alternate week-ends. Perhaps the court took into consideration the fact that this would relieve the plaintiff of some of the expense of caring for the child, and would thereby indirectly increase the amount the support of the child would cost defendant. Defendant, too, was just getting started in the rebuilding of his dental practice, and while the first five months experience showed that apparently he would soon have a substantial practice, and the court might well have taken that into consideration and awarded more support, the court probably had in mind, as have we, that there is no finality to the award made. The plaintiff had and now has the right to apply again to the court for a change in the allowance. The only justification for such a low allowance in view of the defendant's income as shown during the last two months included in the statement, in view of the inadequate income of the mother, would be that the court feared that such income might be a "flash in the pan," and not represent a condition that might continue. Likewise, the court's error in failing to consider the matter of the defendant's earning ability is without prejudice, for to grant an award on future earning ability based on such a short actual experience of practice might be too speculative, especially as the amount awarded has no aspects of finality. If his earnings have continued at the same rate, or increased, the court, upon application, necessarily will be required to award a substantially larger sum.

The judgment is affirmed.

PETERS, P. J., concurs.

WARD, Justice (concurring).

I concur in the order affirming the judgment. I am convinced that the record does not disclose an abuse of discretion on the part of the trial court. For that reason I do not find it necessary to form an opinion on the factual question of the propriety of the amount awarded as maintenance for the child.

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82 Cal.App.2d 627

## KELLEY v. STATE BOARD OF SOCIAL WELFARE.

Civ. 15797.

District Court of Appeal, Second District, Division 3, California.

Nov. 26, 1947.

Rehearing Denied Dec. 17, 1947.

**1. Administrative law and procedure 🔑784**
**Paupers 🔑42**

Review by superior court and by District Court of Appeal of the decision of State Board of Social Welfare relative to old age aid is confined to questions of law involved. Welfare and Institutions Code, § 2182.

**2. Administrative law and procedure 🔑683**

Where a part of decision of administrative agency was modified by superior court in favor of petitioner and agency took no appeal from modification, correctness of disposition of question made by agency was not before District Court of Appeal on petitioner's appeal.

**3. Paupers 🔑43(2)**

Recipient of old age assistance was not entitled to receive direct benefit of sums recovered by county from recipient's son in addition to regular payments received. Welfare and Institutions Code, § 2224.

**4. Paupers 🔑37(1)**

Section 2181 setting out a graduated scale of maximum monthly contributions required of spouses and adult children within the state of old age aid recipients and section 2224 authorizing an action by county granting aid for recovery from such relatives of such portion of aid as relative is able to pay are not unconstitutional as being discriminatory against such relatives. Welfare and Institutions Code, §§ 2181, 2224; Civ.Code, §§ 155, 206.

**5. Paupers 🔑37(1)**

One spouse in supporting another, and adult children in supporting indigent parent are not assuming a part of any debt owed by county to an old age aid recipient, since there is no vested right to receive old age aid and obligation of support is independent of aid granted needy aged by public authorities. Welfare and Institutions Code, §§ 2002, 2181, 2224; Civ.Code, §§ 155, 206.

**6. Paupers 🔑43(2)**

The Old Age Security Law contemplates state aid to needy aged only to extent their legally responsible relatives are unable to support them and in no case beyond statutory maximum payment. Welfare and Institutions Code, §§ 2002, 2181, 2224; Civ.Code, §§ 155, 206.

**7. Paupers 🔑43(2)**

Where wife of applicant for old age aid, a school teacher, filed a responsible relative statement in June of year in question, stating that she was giving full support, aid was properly denied to applicant for the months of May and June and he was thereafter properly granted aid from July 1, during school vacation period, when wife was not earning. Welfare and Institutions Code, § 2183.

**8. Paupers 🔑37(1)**

The rule of State Board of Social Welfare under which statutory schedule of contributions by responsible relatives for aid of needy aged is treated as inapplicable to community income of an aid recipient and spouse, is within rule making powers of board. Welfare and Institutions Code, §§ 2181, 2140.

**9. Paupers 🔑37(1)**

Where rule of State Board of Social Welfare relative to allocation of community income, first to needs of wage earning spouse and then to needs of other spouse, with supplementation by old age aid, was placed in effect in 1933, court would not presume that, in setting up schedule in 1941, Legislature ignored established practice of board under the rules and intended to abrogate it. Welfare and Institutions Code, § 2181.

**10. Paupers ⚷37(1)**

The statute establishing a schedule of contributions for responsible relatives toward support of recipients of old age aid was not intended to limit obligation of spouses of recipients with respect to community income to maximum contributions prescribed for responsible relatives. Welfare and Institutions Code, § 2181.

**11. Husband and wife ⚷266**

Husband's deed of gift of wife's earnings to her as her separate property was not effective to convert community earnings into separate earnings of wife where wife did not join in husband's purported instrument of release and thereafter treated her earnings as community income.

**12. Paupers ⚷41**

Where evidence was practically undisputed as to needs and as to income of applicant for old age aid for a particular month, proper award of aid was a question of law. Welfare and Institutions Code, §§ 2181, 2002, 2182, 2224; St.1947, c. 1255.

**13. Paupers ⚷41**

Where under any method of allocating income to community there would be a deficit in amounts received by applicant for old age aid for two months of either $17 or $21, finding that during such months applicant's income exceeded his unmet needs was not sustained by evidence. Welfare and Institutions Code, §§ 2181, 2002, 2182, 2224; St. 1947, c. 1255.

**14. Paupers ⚷42**

State Board of Social Welfare, on appeal from determination of county board of supervisors as to amount of old age aid that should be paid to recipient, had duty to make a new computation and award for the months in question. Welfare and Institutions Code, § 2182.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Proceeding by Charles G. Kelley against the State Board of Social Welfare to review a decision of the board as to retroactive old age aid for petitioner. From an adverse judgment, petitioner appeals.

Affirmed as modified.

Charles G. Kelley, in pro. per.

Fred N. Howser, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen., for respondent.

SHINN, Acting Presiding Justice.

[1] This is an appeal by one Charles G. Kelley, appearing in pro. per., from a judgment of the superior court in review proceedings had under section 2182 and 2182.1 of the Welfare and Institutions Code, to which all section references apply unless otherwise indicated. The judgment upheld the decision of respondent State Social Welfare Board as to retroactive old age aid for Kelley in all respects save the determination of the board that the additional aid claimed by Kelley for the first three months of 1940 was barred by Section 338 of the Code of Civil Procedure. As provided in section 2182, the review of the superior court was confined to the questions of law involved. Our review on this appeal is likewise so limited.

Appellant first received old age aid on January 1, 1940, when he was granted $30 a month. After three months of such aid, the grant was increased to the then maximum amount of $40 a month which he received until the end of 1942. At that time all old age aid to him was discontinued since he then was receiving adequate support from the members of his family responsible therefor. See sec. 2160(f). On April 3, 1944, he again applied for old age aid which was granted to him in the amount of $30 a month effective July 1, 1944. As of September 1, 1944, such aid was increased to the then maximum of $40 a month. This maximum payment was made until June 1, 1945, when it was reduced to $20 a month. Subsequently, according to appellant's statements at the oral argument, his aid was again increased to

$50 a month and then later further increased to the maximum level, which is now $60 a month. Stats. 1947, ch. 1255.

On June 2, 1945, appellant applied to the Board of Supervisors of Los Angeles County for immediate retroactive restoration of his aid in the maximum amount. This application was thereafter denied, and appellant appealed to respondent.

The factual situation in which the various legal questions arose is the following: Appellant produces no income and has no separate income; his wife, who lives with him, is a schoolteacher and earns approximately $2,000 per year, although respondent took into consideration only her actual income from other sources during the vacation months, which are in question here; on September 1, 1944, appellant recorded his affidavit by which he purported to transfer to his wife all his community interest in her earnings and he insists they are her separate property; during a part of the time a serviceman's allotment of $37 per month came to Mr. and Mrs. Kelley from their son, Charles, the allocation of which as between the two by respondent will be later explained. The County of Los Angeles recovered and retained a total of $60 from the Kelleys' son, Paul, in proceedings had under section 2224. The Board of Supervisors and respondent had, at various times, computed the needs and resources of appellant; these computations are shown in the record and their factual aspects are not open to review. Appellant's contentions that the findings of respondent as to his resources were erroneous present questions of law by reason of his claim that respondent allocated to him a portion of his wife's salary, a portion of the allotment from his son, Charles, and charged the county in his favor with none of the amount collected by the county from his son, Paul. His contentions before respondent may be briefly summarized. (1) Appellant is entitled retroactively to maximum aid for the first three months of 1940—an additional $30. (2) He is further entitled to the $60 recovered by Los Angeles County from his son, Paul. (3) Sections 2181 and 2224 are unconstitutional because the State has an obligation to grant him maximum old age aid on proof of his need and this obligation cannot be shifted to his responsible relatives. (4) His aid should have been restored as of May 1, 1944. (5) He should have received maximum aid since that time.

Respondent did not rule on the second and third of appellant's contentions, although the effect of the action taken was to reject them. Respondent's decision follows: "Findings of Fact: The appellant contends that his ineligible spouse's income is her separate income and should not have been taken into consideration in computing his unmet needs. He further contends that the allotment from his son is intended for the ineligible spouse only and should not be considered applicable either wholly or partially to his support. It is the Board's finding that the spouse's income is community income, and that the allotment is to be considered as equally divided between the appellant and his spouse. Determination: On the basis of the above facts, the Board grants the appellant's appeal for retroactive Old Age Security for the period June 1, 1945 through August 31, 1945, and orders payment of retroactive aid in the amount to which he proves eligible. The appellant's appeal for retroactive aid for 1940 is dismissed because of the Statute of Limitations; the appellant's appeal for retroactive aid for 1944 is denied since the appellant's income exceeded his established needs."

Appellant's several contentions will be stated and considered seriatim.

[2] 1. The superior court, in approving this determination of respondent, modified it by directing respondent to compute appellant's old age aid for the first three months of 1940 without regard to the Statute of Limitations. Respondent has taken no appeal from this modification; hence, the legal correctness of the disposition made of appellant's claim of 1940 retroactive aid is not before us.

[3] 2. It may be noted that the claim that respondent failed to require Los Angeles County to give appellant the benefit of the sums recovered from the son, Paul, was omitted from appellant's "substitute" petition to respondent as not being within respondent's jurisdiction. However

since this matter is now before us for a "review of the entire proceedings" upon the questions involved, we shall, of our own motion, consider the merit of this omitted contention. The record shows that the amount of aid received by appellant was not affected by the county's recovery from his son, Paul, under section 2224. His further claim that the $60 so recovered should have been paid to him conflicts with the plain language of the section concerning the disposition of the recovery. Thus appellant's second contention, when stripped down, merges into his third, which is that sections 2181 and 2224 are unconstitutional. The contention that these sections are unconstitutional is unfounded.

3. Section 2181 sets out a graduated scale of maximum monthly contributions required of spouses and adult children (within the State) of aid recipients, while section 2224 creates an action by the county granting aid for the recovery from such relatives of such portion of the aid as the relative is able to pay and for an order for future payment to the extent of the relative's liability. The constitutionality of section 2224 was sustained when liability thereunder was confined to those spouses and adult children who filed State personal income tax returns. County of Los Angeles v. Hurlbut, 44 Cal.App.2d 88, 111 P. 2d 963. Since the expansion of liability thereunder in terms of persons liable gives rise to no constitutional objections not fully considered in that excellent decision, we feel that prolonged discussion of the point by us would be unduly cumulative. But we wish to set forth appellant's theory of unconstitutionality, which is equally applicable to both sections, in order to reveal its fundamental unsoundness.

[4-6] Appellant's theory of unconstitutionality, briefly stated, is this: Old age aid, when allowed, is a debt owed by the county to the recipient. Board of Social Welfare v. County of Los Angeles, 27 Cal.2d 81, 86, 89, 162 P.2d 630. Sections 2181 and 2224 compel spouses and adult children within the State of old age recipients to pay a part of this debt of the county. This constitutes unconstitutional discrimination against these relatives. This theory is completely fallacious. It overlooks the thoroughly established bases for these statutes, namely, the obligation of support owed by spouses to each other (Civil Code, sec. 155) and owed by adult children to their indigent parents. Civil Code, sec. 206. Furthermore, in the performance of their obligation of support these relatives are not assuming in any sense a part of any debt owed by the county to an old age recipient. There is no vested right to receive old age aid. Sec. 2002. The obligation of support owed by these relatives is pre-existent to and independent of the aid granted to the needy aged by public authorities. This prior and primary obligation of support by responsible relatives must be satisfied—either under section 2181, prior to the grant of aid, or under section 2224 subsequent thereto. Appellant has simply put the cart before the horse in asserting the public responsibility of aid to the needy aged to be primary and the private responsibility of the responsible relatives to be secondary. Such is not the law. Under our Old Age Security Law the State aids the needy aged only to the extent their legally responsible relatives are unable to support them and in no case beyond the statutory maximum payment, which now is $60 a month. Sections 2181 and 2224 are valid statutes.

[7] 4. Mrs. Kelley had filed a responsible relative statement, June 12, 1944, stating that she was given full support, and for that reason respondent properly denied appellant aid for the months of May and June. He was declared eligible in July, 1944, and aid was properly granted from July 1st. Section 2183.

[8-10] 5. Appellant's arguments under his fifth point are broad and varied. Appellant advanced, and respondent rejected, the theory that no part of the wife's income could be allocated to him for the reason that it was insufficient in amount to make it her duty to contribute to his support as a responsible relative under section 2181. Under the rules of respondent with respect to community income of a spouse of an old age recipient, while living together, the income is first applied to the needs of the earning spouse, then to the

needs of the recipient, not in excess of the needs of the earning spouse, the balance is allocated equally, and if there be a deficit, the amount of the unmet needs of the recipient is awarded as aid. Section 2181 provides a schedule of maximum required contributions by responsible relatives based upon the amount of income and the number of persons dependent thereon. Under this schedule appellant's wife, if considered as a responsible relative, would have been required to contribute nothing toward appellant's support for the months of July or August, 1944. For the months involved in 1945, i. e., June, July and August, the wife, if considered as a responsible relative, would have been required to contribute nothing for the months of July and August, and not more than $15 for the month of June, and then only if she received during the month of June not less than $195. We think the rule of respondent under which section 2181 is treated as inapplicable to the community income of a recipient and the spouse falls within its powers to make rules for the administration of the Law which are not inconsistent therewith. Section 2140. There is ample justification for this rule. Section 2181 deals with income which belongs exclusively to others than the recipient. A recipient of aid has equal ownership with an income producing spouse in the earnings of the latter while the two are living together. Normally this equality is recognized by the use of community income to meet community needs. The result of the allocation of income in appellant's case was to meet the needs of the income producing wife in full, to apply the remainder of the income to appellant's needs, and to supply the deficit by a grant of aid. The needs of the community were met as far as community income permitted. The rule of the board is fair and practicable. It recognizes the duty of the spouses to apply community income to meet community needs. It has been in effect since 1933 and it is not to be presumed that in setting up the schedule in 1941 the Legislature ignored the established practice of the board under the rules and intended to abrogate it. We think it is clear that section 2181 was not intended to limit the obligation of spouses of recipients with respect to community income to the maximum contributions prescribed for responsible relatives, and we hold that respondent properly computes the needs of the recipient and his resources from community income without regard to that section.

[11] Appellant asserted that his wife's yearly earnings as a schoolteacher of approximately $2,000 were her separate property by reason of his attempted deed of gift of them to her, and that no part of this should be treated as income accruing to him. This contention applies to the period subsequent to September 1, 1944. Respondent properly rejected this contention. It may not be questioned that a husband and wife can, by agreement, convert community earnings into the separate earnings of either, but here there was no such agreement. Appellant's wife did not join in appellant's purported instrument of release. See Pacific Mut. Life Ins. Co. v. Cleverdon, 16 Cal.2d 788, 791, 108 P.2d 405. The record also shows that subsequent to the date of recordation of this instrument, appellant's wife applied her community earnings to the needs of the community and that she paid her federal income tax on a community property basis. Furthermore, she stated to the board's investigator that she considered her earnings to be community property.

[12, 13] Appellant's contention, that the finding of respondent that his income for 1944 exceeded his established needs is contrary to the evidence as to the months of July and August, must be sustained. The evidence on this point consisted of determinations made by the Board of Supervisors as to appellant's needs and his income. As to appellant's needs, the board found them to amount to $76.46, while appellant claimed $78.62. The evidence was undisputed as to the amount of the wife's income, the amount of the monthly contribution by the son, Paul, of $10.98 furnished to appellant, and a serviceman's allotment of $37 per month from the son, Charles. There was no conflict of evidence as to the needs of appellant's wife as computed by the Board of Supervisors. Upon these facts only questions of law could arise as

to the proper application of the Law. For the months of July and August the board allocated to Mrs. Kelley the amount of her needs and appellant the remainder of her income. For the month of July, when her income was small, the $37 contributed by Charles was allocated to her. For the month of August the allotment was allocated to appellant. As previously noted, respondent ruled, contrary to the ruling of the Board of Supervisors, that the allotment should be allocated equally to the husband and wife. Under any application of the amounts of need and income, as established by the evidence, there would be a deficit in the amounts received by appellant for the months of July and August of either $17 or $21. We do not find in the brief of respondent any argument in support of the finding that, as applied to the months of July and August, appellant's income exceeded his unmet needs. This finding is not sustained by the evidence.

[14] While the foregoing disposes of appellant's contentions before respondent, appellant raises one further question on the appeal. Respondent, while holding that appellant was entitled to retroactive aid for the period June 1st through August 31, 1945, in the amount to which he should prove eligible, made no determination as to that amount. The judgment of the superior court did not direct respondent to make that determination for the months in 1945, although it was the duty of respondent to make it under section 2182. The section reads in part: "The State Social Welfare Board shall consider the appeal, and shall dismiss the appeal or award aid as prescribed in this chapter. The county board of supervisors shall then pay to such aged person, without the necessity of his establishing a present need, the sum awarded," etc. It will be the duty of respondent, upon the evidence before it or such additional evidence as may be deemed necessary, to make a computation and award for the months of January, February, and March, 1940, July and August, 1944, and for the months of June, July, and August, 1945.

Other points argued by appellant are not deserving of attention.

The judgment of the superior court is modified by adding a provision thereto directing respondent to make determinations and awards for the months of July and August, 1944, and June, July, and August, 1945, in accordance with the views herein expressed and, as so modified, is affirmed.

WOOD, J., concurs.

KINCAID, J., pro tem., concurs in the judgment.

82 Cal.App.2d 378

## HURLEY v. KAZANTZIS.

Civ. 13489.

District Court of Appeal, First District,
Division 2, California.
Nov. 13, 1947.

**1. Continuance** 🔑19

Granting or denial of a motion for continuance on ground of unavoidable absence of a party rests in the sound discretion of the court.

**2. Continuance** 🔑40, 46(10)

Trial court did not abuse its discretion in denying motion for a continuance on ground of unavoidable absence of defendant, where there was want of diligence in delaying motion until morning set for trial, affidavit in support of motion failed to show testimony, if any, to be expected from defendant, affidavits did not state any facts tending to support conclusion that it was impossible to try matter without attendance of defendant, and there was no showing that efforts were made to take defendant's deposition or any excuse for not doing so.

**3. Accord and satisfaction** 🔑1

There can be no "accord and satisfaction" in absence of a bona fide dispute as to amount due and unless the creditor agrees to accept something different from or less than that to which he is entitled in extinction of the debt. Civ.Code, §§ 1521, 1523.

See Words and Phrases, Permanent Edition, for all other definitions of "Accord and Satisfaction".

**4. Accord and satisfaction ⚿10(1)**

Where plaintiff repairing vessel which defendant was seeking to purchase, at defendant's request, surrendered any claim of lien in consideration of payment by owners of vessel, but did not agree to accept payment in full satisfaction of defendant's obligation to pay for repairs and there was no dispute between plaintiff and owners as to amount due but only a question whether plaintiff had a lien upon the vessel for repairs, payment did not constitute an "accord and satisfaction" of defendant's obligation. Civ.Code, §§ 1521, 1523.

**5. Contracts ⚿83**

Where defendant assumed liability for repairs by plaintiffs to be made on a vessel which he was negotiating to purchase from the owners, but there was no proof that any agreement of sale was entered into, ouster of defendant and refusal to deliver the vessel to him by owners did not constitute a failure of consideration so as to relieve defendant from liability on his promise to plaintiff to pay for the repairs on the vessel.

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Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Jack Hurley, Jr., against Theodore E. Kazantzis, also known as Th. E. Kazantzis and T. E. Kazantzis, to recover for repairs made on a vessel. From an adverse judgment, defendant appeals.

Affirmed.

Charles A. Thomasset, of Los Angeles, for appellant.

Lyman Henry and Hall, Henry & Oliver, all of San Francisco, for respondent.

DOOLING, Justice.

This is an appeal by defendant from plaintiff's judgment. The action went to trial in the absence of defendant. On the morning of the date set for trial, November 12, 1946, counsel made a motion for continuance on the ground of the unavoidable absence of the defendant. Notice of time of trial had been served on counsel for defendant on October 10, 1946. Counsel's affidavit showed that he had promptly notified defendant that the case was set for trial and that on October 15, he had received a telegram from defendant advising him that he would not be able to attend the trial on November 12, and asking him to secure a continuance. No showing of facts was made that defendant's presence at the trial was necessary, nor any showing excusing the failure to take defendant's deposition in the period of over four weeks between October 15 and November 12, or of any facts expected to be proved by defendant. Neither was there any showing why the making of the motion for continuance was delayed until the date set for trial and not more promptly made. The case had previously been set for trial on May 20, 1946 and continued by agreement of counsel to accommodate defendant who was at that time also outside the state.

[1] The granting or denial of a motion for continuance on the ground of the unavoidable absence of a party rests in the sound discretion of the court. "While the circumstance that the witness who is unable to attend is, at the same time, one of the parties should no doubt be regarded as strengthening the showing in favor of a continuance, it has never been held in this court that the unavoidable absence of a party necessarily compels the court to grant a continuance. Sheldon v. Landwehr, 159 Cal. 778, 781, 116 P. 44. 'It is for the trial court in all cases, except where otherwise expressly provided by statute, to determine whether or not the circumstances shown upon an application for a continuance are such as to make it proper that a continuance should be granted, and its conclusion thereon will not be disturbed unless there has been a plain abuse of discretion.' Lynch v. Superior Court, 150 Cal. 123, 88 P. 708." Mission Film Corp. v. Chadwick P. Corp., 207 Cal. 386, 389, 278 P. 855, 856.

[2] The failure of the affidavits in support of the motion to show the testimony, if any, to be expected from defendant or

to state any facts tending to support the naked conclusion found in his counsel's affidavit that "it is impossible to try this matter without the attendance of the defendant", (Ross v. Thirlwall, 101 Cal.App. 411, 416, 281 P. 714; Callegari v. Maurer, 4 Cal.App.2d 178, 184, 40 P.2d 883; Capital National Bank v. Smith, 62 Cal.App.2d 328, 339, 144 P.2d 665), the failure to show any effort to take defendant's deposition or any excuse for not doing so (Beckman v. Waters, 161 Cal. 581, 588, 119 P. 922), the want of diligence in delaying the motion for continuance until the morning set for trial and the other facts above recited are sufficient to support the order denying a continuance. What has been said equally applies to the refusal of the court at the close of the trial to grant a continuance for the purpose of taking the defendant's deposition.

The judgment was for a balance due on an open book account. The judgment is based upon repairs made upon the S. S. Vanguard in the plaintiff's yard. Defendant brought the vessel to plaintiff's yard in November, 1941 and personally arranged with plaintiff for its repair. Periodical statements were rendered to defendant and during his absence, to his employee Cocotos whom he left in charge, and were approved by defendant but no payments were made by defendant. It is fairly inferable from the testimony that defendant before bringing the ship to plaintiff had entered into negotiations with the owners to purchase the vessel and had made a payment of $1,750 as earnest money. On December 4, 1941 one Skaggs addressed a letter to plaintiff disclaiming as representative of the owners any responsibility for the repairs.

About the middle of February, 1942, the repairs on the vessel were completed and the amount owing therefor was $16,059.37. The owners of the vessel were demanding possession and disclaiming any lien upon the Vanguard for the repairs. Plaintiff finally entered into a written agreement with the owners whereby he agreed to the sale of the Vanguard to Transmarine Navigation Corporation by the owners for $25,000 free and clear of any liens that he might have and the owners agreed to pay plaintiff the difference between $16,000 plus their expenses and the sale price. It further recited that Skaggs is holding $1,750 received from defendant which he feels obligated to use toward discharging any liens upon the vessel created by defendant's acts and if there are no other such lien claimants that amount will likewise be paid to plaintiff. Plaintiff further agreed to exclude from the vessel all persons except his employees and representatives of Skaggs pending the sale.

The contemplated sale was made and plaintiff received under the above agreement $9,229.17 for which he gave defendant credit. The judgment appealed from is for the balance of $6,830.20.

On the merits appellant makes two arguments:

1. That the receipt of $9,229.17 amounted to an accord and satisfaction.

[3, 4] There can be no accord and satisfaction unless the creditor agrees to accept something different from or less than that to which he is entitled in extinction of the debt. (Civ.Code secs. 1521, 1523.) While plaintiff surrendered any claim of lien in consideration of the payment by the owners he did not agree to accept the payment in full satisfaction of defendant's obligation. Nor can there be an accord and satisfaction in the absence of a bona fide dispute as to the amount due. 1 Cal.Jur. 131. There was no dispute between plaintiff and the owners as to the amount due but only on the question of whether plaintiff had a lien upon the vessel.

[5] 2. That the ouster of defendant and refusal to redeliver the vessel to him was wrongful and amounts to a failure of consideration.

In his letter of December 4, 1941 above referred to Skaggs wrote: "I, as managing owner of the ship, have been negotiating its sale to Th. E. Kazantzis, but no agreement of sale has as yet been signed."

Cocotos testified that he translated this letter to defendant and defendant "told me to tell Mr. Hurley, 'Don't worry, I will pay the ship and I will pay also all your bills up to the last cent.'"

The trial court was entitled to construe this reply of defendant as an implied admission of the truth of the statement quoted from the letter. There is no proof that any agreement of sale was thereafter entered into and hence no proof that defendant had any right of possession which he could assert against the owners.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

82 Cal.App.2d 425

### UNIVERSAL INS. CO. v. MANHATTAN MOTOR LINE, Inc. (AMERICAN DISTILLING CO., Intervener).

Civ. 13433.

District Court of Appeal, First District, Division 1, California.

Nov. 19, 1947.

Rehearing Denied Dec. 19, 1947.

Hearing Denied Jan. 15, 1948.

**1. Appeal and error 🔑1078(1)**

Causes of action, not argued on appeal, were waived. Rules on Appeal, rules 13 and 15(a).

**2. Evidence 🔑588**

Where there was a conflict in the evidence given by the witnesses, the trial court, as trier of the facts, had the right to determine whose recollection and interpretative explanation of conversations was correct. Code Civ.Proc. § 1847.

**3. Appeal and error 🔑994(3)**

Triers of the facts are the exclusive judges of witnesses' credibility. Code Civ. Proc. § 1847.

**4. Insurance 🔑96**

Where insurance brokers who obtained motor carrier's cargo liability policy from insurer for motor transport company were not licensed as agents of insurer, brokers were agents of transport company in negotiations for the policy. Insurance Code, § 33.

**5. Insurance 🔑249**

In action by insurer to rescind motor carrier's cargo liability policy on ground that insurer was fraudulently induced to issue policy on representation that no shipments of liquor would be made in open trucks, evidence justified finding that motor carrier did not, through its manager, practice fraud in the negotiations to obtain the insurance.

**6. Insurance 🔑247**

In action by insurer to rescind motor carrier's cargo liability policy on ground that insurer was fraudulently induced to issue the policy on the representation that no shipments of liquor would be made in open trucks, alleged misrepresentations by insurance broker who was motor carrier's agent, did not authorize rescission where insurer was aware of condition under which carrier operated and did not deem it advisable to place in the policy a covenant limiting method of operation of the motor trucks.

◆

Appeal from Superior Court, San Francisco County; W. T. Belieu, Judge.

Action by the Universal Insurance Company against Manhattan Motor Line, Inc., a corporation, for rescission of an insurance policy issued to the defendant, covering certain merchandise while in course of transportation, wherein the American Distilling Company, a corporation, intervened to resist the plaintiff's claims. From an adverse judgment, the plaintiff appeals.

Judgment affirmed.

Hauerken, Ames & St. Clair and Geo. H. Hauerken, all of San Francisco, for appellant.

Norman A. Eisner, of San Francisco, for respondent.

WARD, Justice.

This is an action by the Universal Insurance Company for rescission of an insurance policy issued to Manhattan Motor Line, Inc., covering certain merchandise while in course of transportation. The policy is referred to as a "Truckmen's and Motor Carrier's Cargo Liability Policy." Three counts are contained in the complaint each setting forth a separate ground of rescission.

The first count alleges "That on or about the 14th day of July, 1945, plaintiff * * * made and issued to the defendant a * * * policy of inland marine insurance * * * for a period of one year from that date * * * by which the plaintiff agreed to pay on behalf of the defendant as the insured, all sums which the defendant should become obligated to pay and does pay by reason of its legal liability to others for loss of and/or damage to lawful goods and/or merchandise shipped on motor trucks and/or truck trailers and/or semi-trailers operated by the insured in California, subject however, to conditions and requirements contained in said contract of insurance.

"That prior to the issuance of said policy and as a part of the consideration therefor, the defendant expressly represented and agreed that no shipments of liquor would be made by it which would or might be covered by said policy of insurance on open trucks * * *; that the plaintiff would not have issued said policy of insurance to defendant unless defendant made said representation and agreement, because of the added risk.

"That in making said representation and promise and obtaining said policy of insurance from the plaintiff, the defendant was guilty and practiced fraud and deceit, in that such promise was made by said defendant without any intention of performing the same; that immediately thereafter the said defendant violated the said promise and did make shipments of liquor upon an open truck.

"That immediately upon ascertaining said fraud and deceit, the plaintiff, on or about the *28th* day of September, 1945, gave written notice of rescission of said contract of insurance to the defendant * * * and offered to and did return to the defendant all premiums paid by it on account of said policy of insurance."

The Manhattan Motor Line, the transporter of the merchandise, filed an answer which denied any fraud or deceit, admitted a notice of rescission and alleged that it refused to accept the offer of rescission or the return of the premium. With the approval of the court, the American Distilling Company, a corporation, the owner of the transported goods, upon the basis that the Manhattan Motor Line was insolvent, intervened in resisting the claims of the insurance company. The American Distilling Company had previously brought an action against the Manhattan Motor Line, Inc., to recover the loss of the merchandise. The complaint in intervention denied any ground for rescission and prayed that the policy of insurance be declared to have been in full force and effect at the time of the loss of the merchandise. The answer to the complaint in intervention admitted the pendency of an action between the American Distilling Company and the Manhattan Motor Line, Inc., and realleged the grounds for rescission.

The second and third counts set forth respectively a failure of consideration, referring to a failure on the part of the Manhattan Motor Line, Inc., to pay an alleged $250 premium, and a failure to report correctly and pay premiums based on its gross charges. The allegations of counts two and three with denials thereof became issues in the case, and reference thereto appears in the transcript of evidence. There was also considerable discussion thereof by counsel prior to and during the presentation of evidence.

There was attached to the complaint a letter, dated September 21, 1945, from the insurance company to the carrier enclosing a check covering the amount of premiums paid, and notifying the carrier of an election to rescind. The letter contained the following: "Said policy was accepted by us upon the express understanding and representation that no shipments of liquor would be made by you and covered under said policy on open trucks and/or open trailers and/or open semi-trailers, and we are informed that on or about July 26, 1945, you did, in violation of said representation, make a shipment of liquor on an open vehicle." This letter was subsequently marked as an exhibit in the case for the plaintiff. Defendant introduced as an exhibit a letter acknowledging receipt of plaintiff's communication which read in part as follows: "I hereby notify you that I refuse to accept your offer of rescission and expressly deny and repudiate the alleged grounds that you set forth. The policy was not accepted by you under any express or other understanding or representation that no shipment of liquor would be made by me or would be covered under the policy on open trucks or open trailers or open semi-trailers. * * * We obtained this insurance in good faith and expect you to abide by the terms of your policy. The check for $80.36 tendered by you in conjunction with your letter of September 21, 1945 is returned herewith." This letter was signed by the president of defendant company.

[1] The plaintiff has appealed from the judgment. The second and third causes of action are not argued although the court found contrary to the contentions of plaintiff on all counts. Plaintiff states that of the three counts contained in the complaint "the most important is the first, and it is to this count that the evidence was principally directed." Plaintiff relies upon an alleged parol promise made by defendant prior to the issuance of the policy without intention of performance. There does not appear to be any argument or further reference to the subject matter in counts two and three. See Rules on Appeal, rules 13 and 15(a). In view of this circumstance, any claimed erroneous matter in connection with the last two counts may be deemed to have been waived. Romero v. Letts, 7 Cal.2d 503, 61 P.2d 449; County of Humboldt v. Kay, 57 Cal.App.2d 115, 134 P.2d 501.

The court found "That it is not true that prior to the issuance of said policy or as a part of the consideration therefor, the defendant expressly or at all represented or agreed that no shipments of liquor would be made by it which would or might be covered by said policy of insurance on open trucks and/or open trailers and/or open semi-trailers; that it is not true that plaintiff would not have issued said policy of insurance to defendant unless defendant made said representation and/or agreement. In this connection the Court finds that any reference to any restriction upon the cargo which defendant might carry was deliberately and intentionally omitted from said policy by plaintiff, and that plaintiff did not consider as material or rely upon any alleged representation or agreement that shipments of liquor would not be made on open trucks and/or open trailers and/or open semi-trailers.

"That it is not true that in obtaining said policy of insurance from the plaintiff defendant was guilty or practiced fraud or deceit, or that any promise was made by defendant without any intention of performing the same; that it is not true that the defendant violated any promise by making shipments of liquor upon an open truck.

"That on or about the 28th day of September, 1945, plaintiff gave written notice of rescission of said contract of insurance to defendant in the form of the notice attached to said complaint, and offered to return all premiums paid by defendant on account of said policy of insurance. In this connection the Court finds that said defendant refused to accept said offer of rescission or said return of premium."

The court also found that the shipper had delivered certain merchandise to the carrier, part of which was lost or destroyed; that the value of the lost or destroyed merchandise was $11,800; that the carrier was insolvent, and "That intervener has a direct interest in this litigation and in resisting the plaintiff's attempt to rescind said contract of insurance." The judgment orders and decrees "that the policy of insurance issued by plaintiff and referred to in said complaint was not rescinded; that said policy was valid and in full force and effect from the time of its issuance and was valid and in full force and effect at the time of the loss of the property of the intervener herein while in course of transportation by the defendant."

Only four witnesses testified: Frank J. Russi, a solicitor for the general insurance brokerage firm of French & St. Clair; Arthur O. St. Clair, a partner in the brokerage firm; Harry W. Browne, Vice President of the firm which acted as general managers for plaintiff company, and Phillip Rene (sometimes referred to as Jack Rence), the President and "operating head" of the defendant carrier.

The evidence shows that a trailer, part of the equipment of the defendant carrier, while hauling a load of liquor, the property of the intervener shipper, overturned on the highway while going down grade. The liquor was covered with a tarpaulin fastened to the trailer. There was some breakage but the greater part of the liquor was stolen. One of the attorneys stated: "* * * the well known American motorists coming along and within a very short period of time there were hundreds of automobiles there and everybody was taking liquor."

[2, 3] Originally Russi, the insurance solicitor on behalf of French & St. Clair, contacted Rene and successfully solicited the replacing of certain insurance policies. During the conversation the kind of equipment used in transporting merchandise, the facts that part of the liquor goods had been carried in open trucks and trailers, and that it was the endeavor of defendant to supply new equipment, were discussed. There had been losses but none "while the commodities were on the truck," "on a long haul on an open trailer." The losses were sustained "after they were unloaded." Rene, speaking of the conversation with Russi, testified: "He said, 'Where was that whiskey taken?' I said it was taken in Los Angeles. That is where most of it was stolen. And we both agreed that it wasn't good policy to handle the liquor in open pieces of equipment. But he didn't tell me that he wouldn't give me the insurance unless I got rid of the open truck, and hauled it strictly in closed equipment, because that could not have been done at that time. In other words, what I would have had to do was take that $15,000 piece of equipment and let it stand out in the street and rot." Rene testified that he continued, after the issuance of the policy involved herein, to ship in both open and closed trucks. Russi's version of these conversations is entirely different from that of Rene. The trial court had the right, in the face of the conflict in the evidence, to determine whose recollection and interpretative explanation of the conversations was correct. As will be noted from the findings, the trial court adopted the view of Rene as to the conversations preliminary to the issuance of the policy. The trial judge declared that the story to the contrary was inherently improbable and that the "demeanor" of the solicitor and the "surrounding facts indicate that no such representation was ever made by Mr. Rene." The presumption that a witness speaks the truth may be repelled by the manner in which he testifies or the character of his testimony, and the triers of the facts are the exclusive judges of his credibility. Code Civ.Proc. sec. 1847; Tingey v. E. F. Houghton & Co., Cal.Sup., 179 P. 2d 807.

[4] Russi testified that he communicated to St. Clair the alleged promise of Rene as to future hauling of liquor in locked vehicles. St. Clair, whose firm was not licensed as an agent of plaintiff insurance company, testified that he represented to Browne, Vice President of the firm which was general manager of plaintiff insurance company, that the carrier would use only locked equipment. The plaintiff relies upon the rule that where one engaged in the insurance business requests the issuance of an insurance policy from a company which he is not legally authorized to represent, he is appearing at such time as the agent for the applicant. Insurance Code, sec. 33. The insurance company and the insured are the contracting parties. The party obtaining the insurance is paid by the insurance company; he is the agent, nevertheless, of the insured. The transcript of evidence designates French & St. Clair as insurance brokers. A broker is not necessarily an agent. 29 Am.Jur., p. 110, sec. 86. However, the broker, impliedly, without the knowledge of the insured may be the latter's agent. The plaintiff contends, and intervener-respondent admits, that the designated "brokers" were agents of the defendant carrier in the negotiation for the issuance of the present policy. That is the law by which this court is bound. Solomon v. Federal Ins. Co., 176 Cal. 133, 167 P. 859; Purcell v. Pacific Automobile Ins. Co., 19 Cal.App.2d 230, 64 P.2d 1114; Bennett v. Northwestern Nat. Ins. Co., 84 Cal.App. 130, 257 P. 586; 32 Cor.Jur. 1054; 29 Am.Jur., supra; Couch, Cyclopedia of Insurance Law, pp. 12, 97.

[5] Fraud and deceit are the grounds set forth in the first cause of action of the complaint praying for rescission of the contract. As heretofore pointed out the

court was justified in concluding that the defendant carrier, through its manager Rene, did not practice fraud or deceit in the negotiations to obtain the insurance. There remains the possibility that St. Clair, the agent of the defendant, may have been guilty of fraudulently and deceitfully obtaining the insurance policy. There is no direct allegation in the complaint that the agent St. Clair made any misrepresentation to the insurance company.

Plaintiff states the controversy as follows: "The sole question therefore was, Was a representation made which was intentionally false? The broker testified that he made a positive representation that the principal did not intend to ship liquor on open trucks in the future. The principal testified that he had no intention of discontinuing the shipment of liquor in open trucks. Whether the broker was misled by his client is simply beside the point. A representation was made to the insurance company which the principal had no intention of keeping." The answer to that is purely factual. It appears in the findings based upon evidence that any reference to restriction of cargoes was deliberately and intentionally omitted and that plaintiff did not consider it material to rely on any representation that merchandise would not be hauled on open trucks or trailers.

The statement made by St. Clair to Browne which is claimed to be the basis of the issuance of the policy is that the trucks would be sealed in Sausalito, near San Francisco, "at the time they were loaded, and the seal would be taken off at the time the trucks arrived in Los Angeles." It also appears in evidence that the carrier was engaged in handling merchandise, a substantial portion of which was liquor, between San Francisco and Los Angeles.

Browne, representing the firm acting as general managers for plaintiff company, testified: "Yes, Mr. St. Clair renewed the discussion on that line some days later, and at that time he told me he had discussed this matter with the assured, and the assured had undertaken not to transport any liquor on their main line between San Francisco and Los Angeles, or anywhere else, in open trucks. So we discussed the matter still further, and on the understanding, the definite representation that there was no liquor to be hauled on open trucks, then and then only, did we agree to issue a policy." A proposed change to haul only in locked trucks later was eliminated as a consideration of their issuance of the policy. Browne further testified: "I asked Mr. St. Clair, in view of the fact that they were not going to transfer liquor on their open trucks, would it be in order for us to put a warranty to that effect on the policy. He said it would, except for one thing: These people, in the course of their business, have a pick up service, like all these large transportation companies have, pick up small packages from individual stores and bring them in to the depot to be sent on their main line haul, and that a driver unknown to his owner could easily pick up an odd case of liquor here and there during the week and bring it in to his assembly depot, and that case of liquor on that truck would nullify the entire insurance on everybody else's merchandise. For that reason he asked us not to put a warranty on the policy. * * * And purely on the discussion and understanding we had we didn't put a warranty on the policy, thereby giving the assured a much better policy than if they had a warranty on it." In addition, the insurance company made its own private investigation through other insurance companies and knew the approximate extent of previous losses from unlocked trucks or trailers. St. Clair testified: "He [Browne] telephoned my office and left a message that he had some information regarding losses that he had secured from other insurance companies or from adjusters wherein the loss experience had been bad."

It is apparent from the testimony of St. Clair and of Browne that a clause forbidding the hauling of merchandise in open trucks or trailers primarily was not inserted in the policy because transportation companies have a "pick-up" system for small packages collected from individual stores, transported to the assembly depot "to be sent on the main line haul." If the insurance company desired a different provision covering the short or "pick-up" and the long haul it would have been an easy matter to insert a provision in the policy that the carrier would not be permitted to transport merchandise on long or main line hauls except in locked vehicles. The evidence shows that prior to the present incident of the truck or trailer running off the road and overturning "there wasn't any whiskey ever taken off of the trucks up until the time they were backed up against the dock [at the end of the journey] * * * there was never any theft on a long haul on an open trailer * * * [the thefts occurred] after they were unloaded."

The complaint alleges, as stated, that the policy was issued "subject however, to conditions and requirements contained in said contract of insurance." The policy in the present case obligates the plaintiff insurance company on behalf of the insured to pay all legal liability of the insured carrier for loss or damage to goods or merchandise shipped on trucks or trailers "subject to the limits hereinafter stated." Certain exclusions are listed but no limitation in relation to locked and sealed or unlocked and unsealed trucks or trailers in carrying merchandise, and no provision, condition, covenant, warranty or limitation on the route or destination except that the trucks and trailers must be operated between points and places in California.

[6] In a suit to rescind a written contract oral evidence of fraud is generally admissible, but here we have a finding that fraud was not perpetrated by the defendant carrier and that the representations made by the insurance broker declared to be the agent of the defendant carrier, were immaterial in view of the fact that the plaintiff insurance company, aware of the conditions under which the defendant carrier operated, did not deem it advisable to place in the policy a covenant limiting either the kind of merchandise or the manner or method of operation of the motor trucks or the attached trailers. Under such circumstances the alleged representations become immaterial and the question of fraud disappears. As the trial court stated: "The reason assigned by Mr. St. Clair and Mr. Browne for not making the agreement not to haul liquor in open trucks a part of the policy is not supported by good reason."

Many of the legal contentions presented by plaintiff insurance company or the reply of defendant carrier do not here require determination or consideration, namely, that a false representation as to a material fact or intention is basis for rescission, even though it involves a promise of future conduct; that the Insurance Code goes even further and provides that a representation intentionally false gives the right to rescind whether material or not; that a rescission of contract may be had even against an innocent principal because of unauthorized misrepresentations by his agent, and that it is not necessary to show specifically an intent to deceive. The real issue, the factual question of misrepresentation, was submitted to the trial court and appears to have been decided impartially and justly.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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82 Cal.App.2d 393

## BUSBY v. SILVERMAN et al.

Civ. 15708.

District Court of Appeal, Second District,
Division 3, California.
Nov. 14, 1947.

**1. New trial 🔑70**

Trial court must carefully scrutinize the evidence on a motion for new trial on ground of insufficiency of the evidence and grant a new trial whenever in its opinion the evidence is insufficient to support the verdict.

**2. Appeal and error 🔑933(1)**

On appeal from order granting new trial the presumption is in favor of the order and against the verdict and order will not be reversed except upon a showing of manifest abuse of discretion.

**3. Landlord and tenant ⚷164(1)**

A landlord is not liable to tenant for injuries due to defective condition or faulty construction of demised premises in absence of fraud, concealment or covenant, but he must exercise ordinary care to see that portions of premises used in common with other tenants are kept in a reasonably safe condition.

**4. Landlord and tenant ⚷164(6)**

A landlord is not responsible for a defective condition unless he has actual knowledge thereof or it has existed for such a period of time that in exercise of ordinary care he should have known of its existence within such time as would give him a reasonable opportunity to make repairs.

**5. Landlord and tenant ⚷164(4)**

At common law, landlord was not required to illuminate common passageways over which he reserved control in absence of defective conditions of peculiar danger calling for special warning.

**6. Landlord and tenant ⚷169(6)**

Apartment house tenant suing landlord for injuries sustained in fall on common stairway had the burden of proving by a preponderance of the evidence some negligent act or omission by landlord proximately contributing to her injuries.

**7. Landlord and tenant ⚷164(4)**

That light at head of common stairway in apartment house was not lighted at time of tenant's fall thereon would not in itself charge landlord with negligence in absence of evidence showing landlord's knowledge of such condition, either actual or constructive.

**8. New trial ⚷71**

Granting a new trial after verdict against apartment house owners for injuries sustained by tenant in fall on common stairway was not abuse of discretion, where landing, stairway and bannister were not shown to be defective and evidence as to whether light at head of stairway was burning at time of accident and, if not, whether owners had actual or constructive knowledge of such condition, was in sharp conflict.

Appeal from Superior Court, Los Angeles County; Charles A. Paulsen, Judge.

Action by Alice Mary Busby against Harry Silverman and others for personal injuries sustained by plaintiff in fall on stairs while a tenant in apartment house owned and operated by named defendant. From an order granting a new trial after verdict in her favor, plaintiff appeals.

Order affirmed.

Byron R. Bentley, of Los Angeles, for appellant.

Sidney A. Moss and Robert E. Ford, both of Los Angeles, for respondent.

VALLEE, Justice pro tem.

In an action to recover damages for personal injuries sustained by plaintiff in falling down a flight of stairs while a tenant in the Barclay Manor, an apartment house owned and operated by defendant, Harry Silverman, plaintiff appeals from an order granting a new trial after a verdict in her favor.

Defendant's motion for new trial was based upon the ground, among others, of the insufficiency of the evidence to justify the verdict. The order of the trial court in granting the motion specified that the new trial was granted "as to all issues upon the grounds set forth in the motion and particularly on the ground that the evidence is insufficient to support said verdict and judgment."

[1, 2] It is well established that the trial court is not only authorized, but it is its duty, to carefully scrutinize the evidence on a motion for a new trial in cases where the evidence is claimed to be insufficient, and to grant a new trial whenever in its opinion the evidence is insufficient to support the verdict. The presumption is in favor of the order granting a new trial and against the verdict. Rosenberg v. George A. Moore & Co., 194 Cal. 392, 396, 229 P. 34. An order granting a new trial will not be reversed except upon a showing of manifest abuse of discretion. The question before us, therefore, is whether it clearly appears that the trial court abused its discretion in granting the motion for new trial.

Briefly, the facts are these: At approximately 8:15 o'clock a. m., of July 18, 1945, plaintiff left her apartment on the third floor of the Barclay Manor for the purpose of going to her place of business, at which place she was due at 8:30. After waiting a considerable period of time for the automatic elevator, which at that time was in constant use, she decided to use the stairway "in order to keep from being late," which stairway was located in the north wing of the building near the elevator and was used in common with the other tenants. She proceeded without mishap down the stairway to the second floor. At the trial reference was made to four lights on the second floor. Light No. 1 was at the foot of the stairway from the third to the second floor. Light No. 2 was near the head of the stairway from the second to the first floor. Lights Nos. 3 and 4 are of no importance upon this appeal. There was another light not referred to by number at the foot of the stairway from the second to the first floor. No other person was present at this time. Plaintiff, in describing the happening of the accident, stated that she was not in a hurry and that she walked "very carefully" down the second floor hallway to the stairway which led to the first floor; that she noticed the light (Light No. 2) was out; that she turned left from this hallway and walked down two steps to a square landing, located just above the fifteen stairs leading down to the first floor; that she then "reached for the banister to take a step forward" and in reaching for it lost her "balance and went down" the entire fifteen stairs to the first floor landing. She further testified that she "looked" before she attempted to step down from the landing at the point where she lost her balance but the "outline of the step was not clear; it was not visible. * * * It was very confusing due to the design and the darkness of the carpet"; that it was "too dark" even to see the design of the carpet; that she "wasn't able" to see the exact location of the banister leading below the landing. On cross-examination she testified that she had lived in the Barclay Manor for approximately ten or twelve years before the accident; that she had used the stairs frequently and that there was no change in the location of the banisters during the time she had lived there; that the light near the steps leading to the landing (Light No. 2) was "not burning" and the "landing was dark"; that there was a "light at the bottom of the stairway" on the first floor, but it did not illuminate the landing platform on which she stood; that she could not see "clearly" the edge of the platform or the first two or three steps below the platform; that she could not see the banister; that she "reached for the banister to support" her, as she had always done, and while she could not see it, she "knew it was there." In a matter of seconds after the fall, Mrs. Harrison, manager of the apartment, and a Mr. Hansen, an employee, appeared. Plaintiff was then carried by Mr. Hansen to her room and Mrs. Harrison immediately called a doctor.

Appellant contends that the court erred in granting the new trial on the ground of insufficiency of the evidence because "there was no substantial conflict in the evidence and no substantial evidence in support of a verdict for the defendant." A careful perusal of the record in this case convinces us that this contention is without merit.

[3, 4] The duty which is imposed upon an apartment house owner is one of ordinary care to see that the premises used in common with other tenants are kept in a reasonably safe condition. The principles relating to the landlord's duty in this regard are succinctly stated in Harris v. Joffe, 28 Cal.2d 418, 423, 170 P.2d 454, 458: "The general rule that a landlord is not liable to a tenant for injuries due to the defective condition or faulty construction of the demised premises in the absence of fraud, concealment or covenant, is subject to exception. When a portion of the premises is reserved by the landlord for use in common by himself and his tenants, or by different tenants, a duty is imposed upon the property owner to use ordinary care to keep that particular portion of the premises in a safe condition. Bock v. Hamilton Square Baptist Church, 219 Cal. 284, 287, 26 P.2d 7; Dorfer v. Delucchi, 61 Cal.App.2d 63, 64, 141 P.2d 905; Turner v. Lischner, 52 Cal.App.2d 273, 277, 126 P.2d 156; Reiman v. Moore, 42 Cal.App.2d 130, 136,

108 P.2d 452; Kossine v. Styliano, 40 Cal. App.2d 721, 723, 105 P.2d 952; Ellis v. McNeese, 109 Cal.App. 667, 670, 293 P. 854. But a landlord may not be charged with responsibility for a defective condition unless he had actual knowledge of the condition, or it has existed for such a period of time as to justify the conclusion that, in the exercise of ordinary care, he should have known of its existence within such time as would give him a reasonable opportunity to make repairs. Mondine v. Sarlin, 11 Cal.2d 593, 597, 81 P.2d 903; McKellar v. Pendergast, 68 Cal.App.2d 485, 491, 156 P.2d 950; Owen v. Beauchamp, 66 Cal.App.2d 750, 752, 152 P.2d 756; Van Wye v. Robbins, 48 Cal.App.2d 660, 662, 120 P.2d 507; Wills v. J. J. Newberry Co., 43 Cal.App.2d 595, 599, 111 P.2d 346; Kossine v. Styliano, supra, 40 Cal.App.2d at page 724, 105 P.2d 952."

[5] At common law no duty was imposed upon a landlord to illuminate the common passageways over which he reserved control in the absence of defective conditions or those of peculiar danger calling for special warnings. See, cases collected in Martin v. Rich., 288 Mass. 437, 193 N.E. 21, 97 A.L.R. 220, 232; Gibson v. Hoppman, 108 Conn. 401, 143 A. 635, 75 A.L.R. 154, 166; Rosenberg v. Chapman Nat. Bank, 126 Me. 403, 139 A. 82, 58 A.L.R. 1411, 1419; Blaufarb v. Drooker, 251 Mass. 201, 146 N.E. 242, 39 A.L.R. 294, 302; 25 A.L.R. 1273, 1312. Section 17819 of the Health and Safety Code of the State of California provides that "In every apartment house with more than two apartments above the first floor, and in every hotel there shall be installed and kept burning from sunrise to sunset throughout the year artificial light sufficient in volume to illuminate properly every public hallway, public stairway, fire escape egress, elevator, public water-closet compartment, or toilet room, in any part of which there is insufficient natural light to permit a person to read."

On the principal issue involved in the action before the trial court, i. e. whether defendant failed to keep burning artificial light sufficient in volume to illuminate properly the hallways and stairways, and particularly the area in and near the second floor stairway over which plaintiff fell, the record reveals a decided conflict in the evidence. It was stipulated at the trial that no natural light reached the landing and the stairway on the second floor and that the only illumination came from artificial lighting. The light fixtures which were used throughout the building and in and near the area of the second floor landing and stairway, were those the electric globes of which were covered with frosted light reflectors. Plaintiff admitted that two ceiling lights in and near the area where she fell were burning on the morning of the accident. One of these, Light No. 1, was located east of the second floor stairway down which she fell, and the other was located near the foot of the stairway on the first floor. The testimony of the witnesses, however, varied as to the volume of the light globes used at both locations, the degree of illumination being referred to as "very dark," "very dim" and "very poor." The ceiling light fixture on the second floor, upon which plaintiff placed great emphasis during the trial, was that referred to as Light No. 2. This light fixture served to illuminate the stairway and landing. It was located six feet and six inches from the corner of the stairway and landing. It is this light fixture which plaintiff testified was not burning at approximately 8:15 o'clock a. m. of July 18, 1945, the morning of the accident, and which several of plaintiff's witnesses testified was not on at various other times prior to plaintiff's accident. In contradiction to this evidence, defendant introduced evidence by Mrs. Harrison, manager of the apartment, to the effect that on the morning of the accident Light No. 2 contained a 25-watt globe and that the light fixture at the foot of the stairway on the first floor contained a 40-watt globe, and both these light fixtures were burning a few minutes before Mrs. Busby's fall. A Mr. Hansen, employed by defendant about three months before plaintiff's accident as houseman and in charge of "all electrical equipment," corroborated Mrs. Harrison's testimony in this regard. He testified further that Light No. 2 and the light at the foot of the stairway on the first floor were on both before and after plaintiff's fall; that his "instructions at the time from Mr. Silverman and from Mrs. Harrison were that the lights at the top and bottom of the stairs were to be left lighted at all times day and night"; that after the fall "Mrs. Busby at that time said she was in a hurry, that she didn't have time to wait for the elevator"; that he had not worked for defendant "since September, 1945." There was also evidence that the landing, stairway and banister were in the same condition at the time of the accident as they were during all the time Mrs. Busby was a tenant in the apartment. Defendant introduced an expert witness who testified that the steps of the stairway over which plaintiff fell were of uniform width and height and that in his opinion the construction of the stairway, including the landing, the banister and the newel posts, conformed to scientific, customary, and standard practice of architecture in apartment houses of this class and character.

After the close of plaintiff's case the jury was taken to the scene of the accident and under the instructions of the trial judge various tests were made showing the visibility under the degrees of illumination testified to by the witnesses. Light No. 1 was tested with a 15-watt globe and a 25-watt globe. Light No. 2 was tested with a 25-watt globe. The light at the foot of the stairway on the first floor was tested with a 40-watt globe and a 25-watt globe. Light No. 2 was completely turned off.

[6, 7] The burden of proof was upon plaintiff to prove by a preponderance of the evidence that defendant was guilty of some negligent act or omission proximately contributing to her injuries. Even though the jury might have believed that Light No. 2 was out at the time of the accident, as testified to by plantiff, nevertheless that condition, of itself, was not sufficient to charge defendant with a lack of ordinary care to keep the premises in a safe condition, in the absence of evidence showing knowledge of this condition on defendant's part, either actual or constructive. In an attempt to prove that Light No. 2 was customarily turned off, and that this situation was known to defendant, William Allen, a former employee of defendant and a witness for plaintiff, testified that during his employment he had been instructed by defendant to turn off Light No. 2 and that this situation existed for a long period of time. Mr. Allen's testimony was to the effect that he had been employed as a desk clerk for defendant in 1942; that he had left defendant's employ on July 13, 1944 (a period of more than a year before plaintiff's accident); that defendant had given him certain instructions respecting the lights; "At that time in the morning, it was about 7 o'clock my instructions was to turn out the lights with the exception of the corner light and the elevator light on all floors"; that he was instructed to leave Light No. 1 on; that "Every other light [every alternate light] was supposed to be on from that corner light [Light No. 1]"; that Light No. 2, being the next light in order, was turned out. The trial judge had the right to accord this testimony little or no weight because of its remoteness and in view of the positive testimony of several witnesses who were on the premises at the time of the accident that both before and after plaintiff's fall Light No. 2 was on.

[8] Where, as in the instant case, there is a material conflict in the evidence so that a verdict for the moving party, if returned, would have had evidentiary support, the order granting the new trial will not be disturbed on appeal. Dempsey v. Market Street Ry. Co., 23 Cal.2d 110, 113, 142 P.2d 929; Myers v. Moose, 36 Cal.App.2d 739, 742, 98 P.2d 551; Anderson v. Lang, 42 Cal.App.2d 725, 727, 109 P.2d 981; Grover v. Sharp & Fellows Etc. Co., 66 Cal.App.2d 736, 153 P.2d 83.

It is evident from the record that there was no abuse of discretion on the part of the trial court in granting the motion for new trial.

The order granting a new trial is affirmed.

SHINN, Acting P. J., and WOOD, J., concur.

82 Cal.App.2d 622

## ROWLAND v. CITY OF POMONA.

Civ. 16003.

District Court of Appeal, Second District, Division 2, California.

Nov. 26, 1947.

**1. Municipal corporations ⚷819(1)**

In pedestrian's action against city for injuries, direct evidence by witnesses of all material facts, corroborated by a "view" by the judge on stipulation of counsel constituted substantial evidence and sustained every material fact found by the court as trier of fact in favor of plaintiff.

**2. Trial ⚷375**

Evidence received by the trier of fact in a "view" of the scene of an accident which bears on an issue in a cause is independent evidence which may be considered by the trier of fact in arriving at its conclusion, and is substantial evidence to support finding of fact consonant with such evidence.

**3. Municipal corporations ⚷819(1)**

Evidence that a city had permitted waste water to run along a city gutter with resulting deposits of mud, vegetable matter, moss and slime, and that other accidents than the one at bar had occurred at the same place, constituted some evidence that the condition there existing was dangerous to pedestrians under the public liability statute of 1923. Gen.Acts, Act 5619.

**4. Appeal and error ⚷1010(1)**

Whether a city's permitting waste water to run through its street gutter, depositing mud, moss and slime covered by water at a place where several accidents other than the plaintiff's fall had occurred, created a dangerous condition was a matter for the trial judge whose decision supported by substantial evidence was binding upon the appellate court.

**5. Municipal corporations ⚷762(1)**

The fact that water from sources outside city limits may have flowed through its gutters does not relieve a city from liability for negligent upkeep to pedestrians who slip and fall on dangerous silt and moss deposits.

**6. Municipal corporations ⚷757(1)**

Inability to obtain additional men to keep streets in safe condition because the United States was at war did not relieve defendant city from liability for negligent acts to pedestrians who slip and fall.

**7. Municipal corporations ⚷817(1)**

A municipality in absence of actual knowledge or actual notice of a dangerous condition existing in its street is presumed to have constructive notice thereof where such condition has existed for an unreasonable length of time.

**8. Appeal and error ⚷1008(1)**

Whether a dangerous condition in a public street has existed for a sufficient length of time to constitute constructive notice thereof to city is a question of fact for the trial court.

**9. Appeal and error ⚷1008(1)**

Whether a reasonable time to remedy a dangerous condition in a public street has existed after the city can be charged with constructive notice is a question for the trier of fact.

**10. Municipal corporations ⚷819(6)**

Where a city conceded that it knew that waste irrigation water flowed down its street for years, and eyewitnesses testified that a dangerous gutter condition had existed at least four months prior to plaintiff's fall, evidence sustained finding that the city had constructive knowledge of dangerous condition.

**11. Appeal and error ⚷1008(1)**

Where plaintiff lawfully parked his automobile on a city street, and to reach the sidewalk stepped into a mossy gutter covered by an inch of water, a condition conspicuous, observable and known to him, and was injured in so doing, his failure, if any, to use ordinary care was a question for the trier of fact.

◆

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Antonio Rowland against the City of Pomona, a municipal corporation, to recover damages for personal injuries. From a judgment for the plaintiff and from an order denying defendant's motion for a new trial, defendant appeals.

Appeal from the order denying the motion for new trial dismissed. Judgment affirmed.

J. B. Selters, of Pomona, and Mark F. Jones, of Los Angeles (W. L. Engelhardt, of Los Angeles, of counsel), for respondent.

Arlo E. Rickett, Jr., City Atty., of Pomona, for appellant.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury and from an order denying defendant's motion for a new trial in an action to recover damages for personal injuries resulting from plaintiff's falling in a gutter maintained in a public street by defendant city of Pomona, defendant appeals.

The evidence being viewed in the light most favorable to plaintiff (respondent) discloses these facts:

On August 26, 1945, plaintiff parked his automobile along the east curb of San Antonio Avenue, in the city of Pomona, approximately 100 feet north of its intersection with Fifth Street. San Antonio Avenue runs north and south. At the point where he parked his automobile, the curb was lowered to permit a driveway into the rear of the Fuller Rancho Market. One hundred feet south of the point where plaintiff parked there was a pedestrian walk. San Antonio Avenue was designated as a part of the drainage system through the city of Pomona. The easterly side thereof had been constructed and paved with the intention that it should serve as a drain for waste water originating in orange groves located to the north and east of defendant city.

It had rained for three days approximately one week prior to August 26, 1945, and on the latter date there was a large area of sedimentary deposit in the east gutter which included slime and moss with about an inch of water running over the top of it. This condition had existed in the east gutter for four or five months prior to August 26, 1945. Plaintiff after parking his automobile alighted therefrom, and without paying any attention to the condition of the gutter stepped into it as he proceeded toward the sidewalk. His foot slipped from under him and his body fell to the pavement and he received personal injuries.

It is conceded that the city officials of defendant for many years prior to the accident had knowledge that waste irrigation waters flowed down San Antonio Avenue during the summer. It was likewise conceded that plaintiff had the same knowledge.

These four questions are presented for our determination:

[1, 2] First: *Was there substantial evidence to sustain findings of the foregoing facts?*

This question must be answered in the affirmative. Witnesses gave direct evidence of each of the foregoing material facts. In addition the trial judge by stipulation of counsel viewed the premises where the accident occurred and in summarizing the case stated that he observed moss in the gutter at the point of accident and elsewhere along the street. Such testimony and the "view" * of the judge constituted substantial evidence to sustain each and every material fact set forth above.

[3, 4] Second: *Did the evidence show that defendant had permitted a dangerous condition to exist in its street under the public liability statute of 1923?* (Stats. 1923, chap. 328, p. 675, Gen.Acts, Act 5619.)

This question must likewise be answered in the affirmative. The evidence as heretofore stated discloses that defendant had permitted waste water to run along the east side of San Antonio Avenue and that deposits of mud, vegetable matter, moss and slime had accumulated in the gutter. There was likewise evidence that other accidents had occurred at the same place. Testimony to this effect constituted some evidence that the condition there existing was dangerous. (Barker v. Los Angeles, 57 Cal. App.2d 742, 747, 135 P.2d 573.) Whether these facts created a dangerous or hazardous condition was a matter for the determination of the trial judge whose decision, supported as it was by substantial evidence in the instant case, is binding upon an appellate court. (Barker v. Los Angeles, supra; Bauman v. San Francisco, 42 Cal. App.2d 144, 153, 108 P.2d 989.)

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* Evidence received by the trier of fact in a "view" of the scene of an accident which bears on an issue in a cause is independent evidence which may be considered by the trier of fact in arriving at its conclusion, and is substantial evidence sufficient to support a finding of fact consonant with such evidence. (Gates v. McKinnon, 18 Cal.2d 179, 182 et seq., 114 P.2d 576; Mitchell v. City of Santa Barbara, 48 Cal.App.2d 568, 573, 120 P.2d 131.)

[5, 6] There is no merit in defendant's suggestion that the water running in the gutter originated from sources outside the city limits of defendant city, or that defendant had not kept its streets in a safe condition due to its inability to obtain additional men for street work because the United States was engaged in a war. Neither one of these facts relieve defendant from liability for its negligent acts.

[7-9] Third: *Did defendant have constructive notice of the dangerous condition which obtained in its street?*

This question must be answered in the affirmative. The law is settled that a municipality in the absence of actual knowledge or actual notice of a dangerous condition existing in its street is presumed to have constructive notice thereof where such condition has existed for an unreasonable length of time, and that it is a question of fact for the trial court to determine whether the dangerous condition in the public street has existed for a sufficient length of time to constitute constructive notice, and also whether a reasonable time to remedy the condition has existed. The determination of the trier of fact will not be disturbed where there is substantial evidence to sustain it. (Wise v. City of Los Angeles, 9 Cal.App.2d 364, 366, 49 P.2d 1122, 50 P.2d 1079.)

[10] In the present case it is conceded that for many years prior to the accident defendant had knowledge that waste irrigation waters flowed down San Antonio Avenue, and there is testimony of eye witnesses that the dangerous condition of the gutter had existed for at least four or five months prior to the accident. It is clear that such evidence was sufficient to sustain the trial court's finding of fact that defendant had construtive knowledge of the dangerous condition existing in its street.

[11] Fourth: *Was plaintiff contributorily negligent as a matter of law since (a) he knew that waste water flowed down San Antonio Avenue and that sediment and other foreign matter accumulated in the gutter, and (b) when he got out of his automobile without paying any attention to the state of the gutter he stepped into it, the condition of which was obvious and conspicuous?*

This question must be answered in the negative.

(a) & (b). The determination of the trier of fact, where supported by substantial evidence as in the instant case, is binding upon an appellate court. It is evident that plaintiff lawfully parked his automobile on the east side of San Antonio Avenue and that since there was only an inch of water in the gutter it was a reasonable thing for him to proceed to step in the gutter in an endeavor to reach the adjacent sidewalk. Even though plaintiff was familiar with an existing condition which was conspicuous and observable it was still a question for the determination of the trier of fact as to whether or not plaintiff failed to use ordinary care in his conduct. (McStay v. Citizens' Nat. Trust & Savings Bank, 5 Cal.App.2d 595, 600 et seq., 43 P.2d 560.)

The order denying the motion for a new trial being non-appealable the appeal therefrom is dismissed. The judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

82 Cal.App.2d 616

## AGNEW v. CITY OF LOS ANGELES et al.

Civ. 15826.

District Court of Appeal, Second District, Division 2, California.

Nov. 26, 1947.

**1. Physicians and surgeons** ⚷14(2), 18(8)

Generally, a physician is required to have that degree of skill and learning ordinarily possessed by physicians of good standing practicing in same locality, and he must use the same care in applying that learning to the treatment of a patient, and whether he has done so is a question for experts and can ordinarily be established only by their testimony.

**2. Physicians and surgeons** ⚷18(8)

Where question of propriety of treatment of patient by physician is a matter of common knowledge of laymen, expert testimony is unnecessary in order to establish liability in a malpractice case.

**3. Evidence** ⚷20(1)

It is common knowledge that X-ray is used as an aid to diagnosis in case of a fracture or other indicated cases.

**4. Evidence** ⚷20(1)

Court would take judicial notice in malpractice action that a physician's failure to make use of X-ray as an aid to diagnosis in a situation in which a fracture was indicated, amounted to a failure to use that degree of care and diligence ordinarily used by physicians of good standing practicing in the community.

**5. Physicians and surgeons** ⚷18(8)

Evidence that physician diagnosed patient's injury as merely a bruise, and that he failed to have X-ray pictures taken, though a possible fracture was indicated, and that patient was in fact suffering from a fracture, established a prima facie case against physician in malpractice action.

◆

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Malpractice action by Frances Agnew against the City of Los Angeles, a municipal corporation, and others, and Edwin Larson. From a judgment in favor of Edwin Larson, the plaintiff appeals.

Judgment reversed.

Harold B. Pool, of Los Angeles, for respondent.

Cuthbert J. Scott, of Los Angeles, for appellant.

McCOMB, Justice.

From a judgment in favor of defendant Larson after trial before the court without a jury predicated upon the granting of defendant's motion for nonsuit in a malpractice action, plaintiff appeals.

Considering, as we must in reviewing a judgment predicated upon the granting of a motion for nonsuit, the evidence in the light most favorable to plaintiff the record discloses the following facts:

Plaintiff, a woman 51 years of age, on March 3, 1943, while walking west on Hollywood Boulevard in Los Angeles, slipped and fell, landing heavily on her right hip. She was assisted to the porch of an adjacent hotel and thereafer telephoned defendant Dr. Larson's office, but was informed that Dr. Larson was out of the city and when plaintiff stated to the doctor's nurse that she had just had a bad fall she was advised to go to the Hollywood Receiving Hospital. This she did. She was examined by Dr. Gourson at the hospital and thereafter returned to her hotel by taxicab. Plaintiff was assisted to her bed by a friend. During this period she suffered considerable pain. The following morning she again called defendant Larson and told him that she was waiting for him to come over and see her, to which he replied that he had received a report from the receiving hospital and that she was just bruised and it was not necessary for him to visit her; that he was too busy. He advised plaintiff to put a pillow under her knee and keep any strain off of her hip. He also prescribed anacin, rest and hot baths, and told her to call him the following morning.

The following day she telephoned defendant Larson and told him she was still in great pain and could hardly move. She stayed in bed during that day and on the following day, March 6, again telephoned Dr. Larson telling him that she was in great pain and asked him if he did not think he should come over and see her, to which he replied in the negative, stating that a bruise was often more painful than a break.

Plaintiff remained confined to her room until March 11, on which day, while leaning against a dressing table her right ankle turned over and she heard her right hip bone crack. She then called the house physician, Dr. Skaletar who caused her to be removed to the Cedars of Lebanon Hospital where X-ray pictures were taken. She was later transferred to the California Hospital where defendant Larson called in person to see her. She told him that the people at Cedars of Lebanon Hospital thought her hip was broken, but he still adhered to his original diagnosis.

On March 13, however, said defendant told plaintiff that he had examined the X-rays taken at the Cedars of Lebanon Hospital and that her hip was broken. Subsequently additional X-rays were taken; plaintiff's leg was placed in a cast, and plaintiff was hospitalized for twelve weeks. Thereafter she was permitted to move about on crutches and on August 12, she was permitted to use one crutch and a cane. In the latter part of October and early November plaintiff's knee commenced to hurt her and she complained of increasing pain in her hip. Doctor Larson told her that such trouble was not an unusual aftermath of a bone fracture; that continued activity and exercise would remedy the situation. In December further X-rays were taken and the doctor told plaintiff that she was not suffering from any necrosis but that her pain was caused by arthritis or neuritis. Plaintiff consulted several other physicians and finally instituted the present suit for malpractice.

This is the sole question for our determination:

*In view of the fact that there was no expert testimony that Dr. Larson had failed to use that degree of skill and learning ordinarily possessed by physicians of good standing practicing in the community where he resided, would the foregoing facts if believed by the trial judge make a prima facie case in favor of plaintiff sufficient to require the denial of defendant's motion for a nonsuit?*

This question must be answered in the affirmative.

[1] *General Rule.* The law requires that a physician shall have that degree of skill and learning ordinarily possessed by physicians of good standing practicing in the same locality, and that he shall use the same care and diligence in applying that learning to the treatment of a patient. It is likewise the general rule that whether he has done so in a particular case is a question for experts and can be established only by their testimony. (Trindle v. Wheeler, 23 Cal.2d 330, 333, 143 P.2d 932.)

[2] *General Exception.* To the above general rule there is this well recognized exception, to wit, where the question of the propriety of the treatment is a matter of common knowledge of laymen, expert testimony is unnecessary in order to establish liability in a malpractice case.

[3, 4] *Specific Exception.* The use of the X-ray as an aid to diagnosis in cases of fracture or other indicated cases is a matter of common knowledge, and the failure to make use thereof in such a case amounts to a failure to use that degree of care and diligence ordinarily used by physicians of good standing practicing in this community. The court in the absence of expert testimony may take judicial notice of this fact. (Rankin v. Mills, 207 Cal. 438, 441, 278 P. 1044; Reynolds v. Struble, 128 Cal. App. 716, 725, 18 P.2d 690; McCollum v. Barr, 38 Cal.App. 411, 427, 176 P. 463. See also, McBride v. Saylin, 6 Cal.2d 134, 138, 56 P.2d 941.)

[5] It is evident in the present case that when plaintiff fell a possible fracture was indicated, and under the foregoing rules it is likewise apparent that it was a matter of common knowledge of which the trial court should have taken judicial notice that the ordinary physician of good standing in this community in the exercise of ordinary care and diligence would have had X-ray pictures taken of plaintiff's body

when a fracture might have resulted from the fall. In failing to do so defendant did not exercise the degree of learning and skill ordinarily possessed by physicians of good standing practicing in this community. Defendant Larson thus failed to use ordinary care and diligence in his treatment of plaintiff with the result that plaintiff suffered personal injury. Therefore the evidence which plaintiff introduced before the trial court established a prima facie case and it was error to grant defendant's motion for a nonsuit.

The judgment is reversed.

MOORE, P. J., and WILSON, J., concur.

82 Cal.App.2d 408

## PANNO v. RUSSO et al.

Civ. 15722.

District Court of Appeal, Second District, Division 1, California.

Nov. 17, 1947.

**1. Sales 🔑101**

Evidence sustained finding that partnership which had sold crop of oranges, by accepting down payment of only $10,000 pursuant to arrangement, waived right to rescind the sale for failure to make $20,000 down payment originally provided for, and was estopped to deny agreement to postpone payment.

**2. Evidence 🔑467**

The rule against varying written instrument by parol or altering written contract other than by written contract or executed oral agreement is subject to the exception that a party may waive performance of condition by conduct or representations, or be estopped to deny such waiver. Civ.Code, § 1698.

**3. Estoppel 🔑52**

"Waiver" is the intentional relinquishment of a known right, or such conduct as warrants inference of relinquishment of such right, and may result from express agreement or be inferred from circumstances indicating intent to waive.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

**4. Estoppel 🔑85**

"Promissory estoppel" is distinct from ordinary "equitable estoppel", since representation is promissory, not a misstatement of an existing fact.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Estoppel" and "Promissory Estoppel".

**5. Estoppel 🔑85**

To bring case within doctrine of "promissory estoppel", it is essential that promisee could and would have performed the condition, or would not have allowed the defense to arise, but for promisor's waiver.

**6. Executors and administrators 🔑439**

In action for partnership's breach of contract to sell crop of oranges, deceased partner's administratrix was a necessary party. Code Civ.Proc. § 379.

**7. Witnesses 🔑129**

In action for partnership's breach of contract to sell crop of oranges, plaintiff could testify to facts occurring before death of one partner, though judgment was obtained jointly against administratrix of such partner, payable in due course of administration, and surviving partners, since claim was not against the partner's estate. Code Civ.Proc. §§ 379, 1880, subd. 3

**8. Witnesses 🔑152**

In action against surviving partners, plaintiff may testify to transactions prior to partner's death, whether with deceased partner or with others. Code Civ.Proc. §§ 379, 1880, subd. 3.

**9. Sales 🔑417**

Evidence of damages resulting from partnership's breach of contract to sell crop of oranges to plaintiff was sufficient to support judgment for plaintiff and not speculative. Civ.Code, §§ 1786, 1787.

**10. Sales** ⚷418(15)

The measure of damages for partnership's breach of contract to sell crop of oranges was the loss directly and naturally resulting, which would be the loss of profits which plaintiff would have made if the fruit had been delivered and he had been permitted to resell it. Civ.Code, §§ 1786, 1787.

◆

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by Carlo Panno against Mary Russo, as administratrix of the estate of Louis Russo, deceased, and others, for breach of contract to sell oranges. From a judgment for plaintiff, defendants appeal.

Affirmed.

John Van Aalst, of Los Angeles, for appellants Russo Bros., Tony Russo and Joe Russo.

Whitelaw & Whitelaw, of El Centro, for appellant Mary Russo, administratrix.

Henry O. Wackerbarth and Edward J. Cotter, both of Los Angeles, for respondent.

WHITE, Justice.

This is an action for damages arising out of the alleged breach by a partnership of a contract to sell to plaintiff a crop of oranges. Louis Russo, the active member of the partnership, and who conducted the transaction here involved, died prior to the commencement of the action. Plaintiff joined as defendants the surviving partners, the administratrix of the estate of the deceased partner, and others. From a judgment in favor of plaintiff and against the surviving partners and the administratrix, this appeal is prosecuted.

In his complaint plaintiff alleged that on November 23, 1943, Russo Bros., a copartnership composed of Louis, Joseph and Tony Russo, entered into a written agreement, entitled "Bill of Sale," the pertinent portions of which are as follows:

"We, Russo Bros. agree to sell and Carlo Panno agrees to buy the entire crop of 160 acres, or approximately 55,000 boxes of Valencia oranges * * * for the purchase price of Three and One Quarter (.03¼) cents per pound FOB roadside in buyer's containers.

"* * * The sellers agree to irrigate and take care of the crop to maturity in a good and farmerlike manner, but are not to be held responsible for any damage done by wind, or any other act beyond their control.

"The sellers hereby acknowledge the deposit payment of Five Thousand ($5,000.00) Dollars.

"The Buyer agrees to pay an additional advance of Twenty Thousand ($20,000.00) Dollars, January 1st, 1944, and pay weekly for all oranges delivered to him * * *."

This agreement was executed by Louis Russo, now deceased, on behalf of the partnership Russo Bros.

Plaintiff further alleged that on January 3, 1944, he paid to Russo Bros. the sum of $10,000, being one-half the payment required by the contract, which sum Russo Bros. accepted and "thereupon waived the payment, at that time, of the remaining sum of $10,000 due on said 1st day of January, 1944, and agreed that said additional sum of $10,000 need not be paid * * * until demand therefor was made * * *." That Russo Bros. never at any time demanded payment of the $10,000 balance, but on February 3, 1944, sold the orange crop in question to other parties, and on February 4, 1944, notified plaintiff that they had cancelled their agreement with him; whereupon plaintiff offered to pay the balance of $10,000 and made a tender thereof to Russo Bros., which tender was refused.

The theory of plaintiff's first cause of action is that payment of the full $20,000 as required by the agreement was waived by the partnership, acting through Louis Russo, and the second cause of action alleges that Russo Bros. and plaintiff made an oral agreement permitting a delay in payment of the second $10,000 until requested; that pursuant to such oral agreement plaintiff paid the sum of $10,000 and Russo Bros. accepted the same, and that Russo Bros. are estopped from denying the validity of such oral agreement for the reason that Louis Russo told plaintiff he "would let the plaintiff know when he needed the balance of said payment," and that thereafter no demand was made for such balance. Plaintiff testified to conversations with the deceased Louis Russo subsequent to the execution of the agreement in support of the allegations above set forth. On January 1, 1944, when the $20,000 payment was due, plaintiff forwarded a check for $10,000, bearing the indorsement, "2nd dep Cudahy Val Crop 10,000," which check was accepted and cashed by the partnership.

[1] The first point relied upon for reversal is that respondent failed "to establish a waiver or an estoppel of the right to rescind" the contract for failure to make the full payment of $20,000 as required by the terms of the contract. In this connection appellants urge that the testimony of plaintiff as to the statements of the deceased partner, Louis Russo, and the oral understanding between plaintiff and Louis Russo that payment of the full $10,000 ballance need not be made until requested, violated the parol evidence rule; that such oral agreement was not an "executed oral agreement," as required by section 1698 of the Civil Code; and that the evidence does not support a finding that there was a waiver—that is, an intentional relinquishment of the right to insist upon payment in accordance with the terms of the agreement. This contention may not be sustained. In addition to the testimony of plaintiff as to his conversations and understanding with Louis Russo contemporaneously with the execution of the agreement and thereafter, the evidence showed that when the $20,000 payment became due on January 1, 1944, Russo Bros. accepted a payment of only $10,000, made no demand for further payment, and did not give notice of rescission for failure to make such further payment for a period of a month, attempting to rescind only after they had sold the crop to another purchaser at a more profitable figure than was called for by their contract with plaintiff. When Louis Russo returned to plaintiff the $15,000 he had paid on the contract, he accompanied the check with a letter which contained the statement, "However, I did verbally extend the date on the last advance payment until January 10th." There was also testimony by a witness present at conversations between plaintiff and Russo after the attempted rescission, in which plaintiff asked Russo, "Didn't we agree that you would call up when you were in need of money?" to which Russo replied, "I have been so sick I don't know what I am doing half the time." In these conversations Russo did not deny the understanding as to delay in payment. There was also evidence that during the period of approximately one month after the payment of the $10,000, plaintiff and defendant met on several occasions, had other business dealings for the purchase and sale of fruit, and that not only was it agreed that plaintiff would pay the additional $10,000 when demanded, but also that plaintiff would, if requested, advance further sums above those required by the contract if needed by Louis Russo in the conduct of his business. In the circumstances above narrated, it cannot be held that the conclusion of the trial court that the partnership waived the right to rescind and was estopped to deny the agreement to postpone payment are without substantial support in the evidence.

[2-5] It is well settled that the rule against varying the terms of a written instrument by parol or seeking to alter a contract in writing other than by a contract in writing or an executed oral agreement, is subject to the exception that a party to a contract may by conduct or representations waive the performance of a condition thereof or be held estopped by such conduct or representations to deny that he has waived such performance. Whether the established facts in any given case constitute an estoppel or a waiver is not always easily distinguishable. Bastanchury v. Times-Mirror Co., 68 Cal.App.2d 217, 240, 156 P.2d 488, 500. "Waiver" has been repeatedly defined as "the intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right and may result from an express agreement or be inferred from circumstances indicating an

intent to waive." Bastanchury v. Times-Mirror Co., supra, 68 Cal.App.2d 217, page 240, 156 P.2d 488; Johnson v. De Waard, 113 Cal.App. 417, 298 P. 92. The language used in Sessions v. Southern Cal. Edison Co., 47 Cal.App.2d 611, 619, 118 P.2d 935, 939, with reference to promissory estoppel, is here applicable: "That doctrine is 'distinct from the ordinary equitable estoppel, since the representation is promissory, not a misstatement of an existing fact. The promisor misstates no fact; he says, at most, simply, "I will perform though you do not comply with the condition," or, "though you subject yourself to a legal defense." To bring the case within the reason of the rule it is essential that the promisee could and would have performed the condition, or would not have allowed the defense to arise, had it not been for the promisor's waiver.' 3 Williston on Contracts, sec. 689." So here, there was evidence that respondent could and would have paid the $10,000 balance upon demand, but that no demand was made, and approximately a month after receiving and accepting a check for one-half the amount due, Louis Russo, in behalf of the partnership, tendered back all that plaintiff had paid and gave him no opportunity to cure the alleged default in payment.

There is ample evidence to support the findings that the deceased partner, in behalf of the partnership, waived a provision of the contract made for the benefit of the partnership and that by reason of the conduct of the deceased partner the doctrine of estoppel was properly invoked against the appellants.

It is next asserted that plaintiff was not competent to testify to facts which took place prior to the death of Louis Russo.

[6] In the case at bar it is manifest that the administratrix of the estate of the deceased partner, Louis Russo, was "a necessary party to a complete determination or settlement of the question involved therein." Code Civ.Proc., sec. 379.

[7] Concerning the effect of the provisions of subdivision 3 of section 1880 of the Code of Civil Procedure, it must be borne in mind that the claim of respondent was not a claim against the estate of the deceased partner, but a claim against the partnership of which he was a member. That the inhibitions of subdivision 3 of section 1880 of the Code of Civil Procedure are not under the circumstances here present applicable, was the clear and decisive holding in the case of Cullinan v. McColgan, 87 Cal.App. 684, where, at page 699, 263 P. 353, 359, it is said:

"Appellant objected to Mr. Cullinan testifying to declarations made to him by D. A. McColgan, who died prior to the commencement of the action, in the absence of appellant, which objections were overruled by the court, appellant claiming that the estate of the decedent would be adversely affected by a judgment against the surviving partner. This is an action against a surviving partner, and is neither against 'an executor or administrator' nor 'upon a claim or demand against the estate of a deceased person.' So far is a surviving partner from being the same as an executor or administrator of a decedent's estate that he is barred from appointment as such (Code Civ.Proc., sec. 1365), and the executor or administrator has no voice in the settlement of the partnership affairs (Code Civ.Proc., sec. 1585). Subdivision 3 of section 1880 of the Code of Civil Procedure has always been strictly and literally construed and has never been extended to cover cases nor parties not within the express terms of the statute. (Citing cases) * * *"

The view expressed in the case just referred to, that subdivision 3 of section 1880 of the Code of Civil Procedure is not to be extended to cover cases or parties not within its express terms, has been followed in numerous cases and under varying factual situations. In Streeter v. Martinelli, 65 Cal.App.2d 65, 71, 149 P.2d 725, 729, in holding that the statute does not apply to actions seeking to recover property or establish title thereto as against an estate, it was said (quoting from Cal.Jur., vol. 11A, pp. 888, 889): "The statute is not extended by construction to apply to cases not within its terms, or to apply to all actions brought against an executor or administrator, although the reason for the rule might be as applicable to other cases as to the case of a money claim against the estate." See, also, Jones v. Clark, 19 Cal.2d 156, 161, 119 P.2d 731, an action for specific performance of a contract to devise property. The authorities base their decisions upon the ground that the claim is not one against the estate, but to recover property which does not belong to the estate.

[8] There is no difficulty in holding under the authorities cited that in an action against surviving partners a plaintiff may testify to matters occurring prior to the death of a deceased partner, whether such testimony relates to transactions with the deceased partner or with others. However, in the cases called to our attention or found by our own research, either no judgment was sought against the estate or the court held that no such judgment could be rendered. In the present action judgment was sought and obtained jointly against the administratrix (payable "in due course of administration") and the surviving partners.

To us it seems clear that in a situation such as is here presented the claim must be viewed as one against the firm, the partnership entity, rather than against the estate. The testimony of plaintiff established the debt or liability of the firm of which decedent was a member. That the establishment of such debt operated indirectly to diminish the assets of the estate does not justify relieving the estate of liability by invoking the code section in question. Although in the cited cases it was held that the action was not against the estate because no recovery was sought against it and no claim filed, we perceive no reason for a different rule in the two situations—the one where recovery against the partnership may presumably operate to diminish the estate as and when an accounting is had between the estate and the surviving partners, and the other, where, after partnership property is exhausted, resort is had to other assets of the decedent. In either event, the foundation of liability is a claim against the firm of which decedent was a member.

[9, 10] Appellants' contention that the evidence produced in support of damages is speculative and not in accordance with the principles laid down for the determination of the measure of damages cannot be sustained. There was ample evidence to show that respondent was unable to procure other desert Valencia oranges; that while there were other crops in the Coachella Valley, such crops had all been sold or were under contract of sale to other parties at the time appellants breached the contract. The measure of damages was the loss directly and naturally resulting from the seller's breach of contract, which would be the loss of the profit which respondent would have made had the fruit been delivered and had he been permitted to resell the same. (Civ. Code, secs. 1786, 1787; Coates v. Lake View Oil & Refining Co., 20 Cal.App.2d 113, 116, 66 P.2d 463.)

We find no error in the record.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

82 Cal.App.2d 557

**HUHTALA et al. v. HUHTALA.**

**Civ. 7361.**

**Sac. 5824.**

District Court of Appeal, Third District, California.

Nov. 24, 1947.

**1. Appeal and error ⇨1008(1)**

Issues whether deed was procured by fraud, whether it was delivered to grantee, and whether it was executed for a good and sufficient consideration were questions of fact within province of trial court in a case tried to court without a jury.

**2. Deeds ⇨208(1), 210, 211(3)**
**Wills ⇨93**

Evidence sustained finding that instrument was intended by grantor to be a deed and not a will, that it was not procured by fraud, and that it was delivered and was supported by sufficient consideration.

**3. Appeal and error** ⚷1011(1)

Appellate courts will not interfere with a conclusion reached by a trial court on conflicting evidence as to question of fact.

**4. Deeds** ⚷211(3)

In action by deceased grantor's children to set aside deed to defendant, who was the wife of another son of grantee, on ground that deed was obtained by fraud of defendant's husband acting as her agent, evidence sustained finding that defendant's husband committed no fraud on grantor.

◆

Appeal from Superior Court, Placer County; Lowell L. Sparks, Judge.

Action by Henry Huhtala and another against Helen M. Huhtala, also known as Helen M. Meyers, to set aside a deed and to quiet title to real property. From a judgment for defendant quieting her title to the property, entered at the conclusion of the trial by a court sitting without a jury, plaintiffs appeal.

Affirmed.

F. H. Bowers, of Roseville, for appellants.

C. E. Tindall and C. M. Hawkins, both of Auburn, for respondent.

PEEK, Justice.

This is an action by plaintiffs to set aside a deed and to quiet title to certain real property situated in the town of Rocklin, California. At the conclusion of the trial the court sitting without a jury found against plaintiffs and entered judgment for defendant quieting her title to said property.

Plaintiffs' original complaint contained merely the conventional quiet title allegations. The answer of defendant denied plaintiffs' title and affirmatively alleged that she was the owner in fee of said property by virtue of a deed to her from Thomas D. Huhtala (hereinafter referred to as Thomas) dated January 25, 1941 and recorded May 12, 1945. However, at the outset of the hearing plaintiffs were granted leave to file a second amended complaint which, among other things, alleged that Thomas, who was the father of plaintiffs and Alfred Huhtala, defendant's former husband, could neither read nor write the English language; that Thomas reposed great confidence in defendant, his daughter-in-law; that she, acting in unison with her husband Alfred, presented to Thomas for his signature a document which she represented to be a will; that Thomas relying on the representations of defendant and Alfred and without independent advice, signed said document believing he was devising the property he owned in the town of Rocklin to his grandchildren, the sons of defendant and Alfred; that more than four years after the execution of said document defendant caused the same to be recorded; that thereafter on June 12, 1945, Thomas executed a second deed wherein plaintiffs were named as grantees and who by virtue thereof are now the owners in fee of said property; that the second deed likewise was recorded; that the instrument under which defendant claims title is null and void, and that defendant has no right or interest in said property. The complaint concluded with a prayer that defendant's deed be canceled and that title to said property be quieted in them. Defendant's answer to the amended complaint denied all of the material allegations therein set forth, and on the issues so formed the cause proceeded to trial resulting in the judgment previously mentioned.

[1] Essentially the issues argued on appeal are questions of fact wholly within the province of the trial court: (1) That there was fraud in the procurement of the deed from Thomas to Helen, (2) that it was not delivered to her and (3) that it was not executed for a good and sufficient consideration. Nevertheless we have thoroughly examined the transcript and not only do we find evidence which, if taken alone, would support the findings and the judgment but all the evidence when reviewed together is strongly persuasive of the conclusion reached by the trial court.

[2] Thus it appears from the testimony of attorney T. L. Chamberlain that on the day the deed to defendant was executed

Thomas, together with William T. Barnes, the defendant's brother, called at Mr. Chamberlain's law offices in the city of Auburn; that Thomas did not request that a will be drawn but requested that a deed be drawn conveying said real property to defendant; that such request was made in English without the aid of an interpreter. The attorney further recalled that as Alfred had certain financial obligations Thomas did not want to deed the property to him and for that reason the defendant was named as grantee. He could recall no conversation concerning the grandsons or that Thomas desired to devise the property to them. Mr. Chamberlain further stated that Alfred was not present in his office when the deed was drawn; that had he been there the statement for legal services would not have been mailed to him as the office record showed it was. The defendant testified that later the same day the deed was delivered to her by her brother and at all times thereafter she kept the deed in her possession. She also testified that on various occasions she discussed the deed with both Alfred and her father-in-law and that during such discussions there was never any mention of a will. She further stated it was her father-in-law's wish that in order to avoid arguments with plaintiffs the execution of the deed be kept a secret from them and that it was not to be recorded at that time. The testimony relative to the delivery of the deed to defendant by her brother was corroborated by her son J. T. Huhtala. Defendant further testified that for a period of nineteen years she and Alfred resided with Thomas and that she cared for him during all of that time. The testimony of plaintiffs' witnesses was in complete conflict with the evidence so introduced by defendant.

[3] That appellate courts will not interfere with a conclusion reached by a trial court upon conflicting evidence as to a question of fact is a rule so well established that citation of authority would appear to be unnecessary. See 2 Cal.Jur. p. 918, secs. 542-543 and cases cited. The application of this rule to the facts and circumstances of this case must obtain with equal force to the issue of fraud in the procurement of the deed of January 25, 1941, the delivery of that deed to respondent, and the consideration for the same, inasmuch as on all issues the evidence is wholly contradictory and conflicting.

[4] A further contention of plaintiffs is that Alfred was defendant's agent in the procurement of the deed and therefore his alleged fraudulent acts were imputed to her. However, our examination of the transcript shows absolutely no testimony to support such conclusion. Here it should be noted that plaintiffs' case is predicated wholly upon the alleged fraudulent acts of Alfred in procuring a deed of the property from Thomas to defendant rather than obtaining a will as Thomas desired. The only witnesses who testified to what transpired at the time of the execution were Mr. Chamberlain, who drafted the deed and whose testimony has been summarized previously, and Alfred. The latter, when called as a witness for plaintiffs stated that Thomas requested Chamberlain to prepare a will and although he saw the instrument he did not then know it was a deed, and presumably from his testimony he was not aware of this fact until its recordation several years later. His testimony, when called in rebuttal, was that Mr. Chamberlain advised them that because of Alfred's financial obligations it would be better to have a deed drafted and that they took his advice. But immediately following such testimony he said that he believed the document prepared by Chamberlain was a will. There is no other evidence that Alfred requested Mr. Chamberlain to draw a deed. Even if we conclude that a will was requested and that Mr. Chamberlain failed to follow such instructions but contrary thereto drafted a deed, then it was not Alfred but Mr. Chamberlain who is shown to have been guilty of fraud. But on the other hand, if Alfred's testimony on rebuttal be construed to indicate the fact that it was Mr. Chamberlain who suggested a deed rather than a will then such testimony merely created a conflict by virtue of Alfred's own contradictory statements, since obviously both statements cannot be correct. The trial court therefore might properly have given

to the whole of his testimony the slight credence which it apparently did.

For the foregoing reasons the judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

82 Cal.App.2d 435

## GIBBONS v. BREWSTER.

Civ. 15733.

District Court of Appeal, Second District, Division 1, California.

Nov. 19, 1947.

Rehearing Denied Dec. 16, 1947.

1. **Pleading 🔑34(1)**

Allegations of pleading, for purpose of determining its effect, must be liberally construed with view to substantial justice between parties. Code Civ.Proc. § 452.

2. **Pleading 🔑34(1, 3)**

A pleading, not generally or specially demurred to, must be construed liberally, and every reasonable intendment must be indulged in its favor.

3. **Master and servant 🔑80(5)**

In action for salary due plaintiff as manager of defendant's grocery store, complaint was reasonably susceptible of construction as alleging that defendant refused to account to plaintiff for certain profits, including refunds and dividends from wholesalers, so that answer admitting allegation of payment of salary and bonus from net profits, but denying further allegations of complaint, raised issue respecting accounting for patronage dividends received from wholesalers. Code Civ.Proc. § 452.

4. **Appeal and error 🔑197(3)**

In action for salary due plaintiff as manager of defendant's grocery store, where abundant evidence of amount of wholesalers' patronage dividends, received by defendant both before and after date on which defendant began to include such dividends in receipts as basis for bonus payments to plaintiff, was admitted without objection by defendant, variance, if any, between allegations of complaint and defendant's testimony as to amount of such dividends was not prejudicial to defendant. Code Civ.Proc. § 2055.

5. **Appeal and error 🔑1011(1)**

Trial court's fact findings on conflicting evidence are conclusive on appeal, and all reasonable inferences must be indulged in support thereof.

6. **Master and servant 🔑73(8)**

A grocery store manager, protesting owner's change in method of computing his compensation by including bonuses, based on net profits, with his basic salary as operating expense and deducting them before dividing profits, was not estopped from suing for balance due under original compensation agreement by his acceptance of checks for amounts figured in changed manner during remaining period of his employment without further protest.

7. **Accord and satisfaction 🔑1**

The elements of "accord" are proper subject matter, competent parties, consent or meeting of minds of parties, and consideration.

See Words and Phrases, Permanent Edition, for all other definitions of "Accord".

8. **Accord and satisfaction 🔑9**

An employee's acceptance of employer's checks for amounts of compensation, figured on different basis than under original agreement, after protesting new method of computation on receipt of first check, without consenting to change at any time, did not constitute "accord."

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Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Murray L. Gibbons against Houston A. Brewster for wages and salary due plaintiff as manager of the grocery department of defendant's market business. Judgment for plaintiff, and defendant appeals.

Affirmed.

Allard & Brownsberger, of Pomona, James G. Whyte, of Claremont, and Maurice O'Connor, of Los Angeles, for appellant.

Nichols, Cooper & Hickson and A. L. Hickson, all of Pomona, for respondent.

YORK, Presiding Justice.

Plaintiff instituted this action to recover a balance alleged to be due him from defendant on account of wages and salary as manager of the grocery department of the Market Spot a market business owned by defendant. It is undisputed that plaintiff came to work for defendant in August of 1939 and became manager of the grocery department when the Market Spot opened on or about September 1, 1939, continuing as such until March 10, 1945. His basic salary was $30 per week until January, 1941, when it was raised to $35 per week. In addition to his salary, plaintiff received a bonus. From January 1, 1940, to the end of the third quarter of 1944 (with the exception of one quarter when other employees were included in the payment by mutual consent), said bonus was computed as follows: the operating expenses of the grocery department were deducted from the gross profits, the defendant received 6% on the amount he had invested in the merchandise on the shelves and the balance was equally divided between plaintiff and defendant. From its inception, the Market Spot owned shares in and bought merchandise through one or more cooperative grocery organizations and received so-called patronage dividends therefrom. Prior to the third quarter of 1944, these patronage dividends were not included in determining the profits of the grocery department. Likewise, prior to the third quarter of 1944, the basic salary paid to plaintiff was considered an operating expense and was deducted in figuring net profits, but the bonus payments made to plaintiff were neither so considered nor deducted. Beginning with the third quarter of 1944, defendant changed his bookkeeping system and the method of computing the net profits to be divided was thereby altered as follows: (1) The bonus paid to plaintiff was included with the basic salary as an operating expense and was deducted before a division of profits was made; (2) Patronage dividends were included in the receipts and were figured in the bonus payments.

On November 1, 1944, when he received a check covering his bonus for the third quarter of 1944, for the months of July, August and September, plaintiff objected to the addition of his share of net profits to operating expense, and stated to defendant: "* * * bonuses should not be included in net profit. * * * It was not our agreement. I was supposed to receive 50 per cent of the net profit." To this defendant replied: "That is the right bookkeeping way and it is going to be that way, regardless."

Plaintiff also protested the inclusion in operating expenses of Weber Showcase Company's charge of $900 for labor in remodeling the grocery department.

At the time of his final payment and discharge, when he was entering the United States Navy in July of 1945, plaintiff demanded through his attorney that defendant account to and pay him the balance due, including the patronage dividends which had accrued prior to the year 1944.

Defendant testified that he would not have continued plaintiff in his employ had the latter not accepted the changed method of computing the bonus.

The trial court gave judgment for plaintiff in the sum of $3,137.19, computed as follows: $1,573.69 for one-half of the patronage dividends from wholesalers accruing prior to the year 1944; $1,113.50 for one-half of bonuses charged as operating expenses after the third quarter of 1944; and $450, being one-half of the $900 bill paid to Weber Showcase Company for labor on remodeling found by the court to be "permanent."

Defendant prosecutes this appeal from such judgment.

It is here urged that the trial court erred in giving judgment for patronage dividends accruing prior to June 1, 1944, for the reason that (1) this relief was not embraced within the pleadings and is contrary to the allegations of the complaint which were expressly admitted by the answer; (2) this relief is based upon findings which are not supported by the evidence. In this connection, appellant directs attention to paragraph III of the complaint and paragraph II of the answer, to-wit:

"III * * * that the defendant paid said plaintiff the said salary and said bonus of fifty per cent of the net profits derived from the operation and maintenance of said grocery department until about June, 1944, from and after which time the defendant withheld one-half of the bonus due to plaintiff and failed and refused to account to the plaintiff for certain other profits received from the operation and maintenance of said grocery department, and particularly refunds and dividends from certain wholesalers from which the defendant purchased certain supplies."

"II * * * admits that defendant paid plaintiff said salary and the bonus from the net profits derived from the operation and maintenance of said grocery department until about June, 1944, to-wit, at all times to and including the first two quarters of 1944; denies generally and specifically each and every other allegation in said paragraph contained, and on that behalf alleges that beginning with the third quarter of 1944, the method of computing bonus was changed by the defendant with the full knowledge of the plaintiff, who thereupon accepted such changed method of computation and the bonus as computed thereunder."

[1, 2] This court is bound by the rule announced in section 452 of the Code of Civil Procedure, to-wit: "In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." See, also, Milovich v. City of Los Angeles, 42 Cal.App.2d 364, 373, 108 P.2d 960, 965, where it was stated: "Appellants not having filed either a general or a special demurrer * * * we are compelled to construe respondent's pleading liberally and to indulge in every reasonable intendment in its favor."

[3] It is undisputed that under the new system of bookkeeping installed by appellant at the beginning of the third quarter of 1944, patronage dividends were included in the receipts and were figured in the bonus payments for that period and subsequent periods, consequently any recovery on account of such dividends would necessarily be for a period prior to the third quarter of 1944.

With these facts in mind, a reasonable construction of paragraph III of the complaint would be that in addition to withholding one-half of the bonus due to respondent from and after June, 1944, appellant also failed and refused to account to plaintiff for certain other profits, particularly refunds and dividends from wholesalers.

While it is true, as heretofore recited, that paragraph II of the answer admits payment of the salary and bonus from net profits to and including the first two quarters of 1944; it denies each and every other allegation in said paragraph contained, thus raising an issue with respect to an accounting of such other profits, particularly patronage dividends which had been received during the period of employment.

[4] Appellant was called as a witness by respondent under section 2055 of the Code of Civil Procedure and testified without objection that the approximate amount of the patronage dividends up to 1944 was $3,750; "I think that was somewhere near the amount that was in there, which that amount also included the amount of deposit that I made on the original opening with them." Said witness also testified that from 1939 to and including November 30, 1943, respondent had not been given credit for any of these dividends; that his (appellant's) calculation made as represented by the check dated November 1, 1944, included all of the credits given for the first three quarters of 1944, that is up to November 1, 1944, on partronage dividends.

The record discloses that the issues were understood and that abundant evidence was offered and received showing the amount of patronage dividends, both before and after the date of June, 1944, without objection on the part of appellant. Therefore, the variance, if any, was not material and appellant was not misled thereby to his prejudice.

[5] Adverting to appellant's contention that the relief granted is based upon find-

ings which are not supported by the evidence, to-wit:

"3. That the net profits from the operation of said grocery department, were divided fifty per cent (50%) to each up until the quarter beginning June 1st, 1944, insofar as the knowledge of the plaintiff was concerned, but due to lack of knowledge on the part of plaintiff, the amounts of the patronage dividends credited to defendant were not included therein. That from and after June 1st, 1944, the defendant, without the consent of the plaintiff, changed the original contract so that the division of the net profits between plaintiff and defendant, became twenty-five per cent (25%) to the plaintiff and seventy-five per cent (75%) to the defendant, and withheld from the plaintiff the sum of $1,113.50 to which plaintiff was legally entitled, until his final discharge by the defendant on or about March 10th, 1945; that prior to November 1st, 1944, plaintiff was advised of the changes in defendant's bookkeeping system and the resultant changes in methods of computing his compensation, but at no time did plaintiff accept or agree to such changes."

Appellant testified that when respondent first came to work for him he was told that "I would take the patronage dividends for my supervision." In answer to the question, "Did you change the method of the credit for the patronage dividends at any time during the period that Murray was working for you or, in other words, did you ever share any of them with him during the time of his employment?" appellant stated: "They were added in for the entire year 1944 for the third quarter bonus."

Respondent testified that the first time he knew any dividends had been received from Spartan (one of the wholesalers) was November 1, 1944. Conflicting statements were made by appellant as to when respondent had knowledge with respect to receipt of dividends from the wholesalers. The trial court summarized the testimony presented on this issue as follows: "Briefly summarizing, Gibbons said he never heard of them until November, that is, he never knew the amounts of them. He knew they were there but he had no knowledge of what amounts he would receive until November. That is in dispute so far as Brewster is concerned."

In view of the conflict in the evidence, the findings of the trial court based thereon are conclusive on appeal, and all reasonable inferences are to be indulged in support thereof.

[6] It is next contended that the court erred in giving judgment for $1,113.50 based upon one-half of the bonuses charged as operating expense after the second quarter of 1944, for the reason that "by appearing to acquiesce in the changed method of compensation and accepting without further protest three checks figured in that manner, plaintiff induced defendant to retain him in his employment. He is therefore estopped from now saying that he did not accede to the changed method of compensation and did not accept those checks in full payment for his services."

In summing up the evidence the trial court commented as follows: "Now, on that relationship to the bonus, it has been argued here, 'I made the change because of the bookkeeping', 'I had to set it up in bookkeeping'. It occurs to me that if the agreement was 50 per cent of the net profits that you cannot change a basic agreement of employment on the basis of keeping books for the store. It may be all right to change the way of figuring it in, but it changes the basis of the agreement which was protested at the time. It may be properly charged against operating expenses as far as his (appellant's) accounting to his income tax or what not, but as to changing the basic agreement I think it is an error. He could not change the agreement and understanding of employment as to what he was to receive, when he was to receive 50 per cent of the net profit, by setting up the books. I do not think that affects it at all. He deducted it. Then it becomes a question of whether there is a new agreement, whether there is an accord and satisfaction, or whether or not there is a modification or alteration of the original amount. I do not think there was an alteration or modification because I do not think there was a meeting of the minds. I do not think that Gibbons agreed to it at all."

An interpretation of the changed agreement here involved which would deprive respondent of 50 per cent of his former compensation would certainly be unfair and unjust, unless respondent had actually and unequivocally accepted its terms. When advised of the change, respondent protested, but was told by appellant that it was "going to be that way, regardless." The evidence produced points to the fact that there was never a meeting of the minds of the parties, hence respondent by accepting checks for the remaining several months of his employment without further protest, was not estopped from standing upon his original agreement with appellant.

The court found that respondent was entitled to a refund of one-half of $900 being a portion of a bill paid to Weber Show Case Company for permanent repairs made on the Market Spot. The record discloses that the total amount of the bill for this work was $1,300. Appellant testified that $900 thereof was a charge for labor, and $400 was for material; also that the work was in the nature of a temporary improvement. Respondent objected to the addition of the $900 charge to operating expenses, maintaining that the improvement was permanent and constituted a capital investment. In view of the conflict in the evidence on this point, the finding of the trial court is conclusive on appeal.

[7] Appellant urges in his assignment of general errors that each of the accountings for the third and fourth quarters of 1944 and the first quarter of 1945 constituted an account stated and the acceptance of each check therefor constituted both payment of an account stated and an accord and satisfaction. As stated in Moore v. Bartholomae Corp., 69 Cal.App.2d 474, 478, 159 P.2d 436, 437, "The elements of an accord are: (1) a proper subject matter; (2) competent parties; (3) consent or meeting of the minds of the parties; and (4) consideration. (Sierra, etc. P. Co. v. Universal Electric etc. Co., 197 Cal. 376, 387, 241 P. 76.)"

[8] The record is clear that respondent protested the new method of computation upon receipt of his first check, and that at no time did he consent to such change, hence an essential element of an accord is lacking, to-wit: the meeting of the minds of the parties, as the trial court found.

For the reasons stated, the judgment is affirmed.

DORAN and WHITE, JJ., concur.

82 Cal.App.2d 365

## MORELLO v. GROWERS GRAPE PRODUCTS ASS'N et al.

Civ. 13301.

District Court of Appeal, First District,
Division 2, California.
Nov. 13, 1947.

**1. Contracts 🔑22(3)**

A contract is complete when letter of acceptance is posted, in absence of any provision in offer requiring letter of acceptance to be received. Civ.Code, § 1583.

**2. Contracts 🔑42**

The deposit by one party in mails of an instrument properly addressed to other party, with postage thereon prepaid, constitutes a "delivery" to the other party, at the place where and time when it is so deposited. Civ.Code, § 1583.

See Words and Phrases, Permanent Edition, for all other definitions of "Delivery".

**3. Contracts 🔑22(3)**

Where offer for contract was itself sent by mail and it called for an acceptance in writing, use of same medium as that chosen for offer was thereby invited and post office was agent of offeror. Civ.Code, § 1583.

**4. Sales 🔑22(5)**

Where offer to sell brandy called for delivery of a written or telegraphic acceptance within five days, offeree's letter, though placed in mail as late as the fifth day was within time, notwithstanding that it was not received by offeror until after five-day period had elapsed Civ.Code, § 1583.

**5. Sales ⚷22(3)**

Where offer to sell brandy called for signing of four copies of a formal contract in addition to written or telegraphic acceptance within five days, but only one copy of proposed formal contract accompanied offer and offeror did not send copies of formal contract to offeree for signing, the written acceptance within five days sufficed for formation of contract without signing of copies of formal contract.

**6. Sales ⚷52(5)**

Evidence was insufficient to establish as matter of law that plaintiff's letter purporting to accept written offer to sell brandy was superseded by telegram purporting to assign plaintiff's right to purchase the brandy, in face of plaintiff's uncontradicted testimony that he did not authorize signing of his name to the telegram.

**7. Sales ⚷418(15)**

Regardless of whether loss of profits is allowed as a separate item of damages or indirectly as a part of general damages, recovery of them is generally limited to cases where goods are unobtainable on the market, and, consequently, buyer cannot offer his vendee a reasonable substitute to fulfill his resale contract. Civ.Code, §§ 1787(2), 3300.

**8. Sales ⚷413**

The loss of resale profits resulting from breach of contract to sell brandy, if proved, would be a loss directly and naturally resulting in ordinary course of events from seller's breach of contract and, hence, could be proved as general damages without being specially pleaded.

**9. Appeal and error ⚷205**

Where trial judge definitely indicated that he was not going to permit proof of alleged loss of resale profits resulting from breach of contract to sell brandy because it had not been specially pleaded, after plaintiff's counsel had stated what he knew he had to prove, plaintiff was not required to go further in his offer of proof in order to save point for review on appeal.

**10. Appeal and error ⚷205**

Where trial court had refused to permit plaintiff to prove loss of resale profits resulting from alleged breach of contract to sell brandy because he had not specially pleaded it, ruling could not be sustained on appeal on ground that such proof if admitted would have made out a case of new business venture where such loss could not be proved, since record failed to show that plaintiff's proof if admitted would have brought case within the rule invoked.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action Eugenio Morello against Growers Grape Products Association and others to recover damages for alleged breach of contract. From a judgment for named defendant for costs, entered on a directed verdict, the plaintiff appeals.

Reversed.

Edward J. Lynch, of San Francisco, for appellant.

Conley, Conley, & Conley and Phillip Conley, all of Fresno, and John D. Gallaher and Boekel & Moran, all of San Francisco, for respondents.

GOODELL, Justice.

This appeal was taken from a judgment for respondent for costs, entered on a directed verdict. The action was for damages in the sum of $35,853 for breach of contract alleged to have been entered into in November, 1942.

In 1938 there was a surplus of wine grapes in California. The respondent, a non-profit corporation, was organized under state law, and functioned in connection with the California Agricultural Prorate Commission. The program for handling the surplus crop contemplated that the grapes would be crushed and made into brandy. The appellant owned a distillery near Fresno and was a member of the association. On October 4, 1938 he entered into an agreement with the association whereby he undertook to process a part of the grape crop. The agreement is lengthy, technical and complicated and its details need not be gone into here, for it is not the contract in suit. Under the 1938 agreement title to the brandy was vested in the association, but each processor had a preferential right to purchase as much of the brandy in the pool as he had processed. That particular provision (sec. 13) read as follows: "* * * The association shall not * * * sell at any price any quantity of commercial brandy processed for the association by the processor to any person, unless the association shall have first offered to sell the same to the processor at the same price and upon the same conditions, and unless the processor shall have failed or refused to accept said offer in writing or by telegraphic notification delivered within five (5) days from the date of the making of such offer."

Pursuant to that provision the association on November 9, 1942, wrote to the appellant stating that the release had been ordered of the unsold brandy remaining in the pool, amounting to approximately four million gallons. The letter contained the following offer: "The unsold brandy of your distillation remaining in the pool, according to our records, amounts to approximately 23,902.46 original proof gallons. This amount, which is subject to our final verification, or any quantity thereof, is offered to you at $1.25 cash, per original proof gallon, f. o. b. the storage racks within the Internal Revenue Bonded Warehouse where it is now held, provided

"1. That you accept this offer in writing or by telegraphic notification delivered within five days from the date of this letter, in accordance with Paragraph 13 of the Brandy and High-Proof Processing Agreement.

"2. That you sign and return to the Growers Grape Products Association, four copies of the Brandy Purchase and Sales Agreement (copy of this is enclosed, and additional copies will be furnished upon request.)"

The letter went on to say that if the offer was not accepted the association would "then be in a position to accept orders for any unsold brandy of your distillation (or the distillation for which you hold the purchase rights), from any interested party". It concluded, "It is our present intention, as in the past, to accept such offers, at the same price and upon the same terms that we are now offering to you."

On November 13, appellant wrote to the association as follows: "Confirming my telephone conversation with you this afternoon, I accept your offer of Nov. 9th and will purchase the 23,902.46 original proof gallons of commercial brandy at $1.25 cash per gal., all as set forth in said letter; so if you will send the contracts down to me I will immediately sign and return the same."

The case is complicated by the fact that on November 16th respondent received the following telegram: "I hereby assign all my right, title and interest in the present offering of commercial brandy to John A. Williar. Eugenio Morello". The circumstances surrounding its sending were as follows: Appellant is a member of an association known as Central California Wineries with an office in Fresno (and apparently not connected with the respondent association). On November 12th or 13th, at about the time when appellant had respondent's offer, he was sick in bed at his home, about 20 miles from Fresno, when he received a telephone call from one Caine who was talking from the Wineries' Fresno office. Caine told appellant that he had arranged to sell. Whether Caine was selling a preferential right in the surplus pool, similar to appellant's right, does not clearly appear, but we assume such was the case. After some discussion appellant told Caine that he was prepared to give an option to sell his own preferential right (respecting the 23,902.46 gallons) for 2½ cents a gallon, provided he received the money within five days. This telephone conversation was followed by a letter from appellant to Caine dated November 13th (the day appellant wrote to the association) reading: "As per our conversation over the phone last night, in which you represented Mr. Veith, I give you a 5 days option until the 18th of Nov. at 1 p. m. to buy my pro-rate brandy to net me 2½ cents per gal., and if I don't receive check for 2½ cents per gal. by that time then I am to be free to sell same to other parties." The Mr. Veith mentioned seems to have represented Williar, who in turn represented the Seagram organization.

While appellant was talking on the telephone with Caine, as already related, a Miss McKeighan (an assistant secretary of the Wineries, and well known by appellant for some years) was cut in on the conversation. She asked appellant if he wanted her to notify respondent of his willingness to sell his rights, and he authorized her to do so. On Saturday, November 14th, the telegram already quoted was sent from Fresno, stating that *appellant assigned to Williar.* Appellant's name was at the bottom of the telegram as the sender. By whom it was composed does not appear, but presumably Miss McKeighan caused it to be sent. It was received by respondent on Monday, the 16th, about the same time as respondent claims to have opened appellant's letter of the 13th.

Appellant admits having authorized Miss McKeighan over the telephone to send a "notification" to respondent but he disclaims any knowledge that it was to be sent by telegram and asserts and repeats with emphasis, that *he never authorized her or anybody else to sign his name, or to say he assigned.*

The 5-day option given by appellant to Caine was not exercised. When appellant failed to receive from respondent for signature the four copies of the formal contract, he called on respondent and was told that the telegram had been treated as superseding the acceptance; that respondent assumed from the telegram that appellant had no further interest in the subject-matter of its offer of the 9th and that it was at liberty to deal directly with Williar. On December 2nd, respondent wrote appellant to the same effect. On December 3rd appellant made a written demand that respondent complete the transaction, in which he said: "I am hereby confirming my verbal notice to you that offer made to John A. Williar on November 14, 1942, for release by me of rights in said brandy to Williar was withdrawn and cancelled by reason of his failure to accept offer and pay purchase price within the time agreed. My notice to you of assignment to Mr. Williar is withdrawn." This was followed by a letter from appellant's attorney to respondent on December 9th, and the next month this action was commenced.

At the close of plaintiff's case respondent moved for a directed verdict on the ground that there had been no proof of damages. In granting the motion the court said: "I don't see how any jury can find any damages in this case, because there is no proof of damages. Moreover, in the Court's opinion, there is no proof of any contract which has been breached in this case, because the agreement between the plaintiff and the main defendant * * * had certain conditions which the evidence shows were not complied with, and therefore no contract. There was no acceptance of the offer within the terms of the paragraph 13 of the original agreement between the parties. So I am bound to grant the motion for the directed verdict".

The appellant attacks the ruling on both grounds stated by the court. The respondent defends it on the ground inter alia that no contract was made because appellant (a) "did not prove acceptance in writing or by telegram delivered to Growers Grape Products Association within five days after November 9, 1942, and (b) because Morello did not execute any brandy purchase and sale agreement * * * covering the purchase".

Naturally the primary inquiry is whether a contract was made, for if not, there is no need to discuss damages.

In the first place, the language of the acceptance squares with that of the offer, and there is no claim to the contrary.

On the question whether the acceptance was in time: paragraph 13 of the underlying agreement provides for an acceptance of the offer "in writing or by telegraphic notification delivered within five (5) days from the date of the making of such offer." The offer itself calls for an acceptance "in writing or by telegraphic notification delivered within five days from the date of this letter, in accordance with Paragraph 13 * * *."

The offer was dated November 9th. Accordingly the 14th was the fifth day, and it was a Saturday. The acceptance was dated the 13th.

Appellant testified that he telephoned his acceptance to respondent on the 13th and was told that he must put it in writing. The offer called for either written or telegraphic notification, so the telephonic "acceptance" has to be disregarded. However, if appellant's letter dated the 13th was mailed even as late as the 14th—the fifth day—it was within time, although not *received* in San Francisco until Monday, the 16th. Neither paragraph 13 nor the offer itself specifies that the acceptance must be *received* within five days; they call for an acceptance *delivered* within five days.

[1] It is elementary that a contract is complete when the letter of acceptance is posted. Sec. 1583, Civ.Code; Ivey v. Kern County Land Co., 115 Cal. 196, 201, 46 P. 926; Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 315, 74 P. 855, 65 L.R.A. 90. The word "delivered" in the offer creates only an apparent, not a real difficulty, because under the law dealing with the formation of contract *delivery of an acceptance to the post-office operates as delivery to the person addressed,* except in unusual cases.

Sec. 1583, Civ.Code, supra, provides that "Consent is deemed to be fully communicated between the parties as soon as the party accepting a proposal has put his acceptance in the course of transmission to the proposer, in conformity to the last section."

[2] There are many cases holding substantially that the deposit by one party in the mails of an instrument properly addressed to the other party, with postage thereon prepaid, constitutes a *delivery* to the other party, *at the* place where and the *time when it is so deposited.* (See Navajo County Bank v. Dolson, 163 Cal. 485, 490, 126 P. 153, 41 L.R.A.,N.S., 787; Kraemer v. Coward, 2 Cal.App.2d 506, 509, 38 P.2d 458; Loud v. Collins, 12 Cal.App. 786, 789, 790, 108 P. 880; see, also, 1 Williston on Contracts (Rev.Ed.) sec. 86).

[3] The post-office was clearly the agent of the offeror, for the offer was itself sent by mail and it called for an acceptance in writing and thereby invited the use of the same medium as that chosen for the offer.

[4] It is claimed by respondent and conceded by appellant that the acceptance of the 13th was not opened in the respondent's San Francisco office until Monday, November 16th. Appellant argues, however, that it might well have been mailed on the 13th, in which case it might have been received on the 14th had respondent's office been open for business on that day, which was a Saturday. The case is susceptible of that inference, as there is no testimony as to whether the office was open or closed. Let it be conceded, however, that it was received on Monday, the 16th. If from that fact the inference could be drawn that it had been mailed in Fresno county on Saturday, the 14th—the fifth day—then a directed verdict, if based on the acceptance being too late, could not be sustained.

[5] In addition to an acceptance within five days, the offer called for the signing of four copies of a formal contract. These were never sent to appellant *for signing* for reasons already appearing. At the argument on appeal it was conceded that one copy of this proposed formal contract accompanied the offer. Hence its terms had been disclosed to appellant before he accepted. Under the holding in Gavina v. Smith, 25 Cal.2d 501, 503, 504, 154 P.2d 681, this sufficed for the formation of a contract, and the rule announced in 6 Cal.Jur., p. 58, sec. 33, has no application.

[6] It might be noted, before leaving this phase of the case, that respondent did not base its refusal to go forward on the grounds now relied on to support the court's ruling, namely, (a) that the acceptance was not delivered within the five days, or (b) that the formal contract was never signed by appellant. In its letter of December 2nd respondent assigned a totally different reason, namely, that appellant's letter of the 13th "was superseded on the 14th" by the assignment telegram, and added, "We therefore, agreed to sell this brandy to Mr. Williar and are unable to do otherwise at this late date". From this it appears that respondent considered that an assignable contract had been entered into. Appellant argues, moreover, that the very fact that respondent recognized Williar as the assignee

of appellant and proceeded to do business with him as such, was a tacit admission that the contract had been entered into.

This brings us to the telegram which caused the trouble. No reason appears to us, and none is suggested by counsel, why appellant was in any way obligated to notify respondent that he had given an option to anybody. Certainly until the option was exercised it would be no concern of respondent. But the telegram went much further and purported to be itself an assignment of all appellant's rights in the "offering of commercial brandy" then pending. Appellant vigorously denies authorizing any such message. He admits giving Miss McKeighan authority to notify respondent that he had given the option, but that is as far as he goes. He claims he did not authorize the signing of his name to a telegram or to any other message. At the next trial the defense may be able to show that appellant did authorize the telegram in the form in which it was sent, but on this appeal from a judgment entered on a directed verdict this court cannot say that such assignment was made, in the face of appellant's positive testimony, which at this stage is uncontradicted, and which amounts to a claim that such authority as he gave over the telephone was exceeded.

Appellant contends that the court erred in holding that loss of profits could not be proved under a general allegation of damages.

Damages were pleaded in this case in general terms only, the allegation being that as a result of the association's refusal to deliver the brandy plaintiff had sustained damage in sum of $35,853.

The complaint alleged that plaintiff was unable to purchase the quantity of brandy similar to that covered by the agreement, and appellant testified that he tried to buy brandy after the refusal to deliver, but there was none on the market.

Appellant's counsel stated: "Then we have to prove this: That he * * * had made all preparations to bottle this brandy under the regulations then existing, which permitted him to make even a larger profit than he would have made if he had bought and sold the brandy. He had made all the plans for taking care of this brandy and selling it by the case, and we have the figures to show just what the profit would be." The court replied, "* * * you haven't alleged any such damages—loss of profits", and added "general damages do not include, in a case of this kind, loss of profits; they have to be properly pleaded; * * * It is a matter you haven't pleaded, and I am not going to permit the proof."

The following offer of proof was then made:

"Mr. Lynch: I wish to make a complete offer * * * to show what our damage is, and then if your Honor rules that we can't introduce any evidence, why, we will have the record.

"I offer to prove * * * that at the time that the defendant broke the contract, as we allege and failed to deliver the brandy at the price indicated, that there was no possibility of obtaining any brandy in the market; that the brandy supply had been exhausted.

"I offer to prove that this plaintiff had made arrangements with another concern to use that brandy in bottling—to use it for bottling purposes and to sell it in case lots in the general market for which there was a very large demand at that time, and that the profit from that venture would have been approximately $11.38 a case; and that the total profit to Mr. Morello under this arrangement would have been one-half of that, and that he would have been entitled to a profit of some $2.76 * * * per proof gallon.

"We also want to prove that there was a very good market for case goods, for brandy bottled in that way, and that many of the distillers were thus disposing of their brandy—that they wouldn't sell it—that they were using it for the purpose of converting it into case goods and placing it on the market for sale.

"Mr. Conley: To which we object on the ground it would be incompetent, irrelevant and immaterial, no proper proof of damage, not responsive to any properly pleaded issue.

"The Court: I will sustain the objection."

[7] Appellant testified that other brandy was unobtainable on the market, and by his tender he assured the court that he was prepared to prove that he had made arrangements for the ultimate sale of the association's brandy at a profit. This brought the case within the rule announced in McKay v. Riley, 65 Cal. 623, 4 P. 667 and recently reaffirmed in Grupe v. Glick, 26 Cal. 2d 680, 688, 160 P.2d 832, 837, (a breach of warranty case). In the latter case it is said: "* * * whether the loss of profits is allowed as a separate item of damages, or indirectly as a part of the general damages, the recovery of them has generally been limited to cases where the goods are unobtainable on the market (National, etc. Mfg. Co. v. Producers' Refining Co., 169 Cal. 740, 147 P. 963; McKay v. Riley, 65 Cal. 623, 4 P. 667; Coates v. Lake View Oil & Refining Co., 20 Cal.App.2d 113, 66 P.2d 463; Long Beach Fisheries Co. v. Curtis Corp., 58 Cal.App. 318, 208 P. 372; note, 52 L.R.A. 209; note, 53 L.R.A. 33; anno. 88 A.L.R. 1439; 46 Am.Jur.Sales, p. 817, § 689) and, consequently, the buyer cannot offer his vendee a reasonable substitute to fulfill his resale contract." See, also, Roach Bros. & Co. v. Lactein Food Co., 57 Cal. App. 379, 390, 207 P. 419.

Section 3300, Civ.Code provides that "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom", and section 1787 provides that: "(2) The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract".

This action was brought on a contract claimed to have been entered into in November, 1942, but that contract cannot be divorced from the underlying contract of October 4, 1938, for, as we have seen, the earlier one provided that the appellant should have first call on as many gallons as he had processed, at the price offered to the association by outsiders. That provision, obviously, was put into the contract as an inducement to the distillers to join in the enterprise. What, then, was in the contemplation of the parties when these contracts were being negotiated? The whole project was designed to produce brandy to sell. It produced, in fact, four million gallons. The object and purpose of an outsider in buying brandy from the association would certainly be for resale, whether in bulk or bottled, at a profit. The processors, however, had a preferential right to buy, and it is inconceivable that any different object or purpose could have been in contemplation in their case. In Grupe v. Glick, supra, 26 Cal.2d 680, at page 689, 160 P.2d 832, 838, it is said, "* * * it is unrealistic to say that the seller, knowing the purpose for which the buyer is purchasing, cannot foresee the damages that will follow from a breach of warranty not ascertainable until the goods are put to use by the buyer's vendee. * * *"

[8] The loss of such profit on resale, if proved, would seem to be a "loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract". (Sec. 1787(2), Civ.Code; sec. 3300, Civ.Code). If so, then under the authorities it could be proved as general damages without being specially pleaded.

In the leading case of Tahoe Ice Co. v. Union Ice Co., 109 Cal. 242, 249, 41 P. 1020, 1022, it was claimed that as to the profit for a certain year the complaint was insufficient, "and that evidence was erroneously admitted on that subject, because such profit was in the nature of special damages which were not specially pleaded". The court said, "This contention cannot be maintained. Loss of profits which, like those claimed in the case at bar, are the direct and natural results of a contract, and which the law implies from such breach, are recoverable without special allegations. [Citations.]" Other cases so holding are McConnell v. Corona City Water Co., 149 Cal. 60, 66, 85 P. 929, 8 L.R.A.,N.S., 1171; Germain Fruit Co. v. J. K. Armsby Co., 153 Cal. 585, 590, 96 P. 319 (breach of warranty); Ahlers v. Smiley, 163 Cal. 200, 205, 124 P. 827; Robinson v. Rispin, 33 Cal.App. 536, 539, 165 P. 979, and Brunvold v. Johnson, 36 Cal.

App.2d 226, 230, 97 P.2d 489. See also Shoemaker v. Acker, 116 Cal. 239, 245, 48 P. 62. No case to the contrary is cited by respondent.

In Grupe v. Glick, supra, 26 Cal.2d at page 688, 160 P.2d at page 838, it is said, "The amount lost by Grupe on account of these prospective profits was therefore properly included in the sum allowed as general damages for breach of warranty if the evidence shows that such damages are (1) such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, and (2) reasonably certain."

In Bercut et al. v. Park, Benziger & Co., 9 Cir., 150 F.2d 731, 733, an instruction was refused which embodied the theory that prospective profits constituted special damages. In the course of its opinion affirming the judgment the Circuit Court of Appeals (9th) said: "In these California decisions the buyer's loss of profits appears to be regarded as the direct and natural consequence following in the ordinary course of events from the seller's failure to deliver", citing Orester v. Dayton Rubber Mfg. Co., 228 N.Y. 134, 126 N.E. 510 as expressly holding that such damages as loss of profits are not special, but are general damages.

Shoemaker v. Acker, supra, 116 Cal. at pages 244, 245, 48 P. at page 64, points out the difference between ordinary loss of profits and other losses which are consequences of the breach of contract but "are wholly collateral to the one broken, do not directly flow from it, and are not stipulated for or contemplated by the parties to the contract sued on". Such latter losses, under the authorities, must be specially pleaded. The present, however, is not such a case, and we are satisfied that the court erred in ruling against the appellant on his tender of proof.

[9] Respondent claims that appellant's "offer of proof scarcely meets the requirement as to detail and specific character required by the authorities". After appellant's counsel had stated what he knew he had to prove, the judge definitely indicated that he was "not going to permit the proof" of loss of profits because it had not been specially pleaded. After that it would seem that appellant need not have gone further in order to save the point for review on appeal. Caminetti v. Pacific Mutual Life Ins. Co., 23 Cal.2d 94, 100, 142 P.2d 741; Tomaier v. Tomaier, 23 Cal.2d 754, 760, 146 P.2d 905; Lawless v. Calaway, 24 Cal.2d 81, 91, 147 P.2d 604; Heimann v. City of Los Angeles, 30 Cal.2d 746, 185 P.2d 597. Nevertheless he made a more detailed tender, already quoted, which in our opinion was sufficient.

[10] Respondent makes the further point that, assuming the sufficiency of the tender, loss of profits would have been inadmissible (and hence there was no error) because such proof if admitted would have made out a case of a new business venture where such loss cannot be proved. 25 C.J.S., Damages, § 42; 8 Cal.Jur. p. 777; California Press Mfg. Co. v. Stafford Packing Co., 192 Cal. 479, 221 P. 345, 32 A.L.R. 114; Gibson v. Hercules Mfg. Co., 80 Cal.App. 689, 252 P. 780; Lacy Mfg. Co. v. Gold Crown Mining Co., 52 Cal.App.2d 568, 574, 126 P.2d 644. This, in short, is an attempt to support the court's ruling, not on the ground on which it was based (which was that appellant could not prove loss of profits because he had not specially pleaded it) but on a newly-discovered ground not brought to the trial court's attention, and which, therefore, could not have influenced or motivated the direction of the verdict (see Standard Livestock Co. v. Pentz, 204 Cal. 618, 630, 269 P. 645, 62 A.L.R. 1239). Wholly aside from that consideration, it cannot be said on this record what the appellant's proof would have shown, for he was not permitted to produce it. Because of the rulings he was foreclosed from showing what "arrangements" had been made "with another concern to use that brandy in bottling" and "sell it in case lots" (quoting the tender). Hence we are in no position to say whether or not the proof would have brought the case within the rule invoked.

We are satisfied there is sufficient evidence from which it may be inferred that the acceptance was within time. We are satisfied, also, that the court erred in rejecting the proof of loss of profits. Our conclusion on the latter question renders it unnecessary to discuss whether the amendment should have been allowed.

The judgment is reversed.

NOURSE, P. J., and DOOLING, J., concur.

82 Cal.App.2d 569

**LAGARES et al. v. KAPPAS.**

**Civ. 13400.**

District Court of Appeal, First District, Division 1, California.

Nov. 25, 1947.

Rehearing Denied Dec. 23, 1947.

**1. Partnership 🔑336(2)**

In action to dissolve partnership and compel accounting, where bank account of old partnership was transferred to names of new partners and carried on and balance commingled with funds of new partnership, trial court, in making accounting, did not err in admitting evidence with reference to bank balance of old partnership.

**2. Partnership 🔑315**

Where plaintiff appeared in action to dissolve partnership and compel an accounting only as member of new partnership formed after death of her husband and not as member of former partnership of which her husband was a member or as legal representative of husband's estate, plaintiff was without legal capacity to demand judgment for profits of old partnership of which her husband was member. Probate Code, § 571; Civ.Code §§ 2419(d), 2425(4).

**3. Appeal and error 🔑996**

If finding made by trial court was based upon any legitimate inference which might reasonably be drawn from evidence, finding must be sustained.

**4. Partnership 🔑336(3)**

In action to dissolve partnership and compel an accounting, evidence supported finding that one of the four partners was entitled to $1,934, and that two of the other partners were entitled to $450 each as undistributed profits of the partnership.

**5. Partnership 🔑332**

In action to dissolve partnership and compel an accounting, evidence established that undistributed profits of the partnership had not been previously taken over by commissioner and divided along with proceeds of sale of market owned by partnership.

**6. Partnership 🔑344**

Judgment in action to dissolve partnership and compel an accounting awarding to three of the four partners their shares of undistributed profits of partnership was maintainable against other partner alone, where it appeared that such other partner had control of funds from which the sums awarded were to be paid.

**7. Partnership 🔑70**

A partner who withholds that to which other partners are entitled has duty to deliver it up to them.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Clarence Lagares and Irene Lagares against George Kappas and Xenofon Koukis to dissolve a partnership and compel an accounting, wherein the defendant Xenofon Koukis filed a cross-complaint against defendant George Kappas. From adverse judgment, the defendant George Kappas alone appeals.

Reversed in part and affirmed in part.

Jos. T. O'Connor, M. L. Choynski and J. Bruce Fratis, all of San Francisco, for appellant.

William E. Ferriter, James C. Purcell and William Petros, all of San Francisco, for respondents.

FINLEY, Justice pro tem.

This action was brought to dissolve a partnership and compel an accounting. The appeal is by defendant George Kappas from certain portions of the judgment rendered in favor of plaintiffs Clarence Lagares and Irene Lagares against said defendant on their complaint, and in favor of defendant Xenofon Koukis against said codefendant George Kappas on a cross-complaint filed by Koukis at the time of trial.

On January 1, 1945, appellant Kappas and one Thomas Lagares were equal partners in the operation of a food market at 1647-1649 Market Street in San Francisco. This will be referred to as the old partnership. Shortly after January 1, 1945, Thomas Lagares died. On October 1, 1945, a new partnership was formed under written articles naming Irene Lagares, Clarence Lagares, Xenofon Koukis and George Kappas as equal partners. The articles specified that each of the new partners had contributed an undivided one-fourth interest in the capital stock of the copartnership consisting of merchandise and equipment. What actually happened was that Irene Lagares, the widow of Thomas Lagares, and Clarence Lagares, her son, jointly took over the interest formerly owned by Thomas Lagares. George Kappas sold Xenofon Koukis' one-half of the Kappas one-half interest for $2,500.

The articles of copartnership set forth the rights and duties of the four copartners in some detail. Kappas was designated manager and it was specified that he should do all of the buying and fixing of prices. The hours of work were set forth for each partner, with the exception of Irene Lagares whom it was specified should "cause to be employed some person to take her place in the store." Also "That the manager of said business, as hereinafter named, will employ a clerk to work in said business for the same number of hours that the other copartners work in said business and that the wages paid for such clerk shall be deducted from the net amount of the income of Irene Lagares' interest which is derived from said business, and in all other respects said Irene Lagares will receive an equal amount with each of the other copartners."

The following two paragraphs set forth the manner in which the bookkeeping was to be done and the books handled: "It Is Further Agreed that during the continuance of this copartnership there shall be kept perfect, true and just books of account, where each of said copartners shall enter or set down, or cause to be entered or set down all money by them received, paid out or disbursed in and about said business, as well as all goods or stock bought by them or either of them by reason or on account of said business. In all other matters and things whatsoever connected with said business and the management thereof or in any wise belonging, said books shall be used in common between said copartners, so that any of them may have access thereto without the interruption or hindrance of the other.

"Neither of said copartners shall have the right to remove any of said books of account from the premises, No. 1647-49 Market Street, in the City and County of San Francisco, or to such other address as the business may be thereafter removed, without the consent of the other copartners, and the said copartners shall during the continuance of the copartnership as aforesaid, to -wit: on the first day of each and every month thereof, or sooner if necessary, make and render each to the other a true, just and perfectly accurate account of all of the profits or increases by them or either of them made, as well as the losses by them or any of them made or sustained, and also of all payments, receipts and disbursements and all other things received, disbursed or entered in said business, and the said accounts being so made, they shall and will, each to the other, allow a just and equal share of the profits thereof."

On January 15, 1946, respondents Irene and Clarence Lagares filed their complaint herein asking for dissolution of the partnership, for an accounting and also that a receiver be appointed. The complaint alleged that defendants Kappas and Koukis, by their conduct, had impaired the business of the partnership; that they diminished the assets of the business; that by reason thereof the business of the partnership would be ruined; that plaintiffs had repeatedly requested said defendants to account for all moneys taken in and paid out by the business and to cease appropriating property of the partnership to their own use, but they refused to account to plaintiffs or to cease appropriating partnership property.

On February 14, 1946, the trial court made an order wherein it was found that plaintiffs were entitled to an audit of the books and records of the partnership and appointing auditors to perform that service. On March 19, 1946, the auditors appointed submitted to the court a report wherein it was stated that because of the inadequacy of accounting methods of the partnership it would be impractical to proceed with an audit or certify the proper amount of income and expenses of the business. The court thereafter on April 9, 1946, pursuant to stipulation and agreement among the parties made its order appointing a commissioner to sell the business, and on April 30, 1946, it was sold to appellant Kappas for $14,000. From this amount the commissioner paid the expense of sale and certain obligations of the business, leaving a net balance of $11,712.07.

After trial the court entered a judgment (a) directing an equal division of the net proceeds of the sale to each of the four partners, (b) in favor of respondent Irene Lagares and against appellant Kappas for $2,708.49 as "undistributed profits" of the former partnership between Thomas Lagares and appellant Kappas, and (c) against appellant Kappas and in favor of the other partners (all respondents) for undistributed profits of the so-called "new partnership" in the following amounts: To Irene Lagares, $1,934; to Clarence Lagares, $450, and to Xenofon Koukis, $450.

As stated by appellant in his brief "The judgment in favor of plaintiff Irene Lagares and against defendant Kappas for 'undistributed profits' of the prior partnership was based on the * * * [finding] that there was $5,416.98 left in the bank by the 'Old Partnership' when it was dissolved, and this balance was 'checked out' by the 'New Partnership.' One of the contentions in this appeal is that this money was not 'undistributed profits' of the old partnership, but was intended to be used, and was used by the new partnership to pay outstanding obligations of the 'Old Partnership.'

"[That] The judgment against defendant and cross defendant Kappas and in favor of plaintiffs Clarence and Irene Lagares and cross-complainant Xenofon Koukis (as to $450.00 each) was based on evidence that the receipts of the business exceeded $10,000 per month, gross, and no distribution of profits was made by Kappas for certain months. It is contended in this appeal that the uncontradicted evidence shows that the cash receipts of the business (less cash pay-outs for merchandise) were deposited in the bank; that bills were paid by checks signed by two partners; that the balance remaining in the bank (after payment of bills) was distributed to the partners equally. Further, that no distribution of profits was made during some months solely because the bills for merchandise were received and paid during those months, and the 'profits' paid out in the other months were correspondingly greater. In other words that the inventory of the business fluctuated, which fluctuation made the payment of 'profits' vary from month to month.

"[That] The judgment in favor of Irene Lagares and against defendant Kappas for $1,934.00 included the $450.00 (above explained) and $1,484.00 for withdrawals due to her because the other partners had been given such a withdrawal, and she was not. While it is conceded that the other partners received $1,484.00 as withdrawals in January, February and March, 1946, it is contended that Irene Lagares was not entitled to the full amount because she was to be charged with the expense of a clerk hired to work in her place. * * * It is further contended that when the money payable to Irene Lagares was not paid, it remained in the partnership account, and the partnership account, together with the other assets of the partnership, were divided equally between the partners by the Court commissioner, under the authority of the judgment entered herein.

"[That] The appellant did not appeal from that portion of the judgment which directed that the net proceeds of the sale of the partnership ($11,712.07) be divided equally between the four partners * *, and [the evidence shows] this portion of the judgment has already been executed.

"[That] The appellant, however, does appeal [1] from those portions of the judgment which ordered him to pay to Irene Lagares the sum of $2,708.49 (plus interest) as undistributed profits of the 'old partnership'; [2] to pay to Irene Lagares $1,934.00 (plus interest) as undistributed profits of the 'new partnership' and [3] to pay to plaintiff Clarence Lagares and to cross-complainant Xenofon Koukis the sum of $450.00 each as undistributed profits of the 'new partnership.'"

[1] Referring to portion (1) appealed from, appellant urges two grounds for reversal. The first is that this action was brought to dissolve the new partnership and to compel an accounting in connection therewith and that the trial court erred in admitting evidence, making findings and entering a portion of the judgment thereon where said evidence and finding dealt only with the affairs of the old partnership and should therefore not have been considered as an issue in this case. The second ground urged is that respondent Irene Lagares appears in this action as an individual, as a member only of the new partnership and not in any sense as a member of the old or as a legal representative of her deceased husband's estate and that she therefore was without legal capacity to demand or receive judgment for profits therefrom in her individual capacity.

In view of the peculiar facts of this case we doubt the application here of the first reason urged for reversal. It is a practical rather than a legal consideration. The bank account of the old partnership was apparently just transferred to the names of the new partners and carried on. The balance was carried over and commingled with the funds of the new partnership. Furthermore it was apparently paid out on checks of the new partnership. We fail to see how under these circumstances any accounting of the books and accounts of the new partnership could have been accomplished without reference to this old balance. Certainly the trial court did not err in admitting such evidence under these conditions.

[2] As to the second ground, we must agree with appellant on the law. The death of a partner works a dissolution of that particular partnership. (Civil Code, sec. 2425, subd. 4). Furthermore, upon death his right in specific partnership property vests in the surviving partner or partners. (Civil Code, sec. 2419, subd. (d).) The duty of the surviving partner or partners is to wind up the affairs of that particular partnership and account to the estate of the deceased partner for his interest. (Probate Code, sec. 571.)

Irene Lagares does not appear in this action as a legal representative of her deceased husband's estate; there is no evidence in the record that she is such, and the statement to the contrary appearing in the findings of the trial court finds support only in a statement to that effect made by counsel for respondent Irene Lagares. Furthermore, there is no evidence that she has received distribution through court order of any portion of his estate.

Assuming the $5,416.98 left in the bank by the old partnership to be, as the trial court found, undistributed profits it would be no defense to an action brought against appellant by the estate of Thomas Lagares in behalf of creditors or parties in interest other than Irene Lagares, his widow, to plead a judgment in this case awarding his share of those profits to his said widow in her individual capacity. We note in passing that while appellant questions her right to judgment against him for her deceased husband's share in undistributed profits he apparently did not question her right to assume control over her deceased husband's partnership interest in the store, stock and fixtures and in fact recognized such an interest in the written articles of the new copartnership.

However that may be, that portion of the judgment awarding Irene Lagares in her individual capacity the $2,708.49, which represents a one-half interest in the balance left in the bank by the old partnership, must be reversed for we do not consider that any modification as to parties would be practical here. The question as to whether the funds left in the bank by the old partnership were actually undivided profits or funds being held for use in paying the old partnership obligations, seems sufficiently obscure to require further inquiry, which can be better accomplished by another action between the proper parties for that purpose. The reversal of this part of the judgment herein is not in any sense to be considered or construed a bar to such an action should, perchance, such a point arise in any future litigation.

In connection with this point appellant also urges that the trial court abused its discretion in refusing to re-open the case so that he might introduce evidence to show that the $5,416.98 and more was paid out by him on obligations owing by the old partnership. By reason of the reversal of that portion of the judgment on the ground just stated, it becomes unnecessary to pass on this point.

[3, 4] Appellant's objection to that portion of the findings and judgment awarding Irene Lagares $1,934, Clarence Lagares $450, and Xenofon Koukis $450 as undistributed profits of the new partnership, is attacked on three grounds. First, that it is unsupported by the evidence; second, that any profits remaining undivided among the partners at the time the business and assets were taken over by the commissioner appointed by the court were divided by said commissioner along with the proceeds from sale of the business and are included in the amounts set forth in that part of the findings and judgment not appealed from, and third, that judgment in favor of said Irene Lagares for the $1,484, Clarence Lagares for $450 and Xenofon Koukis for $450 representing their respective shares of the undistributed profits of the new partnership should not have been against appellant Kappas alone since the obligation was one "solely against the partnership."

The evidence as a whole is so unsatisfactory, and particularly that stemming from appellant, that a good deal would have to be assumed in differing with the findings of the trial court on any issue pertaining to the accounting. For all practical purposes appellant was the sole defendant. At the trial the other three partners leveled charges of wrong-doing at appellant but not at each other, and still, as far as can be determined from the record, he produced no very satisfactory or intelligent evidence in his own defense. His stock answers to practically all questions directed to the matters at issue were "whatever is in the book," or words to that effect, or that he couldn't remember or didn't know. The evidence did show that, whatever may have been the agreement between the partners as set forth in the articles, appellant hired and directed the bookkeeper, wrote the checks, did the banking and in general kept the records, such as they were, and the finances of the business pretty much under his own control. He disclosed but little information concerning the financial condition to the other partners. Under these circumstances if appellant saw fit to withhold evidence or failed to produce evidence necessary to refute the claims of the other partners, he should not be heard on appeal to complain of inferences adverse to him drawn by the trial court and based on evidence which we cannot hold to be legally insufficient. It is true that the amount found by the trial court to be owing to Irene Lagares as her share of the undistributed profits of the new partnership apparently equalled the total amount paid to respondents Clarence Lagares and Xenofon Koukis without deductions for clerk hire, but it also appears from the testimony of appellant himself that he drew checks to Irene Lagares totaling the amount awarded to her by the trial court as undistributed profits but did not deliver the checks to her. Why did he draw these checks for such amounts? If the finding made by the trial court that these amounts were actually owing to Irene Lagares is based upon any legitimate inference which might reasonably be drawn from the evidence, the finding must be sustained. (Tobola v. Wholey, 75 Cal.App.2d 351, 170 P.2d 952.) We cannot say that the trial court was wrong in the inference drawn. The fact alone that the checks were drawn by appellant in amounts totaling the award of the court would in itself support the finding if the trial court chose to disbelieve any offered explanation as to why the checks were not delivered.

[5] The fallacy of appellant's claim that the undistributed profits of the business were taken over by the commissioner and divided along with the proceeds of sale of the market is obvious from simple math-

ematical computation taking the undisputed figures from that portion of the judgment not involved in this appeal. It is uncontradicted that the commissioner appointed by the court sold the market to appellant for $14,000 and after paying the expenses of sale and certain obligations divided the net balance of $11,712.07 among the four partners equally. $11,712.07 divided by four equals $2,928.01, which is the actual amount distributed by the commissioner to each partner. Obviously no undivided profits were included in this division.

[6, 7] The final point for consideration is whether that part of the judgment awarding to Irene Lagares, Clarence Lagares and Xenofon Koukis their shares of the undistributed profits of the new partnership is maintainable against appellant alone. We must hold that it is for this is an action in accounting. Appellant had control of the funds from which these sums were to be paid, and it is the legal duty of a partner who withholds that to which the other partners are entitled to deliver it up to them.

That part of the judgment awarding the respondent Irene Lagares individually the sum of $2,708.49 as representing her deceased husband's one-half interest in the undistributed profits of the old partnership is reversed. The remaining portions of the judgment appealed from are affirmed.

PETERS, P. J., and BRAY, J., concur.

30 Cal.2d 905

## LOUSTALOT, Sheriff, v. SUPERIOR COURT IN AND FOR KERN COUNTY et al.

L. A. 20275.

Supreme Court of California, in Bank.

Nov. 21, 1947.

**1. Prohibition 🔑5(3)**

Supreme Court could grant alternative writ of prohibition to determine whether superior court had jurisdiction to issue a writ of habeas corpus.

**2. Habeas corpus 🔑46**

Within their respective counties, the jurisdiction of the superior court under constitutional provision conferring on superior courts jurisdiction to issue writs of habeas corpus on petition by or on behalf of any person in actual custody, in their respective counties, is generally concurrent with that of appellate courts. Const. art. 6, § 5.

**3. Administrative law and procedure 🔑657**
**Workmen's compensation 🔑1822**

In the exercise of its normal jurisdiction with respect to compensation awards or safety rules, the decisions of the industrial accident commission are subject to review only by the methods set forth in the workmen's compensation law. Labor Code, §§ 5810, 5950, 5955, 6600, 6601.

**4. Habeas corpus 🔑19**

Since the Legislature has not provided an exclusive method of reviewing decisions of the industrial accident commission except insofar as compensation awards or safety rules are involved, writ of habeas corpus is available to attack validity of order of commission imprisoning a person for contempt. Const. art. 20, § 21; Labor Code, §§ 133, 134, 5810, 5950, 5952, 5953, 5955, 6600, 6601.

**5. Constitutional law 🔑56**

Under constitutional provision vesting Legislature with plenary powers, unlimited by other constitutional provisions, to create and enforce a complete system of workmen's compensation by appropriate legislation and to fix and control the manner of review of decisions rendered by tribunals, designated by it, and subjecting tribunal decisions to review by appellate courts, the Legislature can limit the jurisdiction of the courts in reviewing industrial accident commission decisions. Const. art. 20, § 21.

**6. Habeas corpus 🔑46**

Under statute restricting jurisdiction to review, rule, decision, or award of industrial accident commission to the Supreme Court and District Courts of Appeal, superior court had no jurisdiction to issue writ of habeas corpus to attack validity of order of commission imprisoning a person for contempt. Labor Code, § 5955.

**7. Courts 🔑90(4)**

Where section 67 of Public Utilities Act of 1911, restricting to Supreme Court, jurisdiction to review decision of railroad commission or to suspend or delay execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, and providing for writ of mandamus from Supreme Court to commission, provided a model for section 5955 of the Workmen's Compensation Act, decisions interpreting section 67 are applicable to section 5955. Labor Code § 5955.

**8. Administrative law and procedure 🔑663**
**Workmen's compensation 🔑1828**

An order of the industrial accident commission, even though erroneous, may not be reviewed or annulled by the superior court and must stand as a legal order until reversed by the Supreme Court or a District Court of Appeal, and the only remedy afforded the aggrieved party is a writ by the Supreme Court or a District Court of Appeal. Labor Code, § 5955; Const. art. 20, § 21.

**9. Habeas corpus 🔑113(3)**

No appeal lies from a decision of a superior court on habeas corpus unless, under the provisions of statute relating to when and how an appeal may be taken in habeas corpus cases, the decision constitutes an order discharging a person convicted of an offense prosecuted by indictment or information. Pen.Code, § 1506.

◆

Petition by John E. Loustalot, Sheriff of the County of Kern, State of California, against the Superior Court of the State of California in and for the County of Kern, and Honorable W. L. Bradshaw, Judge of said Superior Court, for writ of prohibition restraining further proceedings in and for the County of Kern in the matter of the application of Earl M. Price for a writ of habeas corpus.

Peremptory writ of prohibition issued.

Tom Scott, Dist. Atty., of Bakersfield, and R. C. McKellips and Elvin B. Connolly, both of San Francisco, for petitioner.

V. P. DiGiorgio, of Bakersfield, for respondents.

TRAYNOR, Justice.

Petitioner, the Sheriff of Kern County, California, seeks a writ of prohibition to restrain further proceedings in the Superior Court in and for the County of Kern in the matter of the application of Earl M. Price, hereinafter referred to as defendant, for a writ of habeas corpus. Defendant mailed a letter to the Industrial Accident Commission of California censuring a decision of that commission in a proceeding in which he was concerned. The commission adjudged defendant to be in contempt, and ordered that he be delivered to the custody of petitioner and that petitioner collect a fine of fifty dollars from him or, in default thereof, that defendant be committed to the Kern County Jail for a term of five days. Defendant refused to pay the fine and was committed to the county jail. He then filed an application for a writ of habeas corpus in the Kern County Superior Court questioning the power of the Industrial Accident Commission to commit him to jail for mailing the letter. Honorable W. L. Bradshaw, the judge presiding in department two of that court, granted the writ but subsequently transferred the cause to the District Court of Appeal, Fourth Appellate District, on the ground that the superior court was without jurisdiction. The District Court of Appeal (In re Price, 4 Criminal 585, July 8, 1947) ordered the matter retransferred to the Superior Court of Kern County, where the matter is now pending.

[1] The alternative writ of prohibition was granted to determine whether the superior court had jurisdiction to issue a writ of habeas corpus in this matter. Browne v. Superior Court, 16 Cal.2d 593, 597, 107 P.2d 1, 131 A.L.R. 276.

[2] The Constitution of this state confers on the superior courts jurisdiction to issue writs of "habeas corpus on petition by or on behalf of any person in actual custody, in their respective counties." Cal. Const. Art. VI, sec. 5. Within their respective counties, the jurisdiction of the superior courts under this provision is generally considered concurrent with that of appellate courts. In re Zany, 164 Cal. 724, 726, 130 P. 710; In re Hughes, 159 Cal. 360, 364, 113 P. 684; cf., however, France v. Superior Court, 201 Cal. 122, 127, 255 P. 815, 52 A.L.R. 869. Section 21 of Article XX of the California Constitution provides, however, that the Legislature is "vested with plenary powers, unlimited by any provision of this Constitution, to create, and enforce a complete system of workmen's compensation, by appropriate legislation, * * *." In creating this system, the Legislature is likewise granted "plenary powers" to fix and control "the manner of review of decisions, rendered by the tribunal or tribunals designated by it; provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this State." There are, therefore, two questions for decision with respect to the jurisdiction of the superior court in this case: Whether the Legislature has constitutionally fixed the manner of reviewing industrial accident commission decisions so as to exclude habeas corpus as an appropriate remedy, and whether the Legislature has so fixed the manner of reviewing decisions of the commission as to exclude superior courts from jurisdiction to review or otherwise interfere with the order in question.

[3] In the exercise of its normal jurisdiction with respect to compensation awards or safety rules, the decisions of the commission are subject to review only by the methods set forth in the workmen's compensation law. Labor Code, secs. 5810, 6600, 6601, 5950, 5955. In these sections the legislature has properly exercised its power to control the jurisdiction of the courts in regard to workmen's compensa-

tion proceedings. Thaxter v. Finn, 178 Cal. 270, 273, 173 P. 163; North Pacific S. S. Co. v. Soley, 193 Cal. 138, 140, 223 P. 462. The question whether habeas corpus is available to interfere with or review a contempt order of the commission is therefore solely one of statutory construction.

Section 5810 of the Labor Code provides that orders, decisions, or awards of the commission, made under division four of the Labor Code, the provisions with respect to compensation proceedings, "may be reviewed by the courts specified in sections 5950 to 5956 within the time and in the manner therein specified and not otherwise." The manner therein specified is an application for a writ of review in an appellate court after filing a petition for rehearing with the commission (Labor Code, sec 5950) or an application for a writ of mandate in a proper case. Labor Code, sec. 5955. The courts specified in those sections are the Supreme Court and the district courts of appeal. Ibid. The scope of review afforded the petitioner is specified in sections 5952 and 5953. The same provisions are made the exclusive methods of review for proceedings under Part One of Division Five of the Labor Code, with respect to workmen's safety. Whatever contempt powers the commission may have (a question not before this court in the present proceeding) are provided in sections 133 and 134 of Division One of the Labor Code. Sections 5810, 6600 and 6601 are not applicable to proceedings thereunder. Reference to the provisions of the Workmen's Compensation Act of 1917 (Stats. 1917, p. 831) makes this conclusion abundantly clear. Sections 133 and 134 are continuations of section 63 of that act. Labor Code, § 2. Section 22 of the Workmen's Compensation Act of 1917 upon which section 5810 is based, applied only to proceedings under sections 6 to 31 of that act. Sections 6600 and 6601, governing safety proceedings, are based on section 45 of the 1917 act and that section applied only to decisions under the safety provisions of the Act.

It has been suggested in one district court of appeal decision, however, that section 5955 prohibits court review of any decision or order of the commission except by writ of review after a petition for rehearing. See Western Pipe & Steel Co. v. Industrial Acc. Com., 119 Cal.App. 19, 20, 5 P.2d 920. This section provides that: "No court of this State, except the supreme court and the district courts of appeal to the extent herein specified, has jurisdiction to review, reverse, correct, or annul any order, rule, decision, or award of the commission, * * * but a writ of mandate shall lie from the supreme court of the district courts of appeal in all proper cases." The suggested construction of section 5955 was unnecessary to the decision in that case, for it was concerned with the availability of the writ of prohibition in a compensation proceeding, a matter clearly controlled by section 5810. The words "to the extent herein specified" in section 5955 refer, not to the method, but to the extent of the review, namely, the extent to which a court having jurisdiction can review the decision as specified in sections 5952 and 5953 of the Labor Code. Any other construction would make sections 5810, 6600 and 6601 superfluous.

It thus appears that the Legislature has not provided an exclusive method of reviewing decisions of the commission except insofar as compensation awards or safety rules are involved. The decision in Brophy v. Industrial Accident Commission, 46 Cal.App.2d 278, 115 P.2d 835, is in accord with this conclusion. In this case the court reviewed and annulled a contempt order of the commission without requiring that a petition for rehearing be first filed with the commission. See Brophy v. Ind. Acc. Comm., 6 Cal. Comp. Cases 15, 16. Implicit in that decision is the holding that the normal proceedings specified for the review of the commission's decisions or orders (Labor Code, § 5950) are inapplicable to the review of orders of the commission when the validity of compensation awards or safety rules are not involved. Moreover, the decision of this court in In re Victor, 220 Cal. 729, 730, 32 P.2d 608, is authority for the proposition that habeas corpus is available to determine the jurisdiction of the commission to punish for contempt. As will hereafter appear, section 67 of the Public Utilities Act (Stats.

ex. sess. 1911, p. 55; Stats. 1915, p. 161; 2 Deering's Gen. Laws, 1944, Act 6386) contains substantially the same provision with regard to the Public Utilities Commission as is contained in section 5955 of the Labor Code, except that jurisdiction is limited to the Supreme Court. In the Victor case, this court granted a writ of habeas corpus to determine the validity of a contempt order of the Railroad Commission.

[4, 5] Except insofar as review of commission action by habeas corpus might involve the validity of a compensation award or safety rule, that writ is available to attack the validity of an order of the Industrial Accident Commission imprisoning defendant for contempt. It does not follow, however, that because habeas corpus is available to defendant, the superior court had jurisdiction to issue the writ in this case. Although section 5955 does not provide an exclusive method for reviewing such orders or decisions, it clearly defines the courts having jurisdiction to reverse, annul or otherwise interfere with the operation of *any* order or decision of the commission: *"No court* of this State, *except the supreme court and the district courts of appeal* to the extent herein specified, *has jurisdiction to review, reverse,* correct, *or annul any order,* rule, *decision,* or award of the commission, *or to suspend or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the commission in the performance of its duties * * *."* (Italics added.) This court has recognized the power of the Legislature under section 21 of Article XX of the Constitution to limit the jurisdiction of the courts in reviewing Industrial Accident Commission decisions. Thaxter v. Finn, supra, 178 Cal. 270, 273, 173 P. 163; North Pacific S. S. Co. v. Soley, supra, 193 Cal. 138, 140, 223 P. 462; see Hanna, Industrial Accident Commission Practice and Procedure, 275.

[6] An examination of the legislative history of section 5955 and of the decisions construing the similar section of the Public Utilities Act clearly shows that section 5955 means that superior courts have no jurisdiction to review or otherwise interfere with the operation of any order of the Industrial Accident Commission. The first workmen's compensation act in this state, the Roseberry Act, provided for review of decisions of the Industrial Accident Board by the superior courts, subject to appeal to this court. Stats. 1911, p. 804, § 18; see Great Western Power Co. v. Pillsbury, 170 Cal. 180, 182, 149 P. 35. At the time this act was passed the superior courts had similar jurisdiction to annul decisions and orders of the Railroad Commission. Stats. 1909, p. 506, § 22. In the same year that the Roseberry Act was passed, an amendment to the Constitution was adopted granting the Legislature full authority to confer any powers on the Railroad Commission. Art. XII, § 22, as amended October 10, 1911. The Legislature then passed the Public Utilities Act of 1911, which provided in section 67 that, "No court of this state (except the supreme court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties; provided that the writ of mandamus shall lie from the supreme court to the commission in all proper cases." Stats. Ex. sess. 1911, p. 55, re-enacted in stats. 1915, p. 161.

In 1913, the Legislature passed the second workmen's compensation act, known as the Boynton Act, creating the Industrial Accident Commission. Section 84 of that Act (Stats. 1913, p. 318) contains a provision that follows almost word for word section 67 of the Public Utilities Act, except that jurisdiction to review, reverse, or annul commission orders or decisions is conferred on both the Supreme Court and the district courts of appeal. In the same year this court held that section 67 of the Public Utilities Act was a proper exercise of the power conferred on the Legislature by the Constitution to deprive superior courts of jurisdiction to review or interfere with decision of the Railroad Commission. Pacific Telephone & Telegraph Co. v. Eshleman, 166 Cal. 640, 652, 658, 137 P. 1119, 50 L.R.A.,N.S., 652, Ann.Cas. 1915C, 822. Following the decision in that case, the Legislature re-enacted section 84 of the Boynton Act as section 67 of the Workmen's Compensation Act of 1917 (Stats. 1917, p. 875). Article XX, section 21 of the Constitution was then amended to its present form, conferring plenary power of the Legislature to control the review of Industrial Accident Commission decisions subject to the condition that decisions may be reviewed by the appellate courts. The amendment also ratified the creation of the commission and all the functions vested therein. In 1937 the provision in question was incorporated into the Labor Code without change as section 5955.

[7] The foregoing Legislative history shows without question that section 67 of the Public Utilities Act provided the model for section 5955 and that the decisions interpreting section 67 are likewise applicable thereto. The construction of section 67 of the Public Utilities Act adopted in the Pacific Telephone case, supra, has been followed in subsequent cases. Sexton v. Atchison, T. & S. F. Ry. Co., 173 Cal. 760, 762, 161 P. 748; Wallace Ranch Water Co. v. Foothill Ditch Co., 5 Cal.2d 103, 121, 53 P.2d 929; People v. Hadley, 66 Cal.App. 370, 374, 226 P. 836; Independent Laundry v. Railroad Commission, 70 Cal. App. 2d 816, 822, 161 P.2d 827; see Truck Owners & Shippers Inc., v. Superior Court, 194 Cal. 146, 152, 228 P. 19. It is thus settled that a superior court has "no jurisdiction directly or indirectly to overrule an order of the Railroad Commission. The power to reverse, review, correct or annul orders of that commission rests solely in the Supreme Court (sec. 67 of the Public Utilities Act, supra), and the superior court is without jurisdiction in the premises." Wallace Ranch Water Co. v. Foothill Ditch Co., supra, at page 121 of 5 Cal.2d, at page 938 of 53 P.2d. "Even though the order by the Railroad Commission be palpably erroneous in point of law, until some order by the Supreme Court may be issued to the contrary, the original order of the Commission must stand as a proper and legal order in the premises. * * * Such being the state of the law, it would follow that, as is provided by the act itself, the only relief which the aggrieved party may have from such an order is by or through a writ issued by the Supreme Court." People v. Hadley, supra, at page 375 of 66 Cal.App., at page 839 of 226 P.

[8] Likewise an order of the Industrial Accident Commission, even though erroneous, may not be reviewed or annulled by the superior court and must stand as a proper and legal order until reversed by this court or a district court of appeal. The only relief afforded the aggrieved party is a writ by this court or a district court of appeal. The Constitution grants to the Legislature "plenary power, *unlimited by any provision of this Constitution*, to create, and enforce a complete system of workmen's compensation, by appropriate legislation, * * *" Moreover, it is expressly declared to be "the social public policy of this State, binding upon all departments of the State government," that the Legislature have full power to create a tribunal vested "with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases *expeditiously*, inexpensively, *and without encumbrance of any character;* * * *" Article XX, § 21. (Italics added.) The only limitation on this legislative power with respect to the tribunal in question, is the provision for review of its decisions by this court and the district courts of appeal.

[9] In restricting any interference with the commission's decisions or orders to proceedings in the appellate courts, the Legislature has carried out the declared policy of the constitutional provision that the commission be unencumbered by any but proceedings in the appellate courts. By granting a petition for habeas corpus, the superior court clearly interferes with the operation of the commission's order. Moreover, if the superior court discharged defendant, that decision would have the effect of annulling the commission's order. Even if the commission's order is valid, the decision of the superior court would be final, and not subject to review by the appellate courts. No appeal lies from a decision of the superior court on habeas corpus (In re Zany, 164 Cal. 724, 726, 130 P. 710), unless under the provision of sec-

tion 1506 of the Penal Code it constitutes an order discharging a person convicted of an offense prosecuted by indictment or information. In re Page, 214 Cal. 350, 354, 5 P.2d 605; In re Alpine, 203 Cal. 731, 744, 745, 265 P. 947, 58 A.L.R. 1500; In re Murdock, 5 Cal.2d 644, 646, 55 P.2d 843. The Legislature, in accord with the Constitution, has provided that the legality of any order of the commission can be questioned only by the appellate courts. Certainly the superior courts were not meant to have jurisdiction to determine finally the legality of such an order. Any such interference with an order of the commission must be considered an "encumbrance" on the administration of the workmen's compensation laws, within the power of the Legislature to prohibit. The defendant, if unlawfully imprisoned, is not denied an adequate remedy, but must seek relief in an appellate court having jurisdiction to review or annul the order in question.

Let a peremptory writ of prohibition issue as prayed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.

30 Cal.2d 898

### LA MAR v. LA MAR.

L. A. 19845.

Supreme Court of California.
Nov. 21, 1947.

Rehearing Denied Dec. 18, 1947.

**1. Divorce ⇨150(2)**

A trial court's statutory duty in a divorce action to make findings of fact is to find ultimate rather than probative or evidenciary facts. Civ.Code, § 131.

**2. Divorce ⇨184(10)**

Findings of ultimate facts by a court in a divorce action are controlling unless drawn as conclusions from findings of probative facts that do not support them. Civ. Code, § 131.

**3. Divorce ⇨150(2)**

A court's finding in a divorce action that one spouse by cruel treatment inflicted grievous mental suffering on the other spouse is a "finding of fact" under statute and not a "conclusion of law". Civ.Code, § 131.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion of Law" and "Finding of Fact".

**4. Divorce ⇨150(2)**

If facts are stated in findings in a divorce action in same way in which they are stated in the pleadings, they are sufficient. Civ.Code, § 131; Code Civ.Proc. § 426(b).

**5. Divorce ⇨150(2)**

Where defendant did not interpose, on ground of uncertainty, a demurrer to complaint in divorce action alleging that defendant had treated plaintiff in a cruel manner and had thereby inflicted on her grievous mental suffering, defendant had no right to court's findings that were more specific than the allegations in the complaint. Civ.Code, § 131; Code Civ.Proc. § 426(b).

**6. Evidence ⇨461(1)**

Evidence is admissible to show that a husband and wife who took property as joint tenants actually intended it to be community property.

**7. Husband and wife ⇨278(1)**

Where two copies of property settlement agreement stating that community property should be sold and proceeds be divided between husband and wife and that property should be held in interim by parties as tenants in common were signed by husband and delivered to wife's attorney, and wife signed both copies, keeping one and giving the other to her attorney who never delivered that copy to the husband or his counsel, agreement never took effect, and husband was thereafter free to withdraw the agreement by a letter of revocation. Civ.Code, §§ 1054, 1626.

SHENK, J., dissenting in part.

Appeal from Superior Court, Los Angeles County; Geo. A. Dockweiler, Judge.

Action for divorce by Helen Sanders LaMar against Jack C. LaMar, wherein the defendant filed a cross-complaint for divorce. From an adverse judgment the defendant appeals.

Judgment affirmed.

Prior opinion, 181 P.2d 695.

John W. Preston and David L. Sefman, both of Los Angeles, for appellant.

Don Lake, of Los Angeles, for respondent.

Ben Van Tress, of Los Angeles, amicus curiae on behalf of respondent.

TRAYNOR, Justice.

Plaintiff brought this action for divorce against her husband on the grounds of adultery and extreme cruelty. The cause of action on the ground of extreme cruelty was stated in general terms as follows: "Wilfully disregarding the solemnity of his marriage vows, defendant has treated plaintiff in a cruel manner and has subjected her to a course of cruel treatment and has thereby wrongfully inflicted upon plaintiff grievous mental suffering, humiliation and embarrassment. That because of such cruel treatment, plaintiff has suffered mental cruelty to such an extent as to impair her health and peace of mind." Defendant denied plaintiff's allegations as to both causes of action. He filed a cross-complaint praying for a divorce on the ground of extreme cruelty of plaintiff, which he alleged in general terms. He also alleged specific acts of cruelty. The trial court granted plaintiff a divorce on the ground of defendant's extreme cruelty. It made no specific findings, but found that the allegations of cruelty in the complaint were true despite defendant's objection "that the proposed findings of facts do not cover specific facts as to the issue of extreme cruelty" and his request for specific findings. The trial court also found that the allegations in defendant's amended cross-complaint were untrue. The judgment awarded all community property to plaintiff except the sum of $2,500 awarded defendant. The property awarded plaintiff included a ranch, which the trial court found to be community property. Defendant appeals.

Defendant contends that the general finding as to his alleged cruelty was insufficient to support the judgment in the absence of a waiver of specific findings, that there was no such waiver since he objected to the proposed general findings, and that therefore the trial court committed prejudicial error in failing to make specific findings as to defendant's cruelty.

[1-3] A trial court's duty to make findings of facts in a divorce case is predicated upon Civil Code section 131, which provides: "In actions for divorce, the court must file its decisions and conclusions of law as in other cases * * *." That duty, which is the same in divorce cases as in other cases, Waldecker v. Waldecker, 178 Cal. 566, 567, 174 P. 36; see Ungemach v. Ungemach, 61 Cal.App.2d 29, 39, 40, 142 P.2d 99, is to find ultimate rather than probative or evidentiary facts. Findings of ultimate facts are controlling unless drawn as conclusions from findings of probative facts that do not support them. Fitzpatrick v. Underwood, 17 Cal.2d 722, 727, 112 P.2d 3; Quinn v. Rosenfeld, 15 Cal.2d 486, 492, 102 P.2d 317; Hammond Lumber Co. v. Barth Inv. Corporation, 202 Cal. 606, 609, 262 P. 31; see 24 Cal.Jur. 968. Defendant, relying on Smith v. Smith, 62 Cal. 466, 468, contends, however, that a general finding that one spouse by cruel treatment inflicted grievous mental suffering upon the other is a conclusion of law and not a finding of an ultimate fact. In the Smith case a finding was held to be "but a conclusion of law" that stated: "That the repeated acts of cruelty, as established by the evidence, upon the part of said defendant toward her said husband and children during the last several years, have inflicted upon the plaintiff grievous mental suffering." This holding is contrary to the rule established by later cases that the question whether one spouse has inflicted grievous bodily injury or grievous mental suffering upon the other is a question of fact to be determined by the trial court as the ultimate fact in issue in a divorce action for cruelty. "Whether in any given case there has been inflicted this 'grievous mental suffering' is a pure question of fact to be deduced from all the circumstances of each particular case, keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party; and no arbitrary rule of law as to what

particular probative facts shall exist in order to justify a finding of the ultimate facts of its existence can be given." Barnes v. Barnes, 95 Cal. 171, 177, 30 P. 298, 299, 16 L.R.A. 660; Keener v. Keener, 18 Cal.2d 445, 447, 116 P.2d 1; Fleming v. Fleming, 95 Cal. 430, 30 P. 566, 29 Am.St.Rep. 124; Mac Donald v. Mac Donald, 155 Cal. 665, 102 P. 927, 25 L.R.A., N.S., 45; Avery v. Avery, 148 Cal. 239, 82 P. 967; Cline v. Cline, 4 Cal.App.2d 626, 41 P.2d 588; Shaw v. Shaw, 122 Cal.App. 172, 9 P.2d 876; Davis v. Davis, 58 Cal.App. 100, 102, 207 P. 923; Van Camp v. Van Camp, 53 Cal.App. 17, 22, 199 P. 885; Scheibe v. Scheibe, 57 Cal.App.2d 336, 340, 341, 134 P.2d 835; Ungemach v. Ungemach, 61 Cal. App.2d 29, 33, 34, 142 P.2d 99; Del Ruth v. Del Ruth, 75 Cal.App.2d 638, 644, 171 P.2d 34. Smith v. Smith, supra, must therefore be regarded as overruled by the later cases.

[4, 5] Defendant contends, however, that a general finding of the infliction of greivous bodily injury or grievous mental suffering by one spouse upon the other is too uncertain to support a divorce decree and that therefore specific findings of acts constituting the cruelty are necessary, when the losing party has not waived specific findings by his failure to object to proposed general findings. Defendant relies on Franklin v. Franklin, 140 Cal. 607, 609, 74 P. 155; Turner v. Turner, 187 Cal. 632, 635, 203 P. 109; Perkins v. Perkins, 29 Cal. App. 68, 154 P. 483; Nelson v. Nelson, 18 Cal.App. 602, 123 P. 1099; Cargnani v. Cargnani, 16 Cal.App. 96, 116 P. 306; Bilger v. Bilger, 54 Cal.App.2d 739, 129 P.2d 752; Del Ruth v. Del Ruth, 75 Cal.2d 638, 171 P.2d 34; Lucich v. Lucich, 75 Cal.App. 2d 890, 172 P.2d 73. For the determination of the present case it is immaterial what rule governed findings as to cruelty before 1939 when the Legislature adopted section 426(b) of the Code of Civil Procedure (Stats.1939, p. 1673), which provides: "In an action for a divorce, it is not necessary, in the absence of a demurrer for uncertainty, to plead specific acts constituting cruelty in order to plead a cause of action." Findings are made by a trial court to dispose of the issues raised in the pleadings. "If facts are stated in the findings in the same way in which they are stated in the pleadings, they are sufficient. * * * The only purpose of the findings is to answer the questions put by the pleadings." Dam v. Zink, 112 Cal. 91, 93, 44 P. 331, 332; McCarthy v. Brown, 113 Cal. 15, 18, 45 P. 14; Carter v. Canty, 181 Cal. 749, 752, 186 P. 346; Dodd v. Dunn, 193 Cal. 334, 335, 223 P. 952; see 24 Cal.Jur. 927, 985. "A general finding that all of the allegations of a complaint are true has been repeatedly upheld by this court. Gale v. Bradbury, 116 Cal. 39, 47 P. 778; Johnson v. Klein, 70 Cal. 186, 11 P. 606." McKelvey v. Wagy, 157 Cal. 406, 409, 108 P. 268, 269; see Stevens v. Stevens, 215 Cal. 702, 705, 12 P.2d 432; Popescu v. Popescu, 46 Cal.App. 2d 44, 53, 115 P.2d 208. The Legislature was presumably aware of this relation between pleadings and findings when it amended the Code of Civil Procedure to provide that in the absence of a demurrer for uncertainty a cause of action for extreme cruelty is properly stated by pleading cruelty in general terms. Since defendant did not interpose a demurrer for uncertainty, he clearly had no right to findings that were more specific than the allegations in the complaint.

Defendant relies, however, on Bilger v. Bilger, 54 Cal.App.2d 739, 129 P.2d 752; Del Ruth v. Del Ruth, 75 Cal.App.2d 638, 171 P.2d 34; and Lucich v. Lucich, 75 Cal. App.2d 890, 172 P.2d 73, which were decided after the 1939 amendment to the Code of Civil Procedure. In the Bilger case the court was concerned with a finding [54 Cal. App.2d 739, 129 P.2d 753] "that it is not true that the defendant * * * was, is or has been guilty of extreme cruelty to the plaintiff." It was held that this finding was too uncertain to support the judgment. A finding that a party has not been guilty of extreme cruelty is as much a finding of an ultimate fact as one that a party has been guilty of extreme cruelty, and, when cruelty has been pleaded in general terms, it answers the issue raised in the pleadings. It is no more uncertain than other findings of ultimate facts. The Bilger case is therefore disapproved.

In Del Ruth v. Del Ruth, 75 Cal.App.2d 638, 644, 171 P.2d 34, it was held that the general findings of the trial court were sufficient to support the judgment in the absence of any objection to them. The statement in that opinion that the findings would have been insufficient, had they encountered objection, was unnecessary to the decision.

In Lucich v. Lucich, 75 Cal.App.2d 890, 172 P.2d 73, the complaint set forth several specific allegations of cruelty as well as a general allegation. The trial court found that all the allegations in the complaint as to cruelty were true. The trial court also found, however, that "said acts of wrongdoing herein are such in the judgment of the Court as not to constitute or amount to extreme cruelty." It was held by the District Court of Appeal that the findings as to the allegations of the complaint established the ultimate fact that defendant wrongfully inflicted grievous bodily injury or grievous mental suffering upon plaintiff, and that the finding that defendant's conduct did not constitute extreme cruelty was not a finding of fact but a conclusion of law governed by an erroneous conception of extreme cruelty. The statement in the opinion that standing alone a finding of cruelty in general terms would not have been sufficient was unnecessary to the decision. Any language in Del Ruth v. Del Ruth, 75 Cal.App.2d 638, 171 P.2d 34, or Lucich v. Lucich, 75 Cal.App.2d 890, 172 P.2d 73, contrary to the holding in the present case is disapproved.

[6, 7] Defendant contends that the trial court erred in finding that the ranch was community property. He relies on the fact that it was conveyed to the parties by a deed designating them as joint tenants. It is settled, however, that evidence is admissible to show that a husband and wife who took property as joint tenants actually intended it to be community property. Tomaier v. Tomaier, 23 Cal.2d 754, 757, 146 P.2d 905, and cases there cited. There was evidence that when the parties acquired the ranch, they agreed it should be community property. Defendant contends, however, that even if it be assumed that the ranch was community property, it ceased to be such and became property owned by the parties as tenants in common by virtue of a property settlement agreement dated August 17, 1945, which provided among other things: "(4) That both parties own as community property a certain ranch located in Lancaster, California. That it is hereby agreed between the parties hereto that said ranch, its improvements and equipment shall be sold at any price agreed upon by the parties, and that the net proceeds derived from the sale of said ranch shall be divided equally, share and share alike, between the parties hereto. In the interim said property shall be held as tenants in common, each holding an undivided one-half interest in the same." This agreement was prepared by defendant's counsel and was signed by defendant in duplicate. The two copies signed by defendant were delivered to Mr. Paul Cote, who at that time was plaintiff's attorney. Plaintiff signed both copies of the agreement and kept one, giving the other to her attorney, who never delivered that copy to defendant or his counsel. Defendant's counsel advised plaintiff by a letter dated November 8, 1945, "that Mr. La Mar hereby gives you notice of revocation of the proposed agreement above referred to, by reason of the fact that said agreement was never accepted to this date, and for other reasons not herein specifically designated." In accord with this letter defendant's counsel declared at the trial of this case that the property settlement agreement was not completed, on the ground that both copies thereof signed by defendant remained in the hands of plaintiff or her attorney, and that there was no delivery of either to defendant or his counsel and therefore no acceptance of the proposed agreement by plaintiff. This position formerly taken by defendant himself is correct. A contract in writing and a grant of property take effect upon delivery of the instrument. Civ.Code, §§ 1626, 1054; Miller v. Jansen, 21 Cal.2d 473, 476, 132 P.2d 801; McKinney v. Sargent, 216 Cal. 18, 22, 13 P.2d 373; Hudemann v. Dodson, 215 Cal. 3, 6, 7 P.2d 997; Ivey v. Kern County Land Co., 115 Cal. 196, 201, 46 P. 926; Houk v. Williams Bros., Ltd., 58 Cal.App.2d 573, 579, 137 P.2d 737. Since plaintiff failed to deliver to defendant or his counsel a copy of the instrument signed by her, it did not take effect as a contract or a grant of property. Delivery of the instrument signed by defendant to plaintiff's counsel constituted an offer to enter into a property settlement agreement with plain-

tiff, which defendant was free to withdraw and which was withdrawn by the letter of revocation addressed by his counsel to plaintiff.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.

SHENK, Justice (concurring and dissenting).

I concur in the judgment and in the opinion in so far as it holds that the defendant is now foreclosed from his insistence on findings of specific acts of cruelty. This is so because of his failure to demur for uncertainty to the general allegations of the complaint. See section 426b, Code of Civil Procedure. But this is as far as the court need or should go in the determination of the appeal. The question of the effect of the failure of a plaintiff to avail himself of the right to object to general findings against him on such an issue is not involved in this case, and I dissent from the portion of the opinion which assumes to decide that question. I see no reason or justification for reaching out beyond the issues in this case to disapprove directly or otherwise such well-reasoned cases as Bilger v. Bilger, 54 Cal.App.2d 739, 129 P.2d 752, and Del Ruth v. Del Ruth, 75 Cal.App.2d 638, 171 P.2d 34.

82 Cal.App.2d 515

## GROVER v. SHARP & FELLOWS CONTRACTING CO. et al.

Civ. 3441.

District Court of Appeal, Fourth District, California.

Nov. 21, 1947.

Hearing Denied Jan. 19, 1948.

**1. Corporations 🔑382½**

The general rule that public utility is required to continue its services until it has been granted permission by the railroad commission to discontinue them is not absolute.

**2. Railroads 🔑351(2)**

In crossing accident case, instructions relating to protection which law gives common carrier propelling its equipment across highway, and setting forth usual reciprocal rights and obligations of motorists and of trains passing through sparsely populated areas, were not erroneous on theory that railroad had abandoned track and that railroad blocked highway without right, where railroad had merely not used tracks for six months prior to accident and work trains had been operated thereon within such period by contractor carrying out orders of federal government which had requisitioned tracks in exercise of war powers. Civ.Code, § 3479.

**3. Railroads 🔑309**

A train colliding with automobile at crossing was not a "vehicle" within statute defining duties of driver of "vehicle" about to enter or cross public highway from alley or private road or driveway, in view of statute defining vehicle as not including device used exclusively on stationary rails or tracks. Vehicle Code, §§ 31, 553.

See Words and Phrases, Permanent Edition, for all other definitions of "Vehicle".

**4. Trial 🔑296(1)**

The omission from instruction of question which might well have been included was not error, where question was covered by another instruction and jury was not misled by omission.

**5. Trial 🔑296(1)**

A formula instruction erroneously omitting certain questions was not prejudicial, where questions were properly included in other instructions.

**6. Appeal and error 🔑1170(9)**

In action for death of occupant of automobile colliding with work train crossing highway, judgment for defendants would not be reversed for alleged errors in instructions, where there was no miscarriage of justice in view of strong evidence of motorist's contributory negligence which was imputable to occupant. Const. art. 6, § 4½.

Appeal from Superior Court, San Bernardino County; Stanley Mussell, Judge.

Action by Edith J. Grover against Sharp & Fellows Contracting Company, a corporation, and others, for damages for death of James M. Roe in an automobile accident. From a judgment for the defendants, the plaintiff appeals.

Affirmed.

Fred A. Wilson, of San Bernardino, for appellant.

Kenneth J. Murphy, of Los Angeles, and Harry Parsons, of San Bernardino, for respondents.

MARKS, Justice.

This is an appeal from a judgment founded on a verdict for defendants in an action brought by plaintiff, the mother of James M. Roe, to recover damages for his death in a collision between an automobile owned by him in which he was riding, with John Wolbert as driver, and an empty flat car being operated by the employees of Sharp and Fellows Contracting Company. The accident happened at about 8 p.m. on December 21, 1942.

The cause has been here before. Grover v. Sharp & Fellows Contracting Co., 66 Cal.App.2d 736, 153 P.2d 83. At the first trial the jury returned a verdict in favor of plaintiff and the trial judge granted a motion for new trial, specifying in the order that "the evidence is insufficient to justify the verdict." The order was affirmed on the ground that the evidence justified the conclusion that John Wolbert, the driver of the car, was guilty of negligence that proximately contributed to the accident and to the death of James M. Roe, which negligence was imputable to Roe. The Supreme Court denied a petition for hearing.

The opinion on the earlier appeal contains a detailed and rather lengthy statement of the facts established at the first trial. With minor exceptions the same facts were established at the second trial so there should be no necessity of repeating them here. We will confine ourselves to pointing out the two material particulars in which the facts at the second trial varied from those at the first.

At the first trial the evidence indicated that the Tonopah & Tidewater Railroad Company, Ltd., had not operated as a common carrier over the tracks involved here for several years prior to the accident. The only thing bearing on that question in the record now before us is a stipulation of counsel, as follows:

"Mr. Wilson: Also stipulated that the railroad tracks and railroad equipment and the right-of-way on which the same were located were owned by the Tonopah & Tidewater Railroad Company, Ltd., subject to the right of the United States Government by virtue of requisition thereof.

"Mr. Parsons: Which requisition was exercised by the Government.

"Mr. Wilson: That is right.

"Mr. Murphy: So stipulated.

"Mr. Wilson: And finally, that Tonopah & Tidewater Railroad Company, Ltd. had ceased to use the railroad right-of-way and the railroad equipment as a railroad prior to July 1942."

There is nothing in the record to indicate exactly when the requisition by the Government occurred, and there is no stipulation that the railroad had been abandoned.

At the first trial counsel stated that Wolbert and Roe, at the time of the accident, were coming home from school in Utah to spend the Christmas holidays with their parents who lived in Los Angeles. There is nothing in the present record bearing on that subject.

Plaintiff seeks a reversal of the judgment against her on the ground of instructions requested by defendants and given to the jury which she now claims were prejudicially erroneous. She predicates this argument chiefly on the theory that the railroad had abandoned its operations, its trackage and right-of-way and so was not entitled to the protection which the law and, as she argues, the instructions gave a common carrier in propelling its equipment across a public highway upon which the two young men were traveling. She argues that when the work train crossed the highway it blocked it without right and created a public nuisance, citing section 3479 of the Civil Code; California & Nevada Railroad Co. v. Mecartney, 104 Cal. 616, 38 P. 448; and Slater v. Shell Oil Co., 39 Cal.App.2d 535, 103 P.2d 1043.

[1] Speaking generally, a public utility is required to continue its services until it has been granted permission by the Railroad Commission to discontinue them. 22 Cal.Jur. p. 54, sec. 44. However, this rule is not absolute. Lyon & Hoag v. Railroad Commission, 183 Cal. 145, 190 P. 795, 11 A.L.R. 249.

We have been cited to no order of the Railroad Commission permitting the Tonopah & Tidewater Railroad Company, Ltd., to abandon any portion of its services. We have found nothing in the record bearing on the question of abandonment other than the stipulation already quoted, which did not recite that there had been an abandonment of the railway but merely that there had been a non-user by the railroad company for a period of about six months prior to the accident. That there had been use of the tracks by work trains within that time and up to the very moment of the accident is clear. The Federal government, in the exercise of its war powers, had requisitioned the property and had taken possession of it through its contractor, Sharp and Fellows Contracting Company, which was operating its work trains over the usable portion of the right-of-way in carrying out government orders. This suggests that the railroad might be abandoned, rather than that it had been abandoned—a future, rather than a past, event.

In People v. Southern Pacific Co., 172 Cal. 692, at pages 700, 701, 158 P. 177, 180, it was said:

"From the facts above stated it is clear that the finding of the court below that the defendants had abandoned the strips of land in controversy has no support in the evidence, except that which it may derive from the fact that there was a nonuse of the 1,000-foot strip for the nine years from 1894 to 1903 and a nonuse of the other branch from 1888 until the beginning of the action. It is the theory of the plaintiff that nonuse of such a franchise for these periods is sufficient evidence of both the fact of abandonment and the intention to abandon. The court below evidently made its finding upon this theory. In this we think it was in error.

"The rule upon this subject is thus stated: 'As a general rule, in order to constitute an abandonment of an easement in a right of way by a railroad company there must be a nonuser accompanied by unequivocal and decisive acts on the part of the company, clearly showing an intention to abandon. * * * In the absence of a statute, mere nonuser for any length of time will not work an abandonment.' 33 Cyc. 222. See, also, 1 Corpus Juris, 8. * * * In Moon v. Rollins [36 Cal. 333, 338, 95 Am.Dec. 181], in defining 'abandonment,' the court said: 'It is a question of intention, and has been so held over and over again, and not a question of time, except so far as the jury are entitled to consider lapse of time in connection with other circumstances of claim, or nonclaim, and acts of ownership and dominion, or a want of such acts, for the purpose of ascertaining the intention.' In Lawrence v. Fulton [19 Cal. 683] an instruction, which declared 'that lapse of time does not constitute an abandonment,' was approved, and it was added that, in deciding the question of abandonment, lapse of time was not, to speak with exactness, *the* material element, but only 'a material element to be considered.'"

In Jones v. Southern Ry. Co., 5 Cir., 285 F. 19, 21, it was said:

"Where the operation of a railroad has been permanently stopped under conditions like those in the present case, there is no presumption of a purpose to abandon the rails and fastenings thereon, and a purpose to abandon the roadbed evidences no purpose to abandon such rails to the owners of the fee."

Thereafter, the court proceeded to quote with approval from Georgia Railroad & Banking Co. v. Haas, 127 Ga. 187, 56 S.E. 313, 314, 119 Am.St.Rep. 327, 9 Ann.Cas. 677, as follows:

"In the case now before us there is no evidence of any intention on the part of the purchaser to abandon to the landowners the rails and fastenings, and the doctrine of the abandonment of trade fixtures has no application. There may have been an intention to take up the rails and then abandon the land, but the effort to remove the rails directly negatives any intention to abandon them."

[2] As the evidence fails to show an abandonment by the Tonopah & Tidewater Railroad Company, Ltd. up to the time the government took possession under its war powers, and as thereafter trains were operated over the tracks under authority and by direction of the government, the argument that there had been an abandonment of the railroad as well as the argument that the passing of trains over the tracks which crossed the highway constituted an unlawful obstruction to traffic amounting to a nuisance, finds little support in the record.

[3] Plaintiff argues that defendants' instruction number 39, which admittedly set forth the usual reciprocal rights and obligations of motorists and of trains passing through sparsely populated areas, violates the provisions of section 553 of the Vehicle Code which defines the duties of the driver of a vehicle about to enter or cross a public highway from an alley not more than 16 feet wide or from a private road or driveway. This argument is based on the theory of abandonment of the railroad which we have already disposed of. It might not be out of place to further observe that section 31 of the Vehicle Code defines the word "vehicle" and provides that it does not include "a device * * * used exclusively upon stationary rails or tracks," so section 553 of that code can have no application here. Plaintiff's attack on several other instructions is also grounded on the theory of abandonment so they need no further notice.

[4] Plaintiff also complains of defendants' instruction number 37 on the ground that it omitted the necessary element of the negligence of Wolbert, the driver, being imputed to Roe, the owner of the car. The question of the imputed negligence was covered by another instruction, although it might well have been included in the one under discussion.

Under the facts of this case it seems very improbable that the jury could have been misled by the omission of this element from this instruction when it was well covered in others.

In the former decision of this case (66 Cal.App.2d 736, at page 741, 153 P.2d 83, 86,) it was said:

"Second, it is generally held that where the owner of a motor vehicle permits another to drive it, and the owner is a passenger in the car being so operated, an inference arises that the driver is operating the vehicle for the benefit of the owner and as his agent. Souza v. Corti, 22 Cal.2d 454, 139 P.2d 645, 147 A.L.R. 861; Randolph v. Hunt, 41 Cal.App. 739, 183 P. 358; Bosse v. Marye, 80 Cal.App. 109, 250 P. 693; Maberto v. Wolfe, 106 Cal.App. 202, 289 P. 218."

[5] The errors in defendants' instruction number 43, of which plaintiff complains, are more serious. It is in the form of a formula instruction which omits the questions of (1) imputing the negligence of Wolbert to Roe and (2) that the negligence of Wolbert, if any, must have been a proximately contributing cause of the collision. While these elements were erroneously omitted from this instruction they were properly included in several others.

In Dawson v. Boyd, 61 Cal.App.2d 471, 143 P.2d 373, 379, it was said:

"The rigid rules formerly applicable to formula instructions have been greatly modified in recent years. Where the omitted element is fully, fairly and correctly covered by other instructions, and where, from a reading of the instructions as a whole, it is obvious that the jury was not misled, the failure to include one element in a formula instruction is not prejudicial. (Citing cases). That is exactly the situation in the instant case." Dodds v. Stellar, 77 Cal.App.2d 411, 175 P.2d 607, is to the same effect.

[6] The evidence of the contributory negligence of Wolbert is strong. That his negligence should have been imputed to Roe seems clear. Under these circumstances, there being no miscarriage of justice, we are prohibited from reversing the judgment. Sec. 4½, Article VI, Constitution.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER, J., dissenting.

82 Cal.App.2d 467

**NASH et al. v. WRIGHT et al.**

**Civ. 15567.**

District Court of Appeal, Second District, Division 2, California.

Nov. 20, 1947.

Hearing Denied Jan. 15, 1948.

**1. Trial 🔑178**

On defendant's motion for a directed verdict, same conditions as to proof must obtain as on a motion for nonsuit.

**2. Trial 🔑178**

On defendant's motion for directed verdict, trial court must give plaintiff's evidence all the value to which it is entitled and, ignoring conflicts in the testimony, must indulge every legitimate inference reasonably deducible from the proof in favor of plaintiff.

**3. Trial 🔑178**

On defendant's motion for directed verdict, evidence for defense must be disregarded and, if there is any substantial evidence from which jury can find for plaintiff, court must deny the motion.

**4. Appeal and error 🔑989**

On appeal from a judgment after directed verdict for defendant, reviewing court cannot affirm the judgment if evidence of plaintiff, standing alone, would have warranted findings favorable to him, and only evidence most favorable to plaintiff may be examined.

**5. Evidence 🔑89**

An inference is dispelled, as a matter of law by positive and direct evidence produced by adverse party the moment case is submitted for decision, and it is dispelled before submission or at conclusion of plaintiff's case when plaintiff himself produces positive and direct evidence contrary to inference raised by plaintiff's own proof.

**6. Trial 🔑178**

The rule that an inference is dispelled by positive and direct evidence produced by adverse party when case is submitted, and is dispelled before submission or at conclusion of plaintiff's case when plaintiff produces positive and direct evidence contrary to inference raised by his own proof, is the established rule for trial courts in weighing evidence of both parties, either in deciding a case or in trying motion for a new trial, but on motion for instructed verdict such rule does not authorize dispelling inferences by evidence introduced by defendant.

**7. Automobiles 🔑244(22)**

The mere driving of another's automobile is not in itself sufficient proof that it is driven with owner's consent so as to render owner liable for driver's negligence. Vehicle Code, § 402.

**8. Automobiles 🔑192(1)**

Permission to drive another's automobile exists for purpose of rendering owner liable for driver's negligence only when owner had knowledge or reason for believing that automobile would be driven by the person with whose negligence it is sought to charge him. Vehicle Code, § 402.

**9. Automobiles 🔑242(5)**

That defendant's name is painted on motor truck involved in traffic accident is sufficient proof to warrant inference of defendant's ownership thereof so as to render him liable for driver's negligence. Vehicle Code, §§ 66, 155, 159, 402, 760.

**10. Automobiles 🔑192(1)**

Where defendant and another had a number of trucks in a "pool" under arrangement that, when employee of either required transportation for certain purposes, he would take any truck in pool, defendant in using any truck in pool under such arrangement was, to the traffic world, the "owner" thereof, so as to render him liable for negligence of driver, regardless of actual ownership of truck. Vehicle Code, §§ 66, 155, 159, 402, 760; Code Civ.Proc. § 1963, subds. 1, 4, 11, 12, 20.

See Words and Phrases, Permanent Edition, for all other definitions of "Owner".

**11. Automobiles 🔑245(30, 36)**

Evidence that truck involved in accident had defendant's name painted thereon and that driver was in defendant's employ was sufficient to go to jury on issues of defendant's ownership and whether defendant authorized driver to use truck for defendant's purposes, on issue of defendant's liability for driver's negligence, in view of statutory presumptions and inferences arising from evidence, notwithstanding truck was registered in name of another. Vehicle Code, §§ 66, 155, 159, 402, 760; Code Civ.Proc. § 1963, subds. 1, 4, 11, 12, 20.

**12. Automobiles 🔑242(6)**

Where truck involved in accident was being driven by defendant's employee, jury could reasonably infer that use of truck was authorized by defendant and that employee was acting within scope of his employment. Vehicle Code, §§ 66, 155, 159, 402, 760; Code Civ.Proc. § 1963, subds. 1, 4, 11, 12, 20.

**13. Automobiles 🔑242(6), 244(28)**

Testimony that defendant's employee involved in automobile collision while driving truck had been instructed not to use defendant's trucks for his personal needs was not proof that driver, at time of collision, was on way from his home to his work, in absence of evidence that he had taken automobile to his home on preceding night, but, in view of statutory presumptions, there was a presumption that, out of care for his own concerns, driver would not have driven truck except on errands for defendant, so as to make defendant liable for driver's negligence. Vehicle Code, §§ 66, 155, 159, 402, 760; Code Civ.Proc. § 1963, subds. 1, 4, 11, 12, 20.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action for death by Edith Pearl Nash and others against Lawrence William Wright, B. W. Belyea, individually and doing business as B. W. Belyea Transfer Company and Belyea Truck Company, and others. From a judgment for defendant Belyea on a directed verdict in open court, plaintiffs appeal.

Reversed.

See also 186 P.2d 691.

Albert E. Wheatcroft and Robert E. Moore, Jr., both of Los Angeles, for appellants.

Bauder, Veatch & W. I. Gilbert, of Los Angeles (Jean Wunderlich, of Los Angeles, of counsel), for respondent.

MOORE, Presiding Justice.

Appeal from judgment in favor of defendant Belyea "on directed verdict in open court."

Plaintiffs are the widow and two sons of decedent, Ned A. Nash. By their complaint they allege that on November 15, 1943, decedent was killed while a passenger in a station wagon which was struck by a pickup truck negligently operated by defendant Wright, employee of Belyea.

The station wagon, operated by one Guy Steele, had proceeded southerly on Henry Ford Avenue en route to Terminal Island. When it reached a point about 60 feet from a railway crossing and while traveling alongside the center stripe of the avenue Steele observed an eastbound train approaching. He came to a standstill at about 15 feet from the center line of the northerly track. The station wagon had been stopped about 30 seconds when it was struck and propelled by the pickup truck onto the track of the approaching train. As the vehicle spun around from the ensuing impact decedent was hurled to the street. His death two days later resulted from the injuries thus received.

Wright having evidently disappeared from the community was not available as a witness. Without him appellants attempted to prove his agency of Belyea at the time of the accident and thereby the latter's liabilty, by circumstances, inferences therefrom and statutory presumptions. From the time-cards of respondent it was established that on November 15 Wright was in the employ of Belyea as a repair mechanic and checked in at 10:15 a. m. On the preceding day he commenced work at 7:49 a. m. and left at 7:31 p. m. The pickup truck painted gray, the color of most of Belyea's equipment, and an enamel sign containing the words "Belyea Truck Company" was permanently bolted to the cab. The truck was a messenger car whose record title was vested in the Pacific Crane and Rigging Company, garage associate of Belyea, but it was one of "a pool down in Cal-Shipyard" the vehicles of which were used by either Belyea or Pacific Crane "if parts were needed." Such evidence appellants introduced for the purpose of showing that the pickup truck was the property of Belyea and that at the time of the accident it was operated by his employee.

To defeat the inferences arising from such circumstances respondent proved the following: (1) Wright was told by Belyea's truck foreman on November 14 that company equipment was not to be operated for personal use; (2) he was instructed by the mechanical engineer of the Pacific Crane and Rigging Company not to use Belyea's equipment for personal use "under any consideration"; (3) Wright was discharged for having used such equipment for his personal use contrary to orders. By reason of such proof the trial court determined that the inferences arising from appellants' evidence had been dispelled and directed the jury to return a verdict against them. That such instruction was error an attempt is here made to demonstrate.

[1-4] Such demonstration will be facilitated by keeping in mind four cardinal rules which are inalienable from a fair consideration of a judgment based upon a directed verdict: (1) On a motion for such verdict the same conditions as to the proof must obtain as on a motion for nonsuit. (2) Upon such motion it is the trial court's duty to give plaintiff's evidence all the value to which it is entitled, and ignoring conflicts in the testimony to indulge every legitimate inference reasonably deducible from the proof in favor of plaintiff. Mairo v. Yellow Cab Company, 208 Cal. 350, 351, 281 P. 66; Dieterle v. Yellow Cab Company, 34 Cal.App.2d 97, 98, 93 P.2d 171. (3) Under such motion the evidence for the defense must be disregarded, and if there is any substantial evidence from which the jury can find for plaintiff it is the court's duty to deny the motion. (4) On appeal from a judgment after directed verdict the reviewing court cannot affirm the judgment if the evidence of plaintiff standing alone would have warranted findings favorable to him (Anthony v. Hobbie, 25 Cal.2d 814, 817, 155 P.2d 826, and only the evidence most favorable to the plaintiff may be examined.

Despite the foregoing salutary rules respondent contends that where plaintiff's proof consists of circumstances only the inferences therefrom are so utterly dispelled by contradictory direct evidence introduced by the defendant that the trial judge may disregard it and direct a verdict for the defense on the theory that plaintiff's evidence was conclusively disproved. In support of such contention respondent cites Engstrom v. Auburn Auto Sales Corporation, 11 Cal.2d 64, at page 70, 77 P.2d 1059, 1063, which holds that "an inference is dispelled as a matter of law when it is rebutted by clear, positive, and uncontradicted evidence which is not open to doubt, even though such evidence is produced by the opposite side. * * * Of course, if the opposition evidence is conflicting, vague, or uncertain, or is weakened by contradictions or improbabilities, an inference is not dispelled as matter of law."

In order properly to evaluate the pronouncement of the Engstrom decision a review thereof and of its supporting authorities is essential. Section 402 of the Vehicle Code makes the owner of a motor vehicle liable for injury to person or property resulting from negligence in the operation "of such motor vehicle * * * by any person using or operating the same with the permission, express or implied, of such owner * * *." In the Engstrom case the owner, an automobile sales agency, had given permission to one Silkman to drive the car on a Friday for the purpose of demonstrating it to his family. In granting such permission it was agreed that Silkman would return the car in two hours. He did not return it until after the lapse of 23 hours. The accident occurred shortly before his return and after many efforts to locate him. According to the opinion no attempt was made by Engstrom to controvert the proof that Silkman's use of the car had been limited to two hours. He submitted his case in reliance upon the admission of the sales agency that it owned the vehicle and upon the inference that the operator had permission to drive it. Such proof was not sufficient to establish that a prospective purchaser who had driven an automobile away from the merchant's showroom for a demonstration was authorized to use it perpetually. More evidence was required to bring the case within the purview of section 402, supra. For want of any proof that Silkman was at the time of the accident driving the automobile with the consent of its owner, coupled with the express agreement of the corporation and Silkman as to the limited period of its use, the order for the instructed verdict was inevitable.

[5] One further observation on the text of the Engstrom decision will serve to emphasize its differentiation from the case at bar. On page 70 of 11 Cal.2d on page 1063 of 77 P.2d the following pronouncements appear: "A presumption is dispelled when a fact which is wholly irreconcilable with it is proved by the uncontradicted testimony of the party relying on it or of such party's own witness, when such testimony was not the product of mistake or inadvertence. * * * A presumption is not dispelled by evidence produced by the opposite party but remains as evidence in the case sufficient to support a judgment, except in rare cases in which the rebutting evidence is absolutely conclusive. * * * An inference is dispelled as a matter of law when it is rebutted by clear, positive, and uncontradicted evidence which is not open to doubt, even though such evidence is produced by the opposite side." A study of the decision discloses that the passage with reference to the "inference" does not fairly express the meaning intended by the court. It is dispelled as a matter of law by positive and direct evidence produced by the adversary party the moment the case is submitted for decision. It is dispelled as a matter of law before submission or at the conclusion of plaintiff's case when there is produced by the plaintiff himself positive and direct evidence contrary to the inference raised by plaintiff's own proof. That this was the intention of the court in the Engstrom decision is divined from the facts proved by Engstrom in his attempt to establish that Silkman had driven the offending vehicle with the sales agency's permission. It is demonstrated also by the authority cited in support of the last quoted passage, to wit, Maupin v. Solomon, 41 Cal.App. 323, 183 P. 198. A reference to page 324 of 41 Cal.App., page 198 of 183 P. thereof discloses that the appellate court in reviewing a judgment for plaintiff and an order denying defendant's motion for a new trial declared that the inference relied upon by the plaintiff could not be indulged; that "it must yield to the direct and unequivocal evidence rebutting such inference."

[6-8] Such is the established rule for trial courts in weighing the evidence of both parties either in deciding a case or in trying the motion for a new trial. But on a motion for an instructed verdict such rule does not authorize the dispelling of inferences by evidence introduced by the defendant. This is made clear by two other authorities cited in the Engstrom decision as "determinative," viz.: Di Rebaylio v. Herndon, 6 Cal.App.2d 567, 44 P.2d 581, and Howland v. Doyle, 6 Cal.App.2d 311, 44 P.2d 453, 455. In the case of Di Rebaylio, he was attempting to prove that Herndon, the driver of the car which had injured him, was given permission to use it. He called both Herndon and the president of the corporation which owned the car. Both testified that Herndon had never been an employee of the corporation; that when Herndon took the car on Friday he agreed to return it the next morning, but that he did not return it at all on Saturday. There was no contrary evidence. Because the mere driving of another's motor car is not in itself sufficient proof that it is driven with the owner's consent, the jury were properly instructed to return a verdict against the plaintiff. In the case of Howland, judgment of nonsuit was entered in favor of the Reo Dennis Company, a dealer in motor vehicles, which permitted one Fifield, an erstwhile demonstrator for the company, to take a truck for the purpose of purchasing it or selling it to another. Nothing was said to indicate that anyone else would drive the vehicle. But Fifield before calling for the truck had hired one Doyle, who operated it thereafter without the knowledge or consent of the owner and in so doing negligently injured the plaintiff. Holding that since no facts or circumstances were in evidence from which it could be inferred that the owner had given Doyle permission to drive the truck, the cited section (402, supra) was declared not applicable. On appeal it was held that permission to drive a motor vehicle can exist only when the owner had knowledge, or a reason for

believing, that the car "would be driven by the person with whose negligence it is sought to charge him."

[9] It is argued by respondent that from the registration slip the presumption arose that the rigging company owned the truck (Vehicle Code, secs. 66, 155, 159), and that such presumption, reinforced by section 760 which makes it a misdemeanor to violate the code, dispels the inference of respondent's ownership. But the fact is that if the defendant's name is found painted on the motor car immediately after it has injured a person in traffic it is sufficient proof to warrant the inference of ownership. Tieman v. Red Top Cab Company, 117 Cal.App. 40, 45, 3 P.2d 381.

Appellant's proof was aided by certain presumptions. It is presumed that the ordinary course of business has been followed; that a person takes ordinary care of his own concerns; that a person is innocent of wrong, i. e. of using property of another without the latter's consent; that things which a person possesses are owned by him; that a person is the owner of property from exercising acts of ownership over it. Code Civ.Proc., sec. 1963, subds. 1, 4, 11, 12, 20.

[10, 11] Vehicle Code, section 66, declares that an owner is one entitled to possession. In addition to the cited presumptions and to the facts that the pickup truck was being operated by Belyea's employee and was painted in the same color found on all of Belyea's equipment, it was proved that respondent and his associate, the Crane Rigging Company, had a number of trucks in "a pool," and that when an employee of either required transportation to go for parts he would get any truck in the pool for the errand. Under such an arrangement the user of any truck in the pool was, to the traffic world, the owner. Respondent could not by virtue of a private agreement enjoy the free use of a truck registered to the name of his associate and thereafter avoid liability on the ground of nonownership of the vehicle so used. Such facts and the inferences reasonably drawn therefrom and the cited presumptions constituted such evidence as entitled the jury to determine the issue presented by the controversy. There is no such sanctity about the evidence produced by respondent as entitled it to be established by its mere utterance. It consisted in the main of testimony which when contradicted by word or circumstance by universal practice goes into the hopper of the fact finder. Although the registry did show the title of the truck to be vested in another, its color and its name plate and its daily use by Belyea were facts from which ownership may have fairly been inferred.

[12] Moreover, the truck was driven by Belyea's employee. It is not to be denied that in an action for personal injuries caused by the negligence of an employee while operating his employer's motor car, it is reasonable to infer that the use of the vehicle was authorized by the owner and that the employee was acting within the scope of his employment. Shields v. Oxnard Harbor District, 46 Cal.App.2d 477, 487, 116 P.2d 121; Bushnell v. Tashiro, 115 Cal.App. 563, 565, 2 P.2d 550; Blank v. Coffin, 20 Cal.2d 457, 460, 126 P.2d 868. The general manager of Belyea testified that Wright was in the employ of Belyea on November 15 and that he was at the shop all day of the 14th.

[13] Respondent assumes that Wright at the time of the collision was on the way from his home to his work. There is no evidence to support such assumption except the testimony of witnesses that he had been instructed not to use the trucks for his personal needs. Such testimony is not proof that Wright had already checked in at 7:49 as he had done on the morning of the 14th. It is not reasonable to assume that he would have gone to work at 9:30 on Tuesday if he had arrived there before 8 o'clock on the previous Monday. There is no evidence that he had taken the car to his home on the evening of the 14th. But under the presumptions above quoted if he had been warned, as respondent's witnesses testified, not to drive the trucks for his personal uses, it is a presumption that out of care for his own concerns he would not have driven the truck except on an errand for Belyea.

The judgment is reversed.

McCOMB and WILSON, JJ., concur.

Hearing denied; EDMONDS, SCHAUER, and SPENCE, JJ., dissenting.

## NASH et al. v. WRIGHT et al.

**Civ. 15934.**

District Court of Appeal, Second District, Division 2, California.

Nov. 20, 1947.

Hearing Denied Jan. 15, 1948.

**1. Death 🔑30**

Cause of action of decedent's widow and children for death of decedent involved a diminution of their support in praesenti and in expectancy and such support, though based on decedent's earning power, was the "estate" of plaintiffs, and, as loss they suffered by reason of such death existed during lifetime of defendant who died pending plaintiffs' appeal from judgment for defendant, which was reversed on appeal, defendant's estate was liable to plaintiffs for the loss. Code Civ.Proc. § 340, subd. 3, § 377; Civ.Code, § 14; Probate Code, § 574.

See Words and Phrases, Permanent Edition, for all other definitions of "Estate".

**2. Limitation of actions 🔑1**

Statutes barring legal actions are enacted merely for tranquility of the state, and the varying periods whereby the filing of such actions is barred are determined on considerations not specified in the several statutes of limitation.

**3. Death 🔑37**

That action for wrongful death was after one year, whereas action for property damage was not barred within three years, did not preclude plaintiffs from maintaining action for such death after the one year where action was filed prior to defendant's death and was based on diminution of support of plaintiffs by their decedent's death, and was therefore an action for property damage resulting from their decedent's death. Code Civ.Proc. § 340, subd. 3, § 377; Civ.Code, § 14; Probate Code, § 574.

**4. Death 🔑30**

That action for death was filed by decedent's widow and children prior to death of defendant did not affect character of action as one for property or depreciate its survivability as respects substitution of deceased defendant's executor in place as defendant after appeal from judgment adverse to plaintiffs. Code Civ.Proc. § 340, subd. 3, § 377; Civ.Code, § 14; Probate Code, § 574.

**5. Death 🔑11**

On death resulting from automobile accident, a cause of action for wrongful death arose on behalf of widow and children under the wrongful death statute and continued to exist until tort-feasor's death. Code Civ.Proc. § 377.

**6. Death 🔑30**

Where cause of action for wrongful death arose in favor of widow and children of deceased killed in automobile accident, such cause of action against tort-feasor survived his subsequent death against tort-feasor's estate under statute. Code Civ. Proc. § 377; Probate Code, § 574.

**7. Death 🔑30, 46**

A complaint by widow and children alleging their damage resulting from wrongful death of their decedent, without mentioning items constituting their loss and merely alleging destruction of their breadwinner, stated a cause of action under statute authorizing actions by and against executors and administrators based on destruction and waste of property, hence action survived tort-feasor's death and was maintainable against his executor, as against claim that plaintiffs could not recover for loss of consortium, society, and comfort. Code Civ.Proc. § 377; Probate Code, § 574.

◆

Appeal from Superior Court, Los Angeles County; A. W. Ashburn, Judge.

Action for death by Edith Pearl Nash and others against Lawrence William Wright, B. W. Belyea, individually and doing business as B. W. Belyea Transfer Company and Belyea Truck Company, and others. From a judgment for defendant Belyea on directed verdict in open court, plaintiffs appeal. After the appeal had been lodged, defendant Belyea died, and Citizens National Trust & Savings Bank of Los Angeles qualified as executor of his last will and testament. From an order granting plaintiffs' motion substituting the executor as defendant in place of deceased defendant after presentation and rejection of their claim, the executor and certain other defendants appeal.

Affirmed.

Bauder, Veatch & W. I Gilbert, of Los Angeles, for appellant.

Albert E. Wheatcroft and Robt. E. Moore, Jr., both of Los Angeles, for respondents.

MOORE, Presiding Justice.

Defendant Belyea having prevailed in the court below in an action for damages arising from the death of plaintiffs' decedent allegedly caused by the tortious act of Belyea the plaintiffs appealed to this court. A reversal of the judgment has been ordered by opinion this day filed (see Cal.App., 186 P.2d 686). After that appeal had been lodged Belyea deceased and appellant qualified as the executor of his last will and testament. After due presentation and rejection of their claim plaintiffs moved the court below for an order substituting appellant as defendant in the place and stead of Belyea. From the order granting such motion comes this appeal.

The original cause of action was for damages suffered by plaintiffs as heirs of Ned A. Nash. Appellant now contends that since such action is based upon the "wrongful death of decedent," it does not survive the tort feasor. The labors incident to the task of deriving a solution of the issue thus presented is minimized by the decision in Hunt v. Authier, 28 Cal.2d 288, 169 P.2d 913. By that action the heirs of Doctor Hunt sued the administratrix of the estate of his assailant for the wrongful death of the doctor. Code Civ.Proc., sec. 377. Upon a review of the judgment of dismissal after the administrator's demurrer had been sustained, the court after an exhaustive review of the legislation and the decisions upon the doctrine of survivability of tort actions held that by virtue of the language of section 574 of the Probate Code as amended in 1931 any person may maintain an action against the administrator of the estate of a decedent who in his lifetime has wasted, destroyed or carried away the property of the plaintiff; that under section 574 of the Probate Code the injury suffered by the widow and children of him who was killed by the tortious act of one who subsequently deceased is an injury to their property, since it affects their right to receive future support from their decedent and therefore survives as an action against the estate of the tort feasor, that the definitions of the word "property" as set forth in the Civil Code, section 14, do not exclude the injuries suffered from the loss of spouse or parent from the category of property as used in section 574.

[1] The cause of action of respondents involves a diminution of their support both in praesenti and in expectancy which they would have received from their decedent. Such support although it came by virtue of Mr. Nash's earning power was the "estate" of respondents, and the loss they suffered by reason of his death existed during the lifetime of Belyea. It follows that the latter's estate is liable to respondents for such loss.

[2, 3] Appellant contends that the original action by the Nashes is one for wrongful death (Code Civ.Proc., sec. 377) and that the elements of damage commonly comprising such action, such as loss of consortium, society and comfort, are not property as contemplated by the statute (Probate Code, sec. 574) or by the decision in the Hunt case; that while an action for wrongful death is barred by section 340(3), Code of Civil Procedure, the time within which an action for damage to property by one who has deceased is controlled by section 338(1). Such distinction is without a difference. Mr. Nash was killed by the wrongful act of Belyea's agent just as Doctor Hunt was killed by the wrongful act of his assailant. The fact that the action for wrongful death is barred after one year while an action for damage to property is not barred within three years has no significance here. Statutes barring legal actions are enacted merely for the tranquility of the state, and the varying periods whereby the filing of such actions is barred are determined upon considerations not specified in the several statutes of limitation.

[4] There is no substantial difference between the nature of the action brought by the Hunt heirs and that instituted by respondents. The fact that the present action

was filed prior to Belyea's decease does not in the slightest degree affect its character as a suit for property or depreciate its survivability.

[5-7] Appellant contends that an action for wrongful death is not included within the purview of the Hunt decision; that the Hunt heirs sued merely for property damage which excluded loss of consortium, society and comfort. But respondents herein alleged their damage as resulting from the wrongful death of Mr. Nash. No mention is made of the items constituting their loss. Merely the destruction of their bread winner is alleged. This is what the Hunt heirs sued for and the court declared (1) that upon the death of Doctor Hunt a cause of action for wrongful death arose in favor of his heirs under section 377, Code of Civil Procedure, and (2) that it continued to exist until the tort feasor's death, but (3) that upon his death the survival of the action against the tort feasor's estate was effected by virtue of section 574 of the Probate Code which "affords the right to maintain actions after the death of those who could have been plaintiffs or defendants if they had lived, in cases of injury to property, and to that extent has created a departure from the common law rule that actions ex delicto do not survive." 28 Cal.2d at page 292, 169 P.2d at page 916.

Order affirmed.

McCOMB and WILSON, JJ., concur.

Hearing denied; EDMONDS, SCHAUER, and SPENCE, JJ., dissenting.

82 Cal.App.2d 592

## FIRST NAT. BANK OF STOCKTON et al. v. POMONA TILE MFG. CO. et al.

Civ. 15741.

District Court of Appeal, Second District, Division 3, California.

Nov. 25, 1947.

Hearing Denied Jan. 22, 1948.

**1. Assignments 🔑134**

What was intended by arrangement giving rise to relationships of assignors and assignees for security might be fairly presumed from what was effected by it. Code Civ.Proc. § 1963, subd. 3.

**2. Appeal and error 🔑842(1), 1010(1)**

A finding of intent of parties on basis of extensive oral and documentary evidence introduced for purpose of showing terms of arrangement giving rise to relationships of assignors and assignees for security was a finding on a question of fact, and findings having substantial evidentiary support that implied assignment ran in favor of subcontractor was conclusive.

**3. Assignments 🔑90**

An assignee for security holds an entire but defeasible present interest in subject matter of assignment so long as obligation secured remains unsatisfied, but assignor has a future interest in subject matter by reason of his power of defeasance of assignee's interest by discharge of the secured obligation.

**4. Assignments 🔑90, 106**

The assignor's interest in subject matter of an assignment for security is what remains after secured obligation has been satisfied, whereas assignee's interest is limited to amount of secured obligation, and hence, once secured obligation has been discharged, assignee for security holds excess as agent or trustee for assignor.

**5. United States 🔑111**

Where contractor by first assignment transferred to first financing bank all money payable under prime contract with United States, and subcontractor by second assignment transferred to second bank all money payable under subcontract, with effect of providing security both for banks and for subcontractor, an implied assignment, arising from the arrangement, by first bank to second bank of money paid under prime contract for work done by subcontractor ran in favor of subcontractor as well as of second bank.

**6. Assignments 🔑55**

An assignment made for a consideration sufficient to support an informal contract is made for value.

**7. Contracts 🔑50**

"Consideration" is bargained-for benefit or detriment, and need not move to promisor or from promisee. Civ.Code, § 1605.

**8. Contracts 🔑54(1)**

One consideration may support the several promises of one end of a bargain.

**9. United States 🔑111**

Where contractor by first assignment transferred to first financing bank all money payable under prime contract with the United States and subcontractor by second assignment transferred to second bank all moneys payable under subcontract, with effect of providing security both for the banks and for subcontractor, an implied assignment, arising from the arrangement, by first bank to second bank of money paid under prime contract for work done by subcontractor, was supported by ample consideration. Civ.Code, § 1605.

**10. United States 🔑111**

The function of the formalities prescribed by federal statute for assignments of claims upon the United States is merely the protection of the United States from dubious claims, and noncompliance with them is irrelevant once the United States has been discharged from liability. 31 U.S.C.A. § 203.

**11. United States 🔑111**

Where contractor by first assignment transferred to first financing bank all money payable under prime contract with the United States, and subcontractor by second assignment transferred to second bank all money payable under subcontract, an implied assignment, arising from arrangement, by first bank to second bank of money paid under prime contract for work done by subcontractor was valid though not made with formalities prescribed by federal statute, and was not voidable by a subsequent assignee on that ground, once the United States had been discharged from liability. 31 U.S.C.A. § 203.

**12. Assignments 🔑85**

The rule of priority between successive assignees of the same thing in action is that the assignee who first gives notice to the debtor, or in lieu thereof to holder of the fund involved, prevails.

**13. Assignments 🔑85**

Time of assignment fixes priority between successive assignees.

**14. Assignments 🔑85, 87**

A subsequent assignee prevails over a prior assignee only if he is a bona fide purchaser and in addition obtains either satisfaction of the obligor's duty or judgment against the obligor or a new contract with the obligor by means of a novation or delivery of a tangible token or writing required by the obligor's contract for its enforcement.

**15. Interpleader 🔑16**

Interpleader is governed exclusively by principles of equity.

**16. United States 🔑111**

Where contractor by first assignment transferred to first financing bank all money payable under prime contract with the United States and subcontractor by second assignment transferred to second bank all money payable under subcontract, an implied assignment, arising from arrangement, by first bank to second bank of money paid under prime contract for work done by subcontractor was an equitable assignment since its existence was implied from conduct of the parties rather than by express words of formal assignment.

**17. Assignments 🔑85**

Priority between assignment of things in action should be determined without regard to any distinction between legal and equitable titles.

**18. Assignments 🔑90**

The interest of any type of assignee is essentially equitable as distinguished from legal.

**19. Equity 🔑56**

Particularly in equity substance should be preferred to form. Civ.Code, § 3528.

**20. Assignments 🔑85**

In interpleader action, priority between successive assignments involved would not be made to depend upon technical distinction between legal and equitable titles.

**21. Assignments for benefit of creditors ⚿184**

The doctrine of bona fide purchaser, as invoked by assignee for benefit of creditors claiming priority as a subsequent legal assignee for value and without notice, was purely equitable in nature.

**22. Assignments for benefit of creditors ⚿184**

An assignee for benefit of creditor is not a bona fide purchaser, because he is not a purchaser for value.

**23. Assignments ⚿55**
**Sales ⚿238**

"Value", in the phrase "assignment for value", means merely consideration; whereas, in the phrase "bona fide purchaser for value", "value" means present contemporaneous value.

See Words and Phrases, Permanent Edition, for all other definitions of "Value".

**24. Assignments for benefit of creditors ⚿32**

The consideration for a general assignment for the benefit of creditors is the antecedent debts owed by the assignor to the creditors and is nothing but past consideration.

**25. Assignments for benefit of creditors ⚿22**

Both statutory and common-law assignments for the benefit of creditors are recognized in California, the basic distinction between the two being that the former complies with statutory requirements while the latter does not. Civ.Code, § 3460.

**26. Assignments for benefit of creditors ⚿184**

Under statutory assignment for benefit of creditors, the assignee is not a purchaser for value and has no greater right with respect to things in action transferred by the assignment than his assignor had, and in that respect the common-law assignee stands in no better position than the statutory assignee. Civ.Code, § 3460.

**27. Assignments for benefit of creditors ⚿216**

A voluntary assignee, in contrast to assignee in insolvency, who represents the creditors, represents only the debtor, the assignor. Civ.Code, § 3460.

**28. Attachment ⚿175**

Absent a fraudulent conveyance or an illegal preferential transfer, a creditor, even an attaching creditor, can obtain no better position than his debtor enjoys.

**29. Assignments for benefit of creditors ⚿184**

The collective rights of an assignee for the benefit of creditors are no greater than the several rights of those he represents and cannot be raised above those he represents except as to fraudulent conveyances and illegal preferential transfers.

**30. Fraudulent conveyances ⚿115(1)**

An individual may deal with his own property as he sees fit subject only to established limitations of social policy, and preferences are not generally forbidden by the law. Civ.Code, § 3432.

**31. Assignments ⚿86**

Generally, where no fraud is involved and a fund in the hands of a third person has been set apart for payment of a particular creditor, whether by way of equitable assignment or otherwise, the preference of that creditor is enforced in event of the debtor's insolvency.

**32. Assignments for benefit of creditors ⚿333**

Where contractor by first assignment transferred to first financing bank all money payable under prime contract with the United States and subcontractor by second assignment transferred to second bank all money payable under subcontract, implied assignment, arising from the arrangement, by first bank to second bank of money paid under prime contract for work done by subcontractor had priority over subsequent assignment by contractor for benefit of creditors.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Interpleader action by the First National Bank of Stockton, Cal., and others against the Pomona Tile Manufacturing Company, the Board of Trade of San Francisco and G. W. Brainard, and the Bank of America National Trust & Savings Association and another, to determine the ownership of a certain fund. Judgment in favor of the Pomona Tile Manufacturing Company, and the Board of Trade and G. W. Brainard appeal.

Affirmed.

Glikbarg, Wolf & Selig, of San Francisco, Loeb & Loeb, of Los Angeles, A. S. Glikbarg, of San Francisco, and Herman F. Selvin, of Los Angeles, for appellants.

Irl D. Brett, of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

This is an appeal by The Board of Trade of San Francisco and G. W. Brainard, its secretary, both constituting a single party defendant, hereafter called Board, in an interpleader action from a judgment awarding a fund in excess of $36,000 to Pomona Tile Manufacturing Co., another defendant, hereafter called Pomona. The issue between them is which has the better claim to the fund.

This controversy between Pomona and the Board arose in the following manner. On September 19, 1942, Joaquin Potteries, hereafter called Joaquin, entered into a written prime contract with the United States of America under which Joaquin agreed to supply the U. S. Navy with a specified amount of crews' mess chinaware for a price slightly in excess of $500,000. By the express terms of this contract Pomona was to supply about 70% of this chinaware. Pursuant to an oral understanding between Pomona and Joaquin Pomona commenced work on its allocation in the early part of the following December. At this time the heads of Pomona and Joaquin discussed how Pomona was to be paid. Pomona insisted that since it was already having trouble collecting small accounts from Joaquin, some type of arrangement should be worked out whereby Pomona's money would come to it directly from the government, that is without passing through Joaquin's hands. About December 31, 1942, Pomona requested Joaquin by letter that since Pomona might need some financing to enable it to handle its part of the contract, its portion of the billing be assigned directly to its bank, a branch of Bank of America National Trust & Savings Association, hereafter called Bank of America.

Joaquin took this request up with its bank, the First National Bank of Stockton, California, hereafter called Stockton Bank. The Stockton Bank was financing a previous Navy contract of Joaquin, and Joaquin had already promised the Stockton Bank that it would assign to the bank all the money payable to it under its latest Navy contract in return for advances from the bank sufficient to enable it to take care of its 30% of the contract. The Stockton Bank suggested to Joaquin the following arrangement in view of the fact that by virtue of a standard provision in the government contract there could be but one assignment of the money payable thereunder: (1) Joaquin execute to the Stockton Bank its promised assignment for the agreed consideration. (2) Joaquin enter into a subcontract with Pomona (to be dated back to the date of the prime contract) covering Pomona's portion of the prime contract. (3) Pomona execute an assignment of all money payable to it under the subcontract to the Bank of America. (4) Joaquin accept Pomona's assignment. (5) Joaquin instruct the Stockton Bank to make payments under the subcontract to the Bank of America as payments are received on the prime contract for goods manufactured by Pomona.

Joaquin thereupon entered into negotiations with Pomona and the Bank of America to effectuate the arrangement proposed by the Stockton Bank. On January 5, 1943, Joaquin sent to Pomona copies of its proposed subcontract with Pomona. Thereafter the heads of the two concerns discussed the matter with the Bank of America. Joaquin and Pomona then entered into the proposed subcontract as specified by the arrangement. Pomona also agreed to Joaquin's assignment of the money payable under the prime contract to the Stockton Bank, and on January 15, 1943, such an assignment was formally executed by Joaquin and a few days later notice was duly given to the appropriate representatives of the obligor, the United States. Presumably thereafter Joaquin borrowed the money it needed to finance its work under the prime contract from the Stockton Bank. About this time Joaquin sent to Pomona a copy of Pomona's proposed assignment to the Bank of America of the money payable to it under the subcontract. But Pamona did not execute this assignment forthwith. It first exchanged letters with the Stockton Bank in February for the purpose of establishing that the assignment of the money payable under the prime contract had been made as agreed and that the Stockton Bank as the assignee thereof would recognize Pomona's assignment to the Bank of America, when made, by remitting thereafter all payments made by the government under the prime contract for goods manufactured by Pomona directly to the Bank of America. This being established, on or about March 10, 1943, Pomona executed the assignment to the Bank of America previously sent to it by Joaquin and presumably received from the bank thereafter certain advances needed to take care of its work under the two contracts. The Bank of America thereupon requested by letter to the Stockton Bank that both the Stockton Bank and Joaquin acknowledge receipt of notice of Pomona's assignment to the Bank of America. Joaquin, however, by letter to Pomona objected that the assignment was not agreeable to it because it did not recognize the payments already made to Pomona by Joaquin and did not provide for the withholding for Joaquin of a renegotiation reserve as had been agreed upon between Pomona and Joaquin. The Stockton Bank after conferring with Joaquin advised the Bank of America by letter of Joaquin's objection concerning the renegotiation reserve and of the status of the account between Joaquin and Pomona for the work already done under the contracts by Pomona. This disagreement was cleared up by a letter from Pomona to Joaquin, expressly approved by the Bank of America, recognizing the payments already made under the contracts by Joaquin to Pomona and agreeing that the Stockton Bank might withhold a specified renegotiation reserve. The Bank of America notified the Stockton Bank by letter of its approval of this solution. The Stockton Bank then took up the solution with Joaquin. Joaquin approved it and through its president orally directed the Stockton Bank to pay Pomona for goods manufactured by Pomona under the contracts through the Bank of America as required by Pomona's assignment. On March 29, 1943, and March 30, 1943, Joaquin and the Stockton Bank respectively endorsed upon Pomona's assignment to the Bank of America acknowledgment of receipt of notice thereof. Thus the arrangement suggested by the Stockton Bank and outlined in the immediately preceding paragraph was effectuated between the four parties thereto without any modification here material.

This arrangement was performed in the following way. The Stockton Bank kept separate records of the billings attributable to work done by Pomona and of those attributable to work done by Joaquin. On Pomona-manufactured goods the Stockton Bank would receive Pomona invoices from the Bank of America and the corresponding Joaquin invoices covering Pomona's work from Joaquin. It would submit the latter invoices to the Navy for payment. Upon receipt of such payment it would turn over the entire amount by draft to the Bank of America. On the other hand on Joaquin-manufactured goods, it would first apply payments received from the Navy to the payment of Joaquin's indebtedness to it, and hold the balances for Joaquin. Joaquin knew of and acquiesced in this course of conduct by the Stockton Bank. In this manner both banks received payment in full for their respective loans to Pomona and Joaquin.

On September 11, 1943, Joaquin executed a non-statutory general assignment of all of its property, with an exception not here material, to the Board for the benefit of Joaquin's creditors. The Board at this time did not know of any claimed assignment to Pomona. On October 4, 1943, the Board made written demand upon the Stockton Bank for payment to it of all money payable under the prime contract to Joaquin, the Board's assignor. At this time the Stockton Bank held slightly over $11,000 of such money. Subsequently, it received additional amounts and at the time of the trial it had in its possession in excess of $36,000. All of this money had been received from the government in payment for work done by Pomona under the prime contract. A little over a year later the Stockton Bank initiated this interpleader action to determine the ownership of this fund. About this time the Bank of America reassigned to Pomona by proper endorsement its interest in the money payable under the subcontract. The judgment dismissed the action as to both banks. The sole claimants to this money, therefore, now are Pomona and the Board.

Pomona's claim is based upon an alleged assignment to it of the portion of the money payable to Joaquin under the prime contract attributable to the work done by Pomona. This claimed assignment is found in the arrangement. The arrangement between the four parties, which has been both summarized and detailed above, involved two contracts, the prime contract and the subcontract and three assignments, two express and one implied. Both contracts and all the assignments embraced the money payable to Pomona for the work it did for the government. The subcontract represented the 70% of the prime contract which was to be performed by Pomona. The first express assignment transferred all the money payable under the prime contract, including the 70% for Pomona's work, from Joaquin to the Stockton Bank. The second express assignment transferred all the money payable under the subcontract from Pomona to the Bank of America. The implied assignment set over a specific fund, namely the payments by the Navy under the prime contract for work done by Pomona, for the satisfaction of the second express assignment. This implied assignment was accomplished as follows. Joaquin and the Stockton Bank accepted the second express assignment, and Joaquin instructed the Stockton Bank to pay over to the Bank of America, the assignee under the second express assignment, the payments made under the prime contract for work done by Pomona as such payments were received. To effect this, the Stockton Bank divided the total payments into two funds, the first consisting of payments for work done by Joaquin and the second consisting of payments for work done by Pomona. This second fund was paid over to the Bank of America as payments allocable to it came in. Thus a specific and identifiable portion of the money payable under the prime contract, namely that payable for work done for Pomona, was set aside by implied assignment for the satisfaction of the second express assignment. Pomona's position would appear to be that the implied assignment operated in its favor as well as that of the named assignee the Bank of America, because such was the intent of the parties.

The Board's claim to this money rests upon the asserted voidability of Pomona's assignment and the alleged priority of its assignment over that of Pomona. More specifically the Board contends that there was no assignment to Pomona because the implied assignment did not purport to run in its favor. The Board next contends that if there was an assignment to Pomona as the trial court found, such assignment must be held voidable by the Board because made without consideration and without compliance with the formalities required by federal statute for the effective assignment of claims against the United States. Lastly, the Board takes the position that it, as a subsequent innocent legal assignee for value and without notice, should prevail over Pomona, at best an earlier equitable assignee.

We shall now consider the applicability and validity of these contentions of Pomona and the Board. Upon analysis the legal effect of the arrangement between the four parties appears to have been this. The Stockton Bank, although holding by virtue of the first express assignment the entire present though defeasible interest in the money payable under the prime contract agreed to and did limit its interest in such money to the first fund by impliedly assigning the second fund in the manner hereinbefore described to the Bank of America. This course of conduct on the part of the Stockton Bank was followed at the direction and with the knowledge and implied consent of Joaquin. The money here in controversy is what remains of the second fund. The controlling issues between Pomona and the Board thus become: (1) Did the implied assignment to the Bank of America run in favor of Pomona as well? (2) Is the implied assignment voidable by the Board? (3) Which of the two assignments, the implied assignment or the assignment to the Board for the benefit of Joaquin's creditors generally, is entitled to priority over the other?

The Board contends that the implied assignment did not run in favor of Pomona because no such intention was manifested. The Board argues that the only intent shown by the arrangement so far as Pomona was concerned was to make possible the financing of Pomona's portion of the prime contract by setting apart a fund to which the Bank of America could resort as security for its advances to Pomona. The Board concedes that the arrangement effectuated an equitable assignment of the second fund to the Bank of America, Pomona's bank, but denies that this equitable assignment ran to Pomona as well. In this connection it claims that the reassignment from the Bank of America to Pomona was ineffective because the bank's interest in the subject matter of the reassignment terminated prior to the reassignment upon its being repaid its loans by Pomona.

[1] We cannot agree with this contention of the Board because it seems to us to rest upon a misconstruction of the intent of the parties in entering into the arrangement and upon a misconception of the relationship between an assignor and assignee for security. What was intended by the arrangement may be fairly presumed from what was effected by it. Code Civ.Proc., sec. 1963(3). The practical effect of the arrangement was not simply to provide a secure method for the two banks to finance the two contractors by making the government's credit the real security for the bank loans to the contractors. The arrangement also resulted in making the government's credit the real security for the payment of Pomona for the work it did under the two contracts. The banks were not alone in not wishing to rely on Joaquin's credit. Pomona shared their feeling as is evidenced by its request of Joaquin upon beginning work that some type of arrangement be worked out whereby Pomona would receive payment for its work directly from the government. This request the arrangement, in effect, met, because the payments for Pomona's work went directly to the Stockton Bank rather than to Joaquin, the prime contractor, and the Stockton Bank immediately turned them over to Pomona's bank, the Bank of America.

[2] Furthermore, the Board's contention that these payments, which constituted what we call the second fund, were not assigned by Joaquin to Pomona but only to Pomona's bank, the Bank of America, is foreclosed by the contrary findings of the trial court as to the intent of the parties. The trial court found that under the arrangement the Stockton Bank took the first express assignment as trustee for not only Joaquin and the Bank of America but also for Pomona, that Pomona's entry into the formal subcontract was conditioned upon Joaquin's assigning the second fund to Pomona, and that this condition was accepted and performed by Joaquin. The trial court made these findings on the basis of extensive oral and documentary evidence introduced by Pomona for the purpose of showing the terms of the arrangement. A finding of the intent of the parties upon such evidence is a finding on a question of fact. Ross v. Pacific Mortgage Guaranty Co., 16 Cal.App.2d 672, 676, 61 P.2d 368; Hacker Pipe & Supply Co. v. Chapman Valve Mfg. Co., 17 Cal.App.2d 265, 272, 61 P.2d 944; Morrison v. Willhoit, 62 Cal.App.2d 830, 837, 145 P.2d 707. These findings, as indicated herein, have substantial evidentiary support and are therefore beyond challenge here as being legally erroneous. But we regard them as being factually correct as well because the implied assignment to Pomona's bank, the Bank of America, although for security, was absolute in form and was limited in no manner whatsoever to the amount of the loans made by the bank to Pomona. Hence, the assignment to Pomona's bank was equivalent in practical effect to an assignment to Pomona itself and was apparently so understood by the four parties to the arrangement.

[3-5] Moreover, in legal effect the implied assignment ran to Pomona as well as the Bank of America as a consequence of the relationship obtaining between an assignor and an assignee for security after the obligation secured has been discharged. Accordingly, a manifestation of the intent so to do was unnecessary. It is admitted that the second express assignment, the one from Pomona to the Bank of America, was

for security only although absolute in form. The relationship between an assignor and assignee for security is as follows. So long as the obligation secured remains unsatisfied, the assignee holds an entire but defeasible present interest in the subject matter of the assignment. Myers v. South Feather Water Co., 10 Cal. 579, 583; Kelly v. Universal Oil Supply Co., 65 Cal.App. 493, 498, 224 P. 261; McDevitt v. Jones, 60 Cal.App. 773, 779, 214 P. 661. There remains, however, in the assignor a future interest in the subject matter, namely, his power of defeasance of the assignee's interest by discharge of the secured obligation. Adamson v. Paonessa, 180 Cal. 157, 163, 179 P. 880; Webb v. Casassa, 82 Cal.App. 307, 312, 255 P. 541. Stated otherwise, the assignor's interest in the subject matter of the assignment is what remains after the secured obligation has been satisfied (Bridge v. Connecticut Mut. Life Ins. Co., 167 Cal. 774, 777, 778, 141 P. 375), and the assignee's interest is limited to the amount of the secured obligation. In re Phillips, 71 Cal. 285, 289, 12 P. 169. It follows, therefore, that once the secured obligation has been discharged, the assignee for security holds the excess as agent or trustee for the assignor. Fairbanks v. Crump Irr. & Supply Co., Inc., 108 Cal.App. 197, 217, 291 P. 629, 292 P. 529; Ginocchio v. Amador Canal & Min. Co., 67 Cal. 493, 496, 8 P. 29. Thus Pomona, as an assignor for security, at all times held an interest in the subject matter of the second express assignment, the money payable under the subcontract. By means of the implied assignment the second fund was set aside for the satisfaction of this claim. This fund thereby became an incident of the claim. Cf. Duncan v. Hawn, 104 Cal. 10, 14, 37 P. 626; 2 Williston Contracts (Rev.Ed.1936) p. 1251. Upon payment of the obligation secured by the second express assignment Pomona divested the Bank of America of and invested itself with the entire beneficial interest in the claim. Hence, by virtue of the relationship obtaining between Pomona and the Bank of America under the second express assignment, the implied assignment ran not only in favor of that bank as the designated assignee but also in favor of Pomona, the bank's assignor for security. The reassignment of the claim from the bank to Pomona was superfluous and ineffective because the bank's interest had already revested in Pomona upon payment of the secured advances.

[6-9] As previously stated the Board brands the implied assignment as voidable by it because made without consideration and without the formalities required for an effective assignment of a claim against the United States. The Board argues that since at the time of the making of the implied assignment Pomona was already obligated to Joaquin to produce 70% of the prime contract, Joaquin received nothing in return for making the implied assignment. We do not agree. It is true that there are two types of assignment—gratuitous and for value. An assignment made for a consideration sufficient to support an informal contract is made for value. Rest.Contracts, sec. 149. Section 1605 of the Civil Code defines such consideration as bargained-for benefit or detriment. This consideration does not have to move to the promisor, Creamery Package Mfg. Co. v. Bennett 48 Cal.App. 706, 709, 192 P. 328; Roberts v. Aikin, 13 Cal.App.2d 557, 558, 57 P.2d 519 or from the promisee. Barringer v. Warden, 12 Cal. 311, 315, Rest.Contracts, sec. 75(2); Williston, Contracts, Rev.Ed. 1936, sec. 114. One consideration may support the several promises of one end of the bargain. Tennant v. Wilde, 98 Cal.App. 437, 442, 277 P. 137; Rest.Contracts, sec. 83; Williston, op. cit. sec. 137A. Application of these settled rules of law to the making of the implied assignment demonstrate that it was supported by ample consideration. The implied assignment was but a part of the entire bargain made between the four parties, the arrangement. Prior to the arrangement there were simply Joaquin and Pomona and the prime contract. The arrangement introduced the two banks, the subcontract, and the three assignments. The purpose and effect of the arrangement was to provide bank financing for the two contractors and to secure the repayment of the bank loans and the payment of Pomona. The bank credits constituted more than adequate considera-

tion for the arrangement and therefore for its parts, including the implied assignment. While it may be said that the sole effect of the arrangement so far as the Stockton Bank's loans to Joaquin were concerned was merely to limit the security for the loans the bank had already promised, the same cannot be said with respect to the advances of the Bank of America to Pomona. These were obtained solely by means of the arrangement. As the party primarily responsible to the government for Pomona's performance of the portion of the prime contract allocated to it, Joaquin was benefited substantially by the advancement to Pomona by the Bank of America of loans sufficient to enable Pomona to perform properly. Cf. Oswald v. Schwartz, 181 Cal. 620, 625, 185 P. 959. Thus the Bank of America's loan to Pomona constituted consideration for the implied assignment.

[10, 11] Despite Pomona's assertion to the contrary, it must be conceded that the implied assignment was not made with the formalities prescribed by federal statute. 54 Stats. 1029, 31 U.S.C.A. § 203. But the function of these formalities is merely the protection of the United States from dubious claims. Noncompliance with them is irrelevant once the United States has been discharged from liability. Martin v. National Surety Co., 300 U.S. 588, 594-597, 57 S.Ct. 531, 81 L.Ed. 822; McKenzie v. Irving Trust Co., 323 U.S. 365, 369, 65 S.Ct. 405, 89 L.Ed. 305. This is the situation here. We conclude that the implied assignment to the Bank of America and Pomona was a valid assignment for value and is not voidable by the Board.

The validity of the assignment to the Board for the benefit of Jaoquin's creditors generally not being challenged, the final issue of this case still remains—which of the two assignments is entitled to priority over the other. As previously stated the Board claims priority for itself as a subsequent innocent legal assignee for value and without notice over Pomona which it characterizes as merely an earlier equitable assignee. We must reject this claim of priority on the part of the Board. In the first place Pomona should prevail because it is entitled to do so under each of the three generally recognized rules of priority between successive assignees of the same claim. In the second place we are of the opinion that in an equitable action such as interpleader, priority between successive assignments should not now depend upon the thoroughly technical distinction between legal and equitable titles. In the third place we do not think the Board qualifies under the rule of priority it urges since we do not regard it as a bona fide purchaser. In the fourth place to accord the Board priority on the basis of the rule urged by it would result in placing it, a representative, in a better position than either of the parties such an assignee is usually held to represent—the assignor or the creditors of the assignor. Finally Pomona's equity in the fund is essentially superior to that of the Board because Pomona sold its goods to Joaquin in reliance upon payment from this particular fund while the creditors, represented by the Board, were content to trust to merely the business responsibility of Joaquin.

[12-14] First, the rule of priority between successive assignees of the same thing in action in California is that the assignee who first gives notice to the debtor, or in lieu thereof to the holder of the fund involved prevails. Graham Paper Co. v. Pembroke, 124 Cal. 117, 121, 56 P. 627, 44 L.R.A. 632, 71 Am.St.Rep. 26; Widenmann v. Weniger, 164 Cal. 667, 673, 130 P. 421; Title Ins. & Trust Co. v. Williamson, 18 Cal.App. 324, 329, 123 P. 245, 247. Under this rule Pomona should take the fund because it first notified the Stockton Bank, the holder thereof, of its assignment. The second generally recognized rule of priority between successive assignees is that the time of assignment fixes priority. See Notes, 31 A.L.R. 876; 110 A.L.R. 774. Under this rule Pomona as the earlier assignee would likewise prevail. The third rule of priority, relating to "rights arising under contracts or for breaches of contract" (Rest.Contracts, secs. 148, 173), summarily presented, is that the subsequent assignee prevails only if he is a bona fide purchaser and in addition obtains either satisfaction of the obligor's duty or judgment against the obligor or a new contract with the obligor by means of a novation or delivery of

a tangible token or writing required by the obligor's contract for its enforcement. Plainly, the Board has not met any of the alternative requirements of this rule, and consequently under this rule as well, Pomona should take. Thus under all of the generally recognized rules of priority between successive assignments of the same thing in action Pomona should prevail.

[15-20] Secondly, we question whether in an equitable action such as interpleader which is properly governed exclusively by the principles of equity, Union Mutual Life Ins. Co. v. Broderick, 196 Cal. 497, 502, 238 P. 1034, a rule of priority based upon the technical distinction between legal and equitable titles should be followed. We grant that the implied assignment to the Bank of America and Pomona is of the character commonly described in our cases as an equitable assignment since its existence is implied from the conduct of the parties rather than established by express words of formal assignment. See McIntyre v. Hauser, 131 Cal. 11, 14, 63 P. 69; Goldman v. Murray, 164 Cal. 419, 422-424, 129 P. 462; Oswald v. Schwartz, supra, 181 Cal. 620, 624, 625, 185 P. 959; Brady v. Ranch Mining Co., 7 Cal.App. 182, 184, 94 P. 85; Van Orden v. Anderson, 122 Cal. App. 132, 142, 143, 9 P.2d 572; Baumgarten v. California Pac. Title & Trust Co., 127 Cal.App. 649, 656, 657, 16 P.2d 332; Oxnard School Dist. v. Penn. 132 Cal.App. 763, 766-769, 23 P.2d 828. But the modern view is that the law governing assignment of things in action having originated entirely in equity, priority between such assignments should be determined without regard to any distinction between legal and equitable titles. Goodyear Tire & Rubber Co. v. Bagg, 292 Mass. 125, 197 N.E. 481, 483, Middle West Roads Co. v. Peoples Nat. Bank & Trust Co., 210 Ind. 437, 4 N.E.2d 187, 191. It is to be noted in this connection that the Restatement of Contracts does not mention equitable assignments in its treatment of the subject of assignments although it does discuss several types of assignments which our courts term equitable assignments. Rest.Contracts, Ch. 7. Furthermore, leading textbooks upon the subject of assignments agree that the interest of any type of assignee is essentially equitable as distinguished from legal. Williston, op. cit. secs. 404, 446A, 447; Pomeroy, Equity Jurisprudence, 5th Ed.1941, sec. 693. Particularly in equity substance should be preferred to form. Civ.Code, sec. 3528. Accordingly, we cannot accept the Board's proferred rule of priority for application in the equitable action of interpleader.

[21-24] Thirdly, we doubt if the rule of priority urged by the Board is applicable to it. By its own terms the rule operates only in favor of bona fide purchasers. It must be borne in mind that the doctrine of bona fide purchaser is purely equitable in nature —an application of the chancellor's conscience. Pomeroy, op. cit. sec. 738. The overwhelming weight of authority is that an assignee for the benefit of creditors is not a bona fide purchaser because he is not a purchaser for value. 4 Am.Jur. p. 387; 6 C.J.S., Assignments for Benefit of Creditors, § 156; Pomeroy, op. cit. sec. 749b; Rest.Trusts, sec. 306. Our research on the point indicates that apparently only two states, Virginia and North Carolina, now definitely hold to the contrary. In fact the point has been so well settled for so long that one must turn generally to the opinions of judges of generations long gone to find thorough expositions of the basis for the prevailing view. It clearly appears from these older decisions such as Twelves v. Williams, 1838, 3 Whart. (Pa.) 485, 31 Am. Dec. 542, 543-545, and Van Heusen v. Radcliff, 1858, 17 N.Y. 580, 72 Am.Dec. 480, 482-484, and from the Restatement of Trusts, that the foundation for the prevailing view lies in the concept of present value. Value as used in the phrase "bona fide purchaser for value" must be distinguished from value when used in the phrase "assignment for value." Scott, Trusts, sec. 297A. In the latter phrase, as stated earlier in this opinion, value means merely consideration. In the phrase bona fide purchaser for value, value means present contemporaneous value. Fulkerson v. Stiles, 156 Cal. 703, 706, 105 P. 966, 26 L.R.A.,N. S., 181; Rest.Trusts, sec. 298; Pomeroy, op. cit. sec. 747; cf. notes 80 A.L.R. 395, 109 A.L.R. 163, 124 A.L.R. 1259; Title Guarantee & Trust Co. v. Henry, 208 Cal.

185, 192, 280 P. 959. Present value excludes by definition past consideration. The consideration for a general assignment for the benefit of creditors is the antecedent debts owed by the assignor to the creditors, Brainard v. Fitzgerald, 3 Cal.2d 157, 163, 44 P.2d 336, which plainly is nothing but past consideration. In return for a general assignment for the benefit of creditors, the creditors, the parties benefited thereunder, part with nothing and place themselves in no worse position than they were prior to the assignment for their benefit. They part with no present value. In this connection it is relevant to note that the assignment to the Board did not contain any release of Joaquin's liability to any of its creditors. On the basis of the foregoing we are at a loss to understand how an assignee for the benefit of creditors generally, such as the Board, can be regarded as a bona fide purchaser for value. The lone California decision so holding, Ferger v. Allen, 35 Cal. App. 738, 743, 170 P. 861, ignored this fundamental concept of present value and is otherwise unsound as we shall now demonstrate.

[25-27] Our fourth ground for rejecting the Board's claim of priority is that granting it would place the Board, a representative, in a better position than those it represents. In California two types of voluntary assignments for the benefit of creditors generally are recognized—statutory and common-law. Jarvis v. Webber, 196 Cal. 86, 96, 236 P. 138. The basic distinction between the two is that the former complies with the statutory requirements while the latter does not. Under the statutory assignment the assignee is not a purchaser for value and has no greater rights with respect to things in action transferred by the assignment than his assignor had. Civ.Code, sec. 3460. The common-law assignee in this respect stands in no better position than the statutory assignee (Moore v. Schneider, 196 Cal. 380, 387, 238 P. 81), for section 3460 merely adopted the common-law rule that the assignee simply stands in the shoes of his assignor. First National Bank v. Menke, 128 Cal. 103, 106, 60 P. 675. In fact in California the voluntary assignee has been consistently held, in contrast to the assignee in insolvency, who represents the creditors, to represent only the debtor, the assignor. Francisco v. Aguirre, 94 Cal. 180, 182, 29 P. 495; Ruggles v. Cannedy, 127 Cal. 290, 304, 53 P. 911, 59 P. 827, 46 L.R.A. 371; Smith v. Kirkpatrick, 208 Cal. 417, 419, 420, 281 P. 616. The Ferger decision ignored likewise this substantial body of authority. We regard, therefore, the Ferger decision's holding that an assignee for the benefit of creditors generally is a bona fide purchaser to be not only wrong in principle but contrary also to authority. As long ago as 1828 the New York Chancellor rejected as contrary to the settled principles of equity the precise contention of the Board here—namely, that because it as voluntary assignee for the benefit of creditors acquired the legal estate of its assignor, it could thereby defeat prior equities of which it had no notice at the time of the assignment. Matter of Howe, 1 Paige ch. 124, 19 Am. Dec. 395, 397.

[28, 29] But if the Board be regarded as the representative of the creditors as the Ferger decision realistically holds, it does not follow that it thereby becomes a purchaser for value because as previously indicated, the creditors themselves are not such. 6 C.J.S., Assignments for Benefit of Creditors, § 156; Pomeroy, op. cit. sec. 749b. Absent a fraudulent conveyance or an illegal preferential transfer, a creditor, even an attaching creditor, can obtain no better position than his debtor enjoys. Burns v. Peters, 5 Cal.2d 619, 625, 55 P.2d 1182. The collective rights of the liquidator, the assignee for the benefit of creditors, are no greater than the several rights of those he represents. In his representative capacity the assignee must represent either his assignor, the debtor, or his beneficiaries, the creditors. If he be held to represent only his assignor, clearly his position is no higher than that of his assignor. If on the other hand he be held to represent the creditors, his position likewise is no better than theirs. Thus, however the assignee for the benefit of creditors be regarded, his statute cannot be raised above those he represents except as to fraudulent conveyances and illegal preferential transfers. He is not a

purchaser for value because those he represents are not. Glenn, Liquidation (1935) secs. 312, 532.

[30-32] Finally we regard Pomona's equity in the fund as superior to that of the Board. We realize that to decide in favor of Pomona is to give Pomona a preference over the other creditors of Joaquin whom the Board represents. But preferences are not generally forbidden by our law (Civ. Code, sec. 3432), since under our system of law an individual may deal with his own property as he sees fit subject only to established limitations of social policy. Ferguson v. Larson, 139 Cal.App. 133, 136, 33 P.2d 1061. In fact, the general rule in both the United States and England appears to be that where no fraud is involved and a fund in the hands of a third person has been set apart for the payment of a particular creditor, whether by way of equitable assignment or otherwise, the preference of that creditor is enforced in the event of the debtor's insolvency. Note, 32 A.L.R. 950. This rule rests upon the superior equity of the preferred creditor in the fund, who rendered his services or otherwise advanced his credit in reliance upon payment from the fund, while the other creditors were content to act upon only the personal responsibility of the debtor. The recognition of the preference gives to each the benefit of his particular bargain. In this case there is no evidence that any of the creditors represented by the Board extended credit to Joaquin in reliance upon any of the money received by Joaquin under the prime contract. Pomona created this fund by its work under the two contracts in reliance upon its appropriation to Pomona by means of the implied assignment. Pomona is therefore entitled to it to the exclusion of the other creditors of Joaquin and of their representative, the Board. Cf. Seymour v. Wilson, 19 N.Y. 417, 420; Muller v. Kling, 209 N.Y. 239, 103 N.E. 138, 140; Greey v. Dockendorff, 231 U.S. 513, 516, 34 S.Ct. 166, 58 L.Ed. 339; Pomeroy, op. cit. sec. 685.

The judgment is affirmed.

WOOD, J., and VALLEE, Justice pro tem., concur.

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82 Cal.App.2d 585

## PEOPLE v. PORTER.

Cr. 4164.

District Court of Appeal, Second District,
Division 2, California.

Nov. 25, 1947.

Rehearing Denied Dec. 8, 1947.

Hearing Denied Dec. 22, 1947.

**1. Criminal law 🔑1088(10)**

Only evidence which can be properly inserted in record on appeal is that which was heard by trial court or offered in evidence and excluded.

**2. Criminal law 🔑1110(1)**

Motion for augmentation of record on appeal by having inserted therein record of judgment in a case tried in a municipal court was denied, where record of judgment in municipal court had not been offered or received in evidence in trial court.

**3. Assault and battery 🔑92**

Evidence supported conviction of assault with a deadly weapon. Pen.Code, § 245.

**4. Criminal law 🔑1144(13)**

Where there was nothing inherently impossible or incredible in complaining witness' testimony, appellate court, on appeal from conviction, would disregard conflicting and contradictory statements of other witnesses.

**5. Criminal law 🔑1036(1)**

Generally, objections to admission of evidence may not be made for first time on appeal.

**6. Criminal law 🔑1043(2)**

An objection that a "proper foundation has not been laid" for admission of evidence is too general in absence of specification of particulars wherein foundation is insufficient to permit defendant to urge on appeal insufficiency of the foundation for receipt of the evidence.

**7. Criminal law 🔑1043(2)**

If a general objection to evidence is overruled, such objection cannot avail objector on appeal unless it appears that such evidence was inadmissible for any purpose.

**8. Criminal law 🔑1043(2)**

Defendant could not complain on appeal that trial court committed prejudicial error in permitting deputy district attorney during cross-examination to ask witnesses, who had testified that defendant had good reputation for being peaceful and law-abiding citizen, whether they knew that defendant had been arrested and found guilty of disturbing peace, where only objection at trial was general objection that a proper foundation had not been laid.

WILSON, J., dissenting.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

James H. Porter was convicted of assault with a deadly weapon, and he appeals and moves for augmentation of the record on appeal.

Motion denied and judgment affirmed.

Avery M. Blount, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Alberta Gattone, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

We have for consideration (1) a motion for the augmentation of the record on appeal, and (2) an appeal from a judgment of guilty of violating section 245 of the Penal Code (assault with a deadly weapon) after trial before the court without a jury.

### The Motion for Augmentation of the Record.

Defendant asks this court to augment the record on appeal by having included therein (1) the arguments of the district attorney and defendant's attorney before the trial court, and (2) the record of the judgment in case number 23386 of the municipal court of the city of Los Angeles.

The purpose of such motion is to support in this court the argument that the district attorney committed prejudicial error in asking character witnesses in behalf of defendant whether or not they knew that defendant had been arrested for disturbing the peace and found guilty of such charge, and in thereafter arguing to the court that the character witnesses' testimony should be considered in the light of the fact that they did not know that defendant had been found guilty of disturbing the peace. Defendant asserts that the judgment in the municipal court just referred to shows that he was found guilty only of being drunk in a place open to the public view and was not found guilty of disturbing the peace.

[1, 2] The motion must be denied for the reason that the record of the judgment in the municipal court was not offered or received in evidence in the trial court. Only evidence can properly be inserted in the record which was (a) heard by the trial court, or (b) offered in evidence and excluded. To permit an appellant to place in the record any evidence (a) not actually heard by the lower court or (b) offered in evidence and excluded, would work great injustice both to the trial court and to the opposing party. It might present to the appellate court a case entirely different from the one presented to the trial court and decided by it. (In re Moore, 78 Cal. 242, 244, 20 P. 558; Hamilton v. Kelsey, 126 Or. 26, 268 P. 750, 755; Thex v. Shreve, 38 Wyo. 285, 267 P. 92, 94.)

Since the judgment of the municipal court was not offered or received in evidence by the trial court, it cannot properly be made a part of the record in this court, and as a result it naturally follows that it would not be of advantage to defendant to order the arguments of counsel made a part of the record here.

### The Appeal.

[3] Defendant contends that the judgment should be reversed for the following reasons:

First: *There is not any credible or substantial evidence to sustain a finding that defendant committed an assault with a deadly weapon upon the complaining witness.*

This proposition is untenable. The complaining witness testified that defendant was making a lot of noise in loading his automobile and trailer which disturbed the complaining witness and other neighbors; that he went over and asked defendant not to make so much noise which request defendant disregarded, whereupon complaining witness told defendant, "you better keep quiet or I will call the police"; that he thereupon turned to call the police and defendant hit him on the head with a hammer. This evidence which was evidently believed by the trial judge was sufficient to sustain the finding of guilty of assault with a deadly weapon.

[4] There is nothing inherently improbable or incredible in such testimony. Likewise this court must disregard the conflicting and contradictory statements of other witnesses. (People v. Pianezzi, 42 Cal.App. 2d 265, 269, 108 P.2d 732.)

Second: *The trial court committed prejudicial error in permitting the deputy district attorney during cross-examination to ask witnesses, who had testified that defendant had a good reputation for being a peaceful and law-abiding citizen, whether they knew that defendant had been arrested and found guilty of disturbing the peace.*

[5] In three instances the question was asked the character witnesses and they were permitted to answer without any objection being made. Defendant cannot, of course, predicate error upon the admission of the answers of these witnesses to the question for the reason that it is the general rule that objections to the admission of evidence may not be made for the first time on appeal.

[6, 7] On cross-examination of witness Aumack, when the district attorney propounded the alleged objectionable question, counsel for defendant said, "I object to the question as no foundation." The foregoing objection was not sufficiently explicit to indicate the specific reason for its interposition, and was therefore properly overruled. An objection that a "proper foundation has not been laid" is too general in the absence of a specification of the particulars wherein the foundation is insufficient to permit an appellant to urge on appeal the insufficiency of the foundation for the receipt of the evidence. (Nofziger Lumber Co. v. Solomon, 13 Cal.App. 621, 627, 110 P. 474.) It is the general rule that if a general objection to the evidence is overruled such objection cannot avail the objector on appeal unless it appears that such evidence was inadmissible for any purpose whatsoever. (People v. Conterno, 51 Cal.App.2d 167, 169, 124 P.2d 610.) An objection must usually be specific and point out the ground or grounds relied upon in a manner sufficient to advise the trial court and opposing counsel of the alleged defect so that the ruling may be made understandingly and the objection obviated if possible.

[8] Clearly in the present case the objection did not fall within the foregoing requirements and the evidence was relevant and material to an issue before the trial court.

Again when a similar question was asked the witness William Frank, counsel said, "I object to that." The trial court did not err in overruling the objection thus made. This objection was insufficient for the same reasons that the objection to the testimony of the witness Aumack was insufficient.

The motion to augment the record is denied and the judgment is affirmed.

MOORE, Presiding Justice (concurring).

I concur with the opinion of Justice McCOMB. It complies with the decisions upon the doctrine of the paramountcy of the judgment of the trial court when there is substantial evidence to support it. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Perkins, 8 Cal.2d 502, 510, 66 P.2d 631; People v. Woo, 181 Cal. 315, 326, 184 P. 389, 393. In the Woo case the court said "it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict * * * can be set aside on appeal * * * it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below." In the face of such rule valid reason appears why the conviction of appellant should not be set aside. The testimony of the complainant is clear, firm and reasonable. He approached appellant who in the dead of night was making hideous noises and asked him to desist or he would "call the police," and as he turned to call the police "something hit him on the head." This was contradicted by appellant, who is a licensed detective who testified that after he said he would leave as soon as he could rope down his load complainant jumped over the fence grabbed him and hit him in the face. From the cold record it is not difficult to understand why the trier of fact convicted notwithstanding the numerous contrary statements by the witnesses. Appellant's testimony that while he was lying flat on his back with complainant's one knee on his stomach and the other on his arm he "happened to strike my hand against my hammer and I took the hammer and hit the one that was beating me in the face" is not as reasonable as the narrative of the prosecuting witness.

WILSON, Justice (dissenting).

I dissent. I cannot subscribe to the conviction of the defendant upon evidence so minuscule in quantity and so improbable in quality that it not only fails to overcome the presumption of innocence and to remove the cloak of reasonable doubt that covers a defendant in a criminal action but is unbelievable.

The undisputed facts are these: Defendant had been requested to vacate a garage in which he had been residing; in compliance with the request defendant had moved some of his effects from the garage prior to the date of the alleged offense; at about 1:00 o'clock in the morning he was loading his property into his trailer in front of the garage when the complaining witness left his nearby home and went to the front of the garage where the defendant was loading his trailer. From this point the evidence is in conflict.

The complaining witness, Carlson, testified that he asked defendant to stop making a noise in loading his trailer because he was waking the neighbors; that the defendant threw some lumber into the trailer, and the complaining witness threatened to call the police; that defendant struck the complaining witness with a hammer six or seven times; that he then struck the defendant with his fist, knocking him to the ground; he denied that he struck defendant while the latter was on the ground; denied that his brother struck or kicked defendant. Carlson's claim that he was struck on the head with a hammer several times before he could strike defendant is unbelievable.

Defendant testified that the complaining witness struck the defendant first; that the latter did not have anything in his hand; that defendant fell to the driveway; that while defendant was lying on his back the complaining witness beat him in his face and that the brother of complaining witness kicked him in the side; that while defendant was struggling to defend himself his hand came in contact with a hammer that was lying on the driveway and with it he hit the complaining witness who was then beating defendant in the face; that at that time defendant was lying on his back, complaining witness had one knee on his stomach and the other on his arm.

Mrs. Katie Gauldin, who lived in a house next door to the garage, testified that she heard defendant screaming; that she went out and saw defendant lying on his back with one man on top of him beating him and another man kicking him; that she subsequently ascertained that the two men were the complaining witness and his brother; that when she called to the two men asking them to leave defendant alone one of them said "Go back in the house or he would slap my damn face"; that she called Mr. Johnson, who was rooming in her home; that when Johnson came out and remonstrated with the Carlsons one of them threatened to come over and beat up Mr. Johnson and started toward him.

Mr. Johnson testified that when he came out of the house defendant was on the ground, one man was hitting him and the other kicking him; defendant was screaming; that when he protested against the actions of the two men and said there was no use in killing the defendant one of them replied: "Well, I will come over there and beat hell out of you;" that he came through a gate toward Johnson, and the latter went in the house and called the police.

Carlson's brother, who took part in the affray, was not called as a witness. There is no evidence that the brother was not available or that he could not have been produced at the trial. Therefore under a familiar rule of evidence it will be presumed that if he had been called as a witness his evidence would have been adverse to the prosecution.

If the complaining witness had been hit on the head six or seven times with a hammer he, instead of defendant, would have been lying on the driveway and, unless his head was made of stone, he would have been unable to continue to fight and thereafter to relate so meticulously all the circumstances to which he testified. The evidence as to the hammer-blows corroborates defendant's testimony that he used the hammer while Carlson was on top of him.

Carlson's belligerency is shown by the threats of violence made to Mrs. Gauldin and Mr. Johnson when they protested against the assault of the two against the one who was then helpless on the pavement, and by the fact that when defendant was able to get to his feet and attempted to escape by running down the driveway he was "headed off" by Carlson and prevented from leaving. His hostile conduct tends to corroborate defendant's evidence that the complaining witness struck the first blow without provocation. The latter's testimony that he did not strike defendant and that his brother did not kick defendant while the latter was lying on the driveway is flatly contradicted by defendant, Mrs. Gauldin and Mr. Johnson. What Carlson's brother may have said, if produced, is left to conjecture.

The majority opinion states that the evidence of the complaining witness "was evidently believed by the trial court" and "was sufficient to sustain the finding of guilty." The fact that in the face of all the circumstances shown by the evidence the court believed the complaining witness is not sufficient, giving consideration to all the other evidence in the case, to overcome the presumption of defendant's innocence until he was proved guilty beyond a reasonable doubt.

This case does not come within the rule that a judgment must be sustained when there is substantial evidence to support it for the reason that there is an utter lack of substantial evidence of appellant's guilt. There are no conflicting statements in the testimony of the various witnesses except where they collide with the incredible evidence of the complaining witness.

In view of the evidence of the complaining witness as to the extent of the injuries received by him from the hammer blows, the contradiction of his testimony by defendant and two disinterested witnesses, the injuries inflicted on defendant, consisting of a broken nose, lacerations on his face, bruised side and other wounds, Carlson's evidence that he was struck first by defendant is so highly improbable, incredible and unbelievable that the presumption of innocence still prevails and reasonable doubt has not been dispelled.

The judgment should be reversed.

## In re BUCK'S ESTATE.*

Civ. 7306.

Sac. 5790.

District Court of Appeal, Third District, California.

Nov. 26, 1947.

Hearing Granted Jan. 22, 1948.

**1. Wills** 🔑**753, 756**

A "specific bequest" deals with specific property and can be satisfied with no other, whereas, a "general bequest" is pecuniary in character and the nominal subject matter thereof is mentioned merely to indicate the amount which the legatee is to receive. Probate Code, § 161(1).

See Words and Phrases, Permanent Edition, for all other definitions of "General Bequest".

**2. Wills** 🔑**756**

A general bequest is to be satisfied by the nominal subject if it is in the testator's estate at his death, and if it is not in his estate, then by its value at the date of the testator's death. Probate Code, § 161.

**3. Wills** 🔑**750**

Whether a bequest of a security is specific or general depends on the intention of the testator at time the will was drafted as expressed in the will considered as a whole and in light of the surrounding circumstances. Probate Code, § 161(1).

**4. Wills** 🔑**754**

Language of will bequeathing each of testator's six children "5,000 shares of capital stock" of named corporation "which shares are now represented in my estate by trustees' certificates" and in subsequent paragraph bequeathing to unrelated person "5,000 shares of capital stock" of same corporation "which shares are now represented by trustees' certificates, and in addition thereto the sum of $30,000 in cash" created "specific bequests" and not "general bequests". Probate Code, § 161(1).

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* Subsequent opinion 196 P.2d 769.

See Words and Phrases, Permanent Edition, for all other definitions of "Specific Bequest".

**5. Wills ⟹754**

In determining whether bequest of capital stock of corporation was a specific or a general bequest, court was entitled to consider as part of the extrinsic evidence that the stock had never been traded or listed on any stock exchange and that there had been comparatively few sales of the stock, and that it was closely held. Probate Code, § 161(1).

**6. Statutes ⟹231**

A heading to a code section is entitled to great weight in determining the meaning of a section.

**7. Wills ⟹807**

The statute providing that legacies to a spouse or to kindred shall abate only after abatement of legacies to persons not related to testator, gives a spouse or kindred priority over strangers for the protection of legacies whenever there is a deficiency of assets whether to pay debts or to satisfy legacies. Probate Code, § 752.

**8. Wills ⟹812**

Where testator made specific bequests of capital stock of corporation to each of six children and also to an unrelated legatee and partial ademption resulted when testator entered into property settlement agreement with testator's wife under which a sufficient number of shares of stock were transferred to wife to prevent satisfaction of bequests, the unrelated legatee was required to bear the ademption in toto and was not entitled to share pro rata with children in number of shares remaining. Probate Code, §§ 161(1), 752.

**9. Wills ⟹812**

Where testator made specific bequests of capital stock of corporation to each of six children and also to an unrelated legatee and partial ademption resulted when testator entered into property settlement agreement with testator's wife under which a sufficient number of shares of stock were transferred to wife to prevent satisfaction of bequests, language of will and extrinsic evidence sustained finding that will expressed no intention differing from statute providing that legacies to kindred abate only after abatement to persons not related to testator. Probate Code, §§ 161(1), 752.

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Appeal from Superior Court, Solano County; Harlow V. Greenwood, Judge.

Proceeding in the matter of the estate of Frank H. Buck, deceased, wherein executor petitioned probate court for instructions. From decree that there was an ademption as to shares of capital stock bequeathed to Helen S. Peterson, Helen S. Peterson appeals.

Decree affirmed.

Ira B. Langdon, of Stockton, for appellant.

Andrew F. Burke, of San Francisco, Francis C. McInnis, of Fairfield, and Hardin, Rank, Meltzer, & Fletcher, of Oakland, for respondent.

SCHOTTKY, Justice pro tem.

Frank H. Buck, an attorney at law since 1911 and congressman from the third California district from 1933 until his death on September 17, 1942, executed a will on December 7, 1940. In said will he made certain bequests of shares of stock of a company known as "Belridge Oil Company," made certain cash bequests, and bequeathed the residue of his estate to his wife, Eva B. Buck. The will contained two paragraphs reading as follows:

"Sixth: My children have all been provided for amply under the will of my mother, Annie S. Buck. Nevertheless, as a final and personal bequest, I give and bequeath to each of them Five Thousand (5,000) shares of the capital stock of the

Belridge Oil Company, which shares are now represented *in my estate* by trustees' certificates." (Italics added.)

"Eighth: I give and bequeath to Helen S. Peterson, residing at the time of the execution of this will at Garden Towers, 15th Street, N. W., Washington, D. C., Five Thousand (5,000) shares of the capital stock of Belridge Oil Company, which shares are now represented by trustees' certificates, and in addition thereto, the sum of Thirty Thousand Dollars ($30,000.00) in cash."

There were six children who survived the testator; and Helen S. Peterson, mentioned in paragraph Eighth, is not related to testator.

On February 26, 1941, decedent entered into a property settlement agreement with his wife, Eva B. Buck, under the terms of which agreement 10,000 shares of the Belridge Oil Company stock were transferred to her. At the time of the execution of his will, decedent was the owner of 40,001 shares of Belridge Oil Company stock, 40,000 of which were covered by a Voting Trust Agreement. He acquired no additional shares, so that at the time of his death he owned 30,001 shares which are part of the assets of the estate in probate. Because 35,000 shares were bequeathed by said paragraphs Sixth and Eighth of his will, the executor petitioned the probate court for instructions, and that court, after a hearing, found that the bequests of shares made under said paragraphs were specific bequests, and decreed that under section 752 of the Probate Code the 30,000 shares of the oil company stock should be distributed to the six children of decedent in full satisfaction of their bequests, and that there was an ademption as to the 5,000 shares bequeathed to Helen S. Peterson. The court also determined that all dividends received on said stock since the date of decedent's death should go to the children and none to Helen S. Peterson. Miss Peterson has appealed from said decree.

Before proceeding to discuss the contentions of appellant we shall set forth briefly some additional facts which appear from the record.

The number of shares issued by the Belridge Oil Company was 1,000,000. Of these approximately 61% or 612,911⅔ shares were subject to a voting trust agreement and the owners thereof held trustees' certificates. These shares were not free shares but were shares restricted by the provisions of the voting trust agreement and of the voting trust certificates issued by the trustees in accordance therewith. It appears from the voting trust agreement that the shares subject to it were closely held, and were contributed by three families of which testator's family was one. (At the date of decedent's will, December 7, 1940, the shares subject to the voting trust were held by members of only eight families, and the shares not subject to the voting trust were in only 33 ownerships.) It also appears that the Belridge shares had never been traded in or listed on any stock exchange, and that between January 15, 1937, the date of the creation of the voting trust, and September 17, 1942, the date of testator's death, there were no sales of shares subject to the voting trust, and sales of only 4166⅓ shares not subject to the voting trust were made. The testator was at all times a director of Belridge and one of the trustees under the voting trust agreement.

The first contention of appellant is that the bequests in both articles "Sixth" and "Eighth" are general and not specific.

Section 161 of our Probate Code provides:

"Legacies: Kinds. Legacies are distinguished and designated, according to their nature, as follows:

"(1) Specific. A legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator, is specific; if such legacy fails, resort cannot be had to other property of the testator."

In 4 Page on Wills (Lifetime Ed.) sec. 1394, p. 112, it is said:

"A specific legacy is a gift of a specific thing, or of some particular portion of the testator's estate, which is so described by the testator's will as to distinguish it from other articles of the same general nature. A specific legacy differs from a general legacy in that it is not intended by testator to be paid out of his estate generally, but is to be paid solely by delivering to the beneficiary the specific thing given by will, as distinguished from a designated value, quantity, and the like.

"A specific legacy is given by words which describe and identify the specific property which testator gives to the beneficiary.

"It is not necessary that the property be described in detail, as long as it can be distinguished from testator's general estate."

In 18 Am. & Eng. Encyc. of law (2d Ed.) 718, it is stated: "A bequest of stocks, bonds, or other securities is specific when it appears that the testator intended to give the legatee the particular shares or securities owned by him (the testator) or a certain amount or proportion thereof; and in such case it is the security itself and not the money represented by it that passes to the legatee."

A general bequest is, in essence and legal effect, a pecuniary bequest in which the nominal subject matter of the bequest is mentioned *as a standard of value* only, so as to mark the amount of the testator's bounty. In 4 Pomeroy's Equity Jurisprudence (5th Ed.) sec. 1132, pp. 361, 362, in speaking of general legacies, the author says: "They are, therefore, rather gifts of *amounts* than of things or pieces of property specially described and identified. Since all general legacies are, in their legal effect, equivalent to gifts of money equal in amount to the value of the thing actually described in the bequest, the term 'pecuniary' is also sometimes used as synonymous with 'general'. * * * The peculiar effect of a general legacy is, that, instead of operating as a voluntary assignment of the identical thing to the legatee, and so taking effect only when the specific thing or fund remains in existence as a part of the testator's estate, it creates an obligation resting upon the executor to pay to the legatee the amount specified, if there are sufficient assets left in the estate."

And in 4 Page on Wills, sec. 1393, p. 108, it is said: "As a rule, a general legacy is measured by value or quantity."

[1, 2] Briefly stated, a specific bequest deals with specific property and can be satisfied with no other, whereas, a general bequest is pecuniary in character and the nominal subject matter thereof is mentioned merely to indicate the amount which the legatee is to receive. A general bequest, therefore, is to be satisfied by the nominal subject matter if it is in the testator's estate at his death, and if it is not in his estate, then by its value at the date of the testator's death.

In determining whether a bequest is special or general, the testator's intention controls. As was well said in Re Estate of Jones, 60 Cal.App.2d 795, at page 798, 141 P.2d 764, 765: "Running through the cases * * * are certain fundamental concepts which have been almost universally adopted. Thus, regardless of statutory definitions, see sec. 161, Probate Code, the fundamental and controlling factor is the intent of the testator at the time the will was drafted as expressed in the will considered as a whole and in light of the surrounding circumstances."

And as stated in 69 C.J., sec. 2104, p. 932: "* * * whether the bequest of a security is specific, general, or demonstrative, depends on the intention of the testator, as expressed in the will considered as a whole, in the light of the surrounding circumstances."

In Re Estate of De Bernal, 165 Cal. 223, 131 P. 375, 376, Ann.Cas.1914D, 26, testatrix' will devised and bequeathed to her grandchildren, naming them, "share and share alike to each, five acres of that certain piece or parcel of land * * * known as the Italian Gardens." In holding the devise to be specific the court said, 165 Cal. at page 230, 131 P. at page 378, Ann.Cas. 1914D, 26:

"It was said in Re Estate of Painter, 150 Cal. [498], 505, 89 P. [98], 100, 11 Ann. Cas. 760, that in this state the question whether a testamentary gift is specific or general is to be determined by the same tests where the subject of the gift is real as where it is personal property. Section 1357 of the Civil Code declares: 'A legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator, is specific; if such legacy fails, resort cannot be had to the other property of the testator.' * * * It is unquestionably specific to the extent that it minutely describes the tract of land on which the devise is to operate, and it is also clear that it possesses one of the characteristics of a specific devise or legacy peculiar to such a gift, viz.: that resort cannot be had to property of the deceased other than her interest in the Italian Gardens tract to satisfy it."

In Re Estate of Goodfellow, 166 Cal. 409, at page 412, 137 P. 12, 14, the testatrix bequeathed $5,000 for the benefit of Methodist Episcopal Conference out of her share of her father's estate, but before the death of the testatrix she had received all her share of her father's estate, and in holding the bequest to be specific the court said: "The legacy, it seems to us, was clearly specific. We are not unmindful of the rule that courts in general are averse to construing legacies as specific, * * * While the decisions are by no means uniform, the weight of authority supports the view that this was a specific legacy."

In Re Estate of Jepson, 181 Cal. 745, 186 P. 352, alluded to in the Jones case, there was an appeal from a decree of distribution; appellants claimed as beneficiaries under a legacy the subject of which was the sum of $12,000 invested at interest in certain mortgages which were paid and cancelled before the death of the testator. The lower court held the bequest was specific and that there was, therefore, a plain case of ademption. Appellants, on the other hand, contended that the legacy was general or demonstrative, and that they were, consequently, entitled to $12,000 out of the general assets of the estate. In sustaining the lower court's view that the bequest was specific, the court said, 181 Cal. at page 747, 186 P. at page 352:

"While it is true that a legacy is presumed to be general unless it clearly appears to be specific, especially where it is of a pecuniary character, the intent of the testator necessarily controls, and where it appears that his intent was to give a particular thing or a given sum of money, not generally but only from a specified and definitely ascertained source, the court has no choice but to give effect to that intent.

"Unquestionably, the legacy under consideration in the instant case would have been specific had its subject been described as the mortgages themselves rather than as a given sum of money. * * * In other words, if it was the sum owing on the mortgages which was bequeathed, and that sum, for the sake of convenience, was described as amounting to the total of the sums secured by the mortgages, the legacy must be considered specific."

In Re Estate of Babb, 200 Cal. 252, 252 P. 1039, 1040, the testator bequeathed to his uncle all the money "I may have in any bank at the time of my decease, * * *." In another provision of the will, as an heir at law of Mary L. Taylor in whose estate he was entitled to share, he devised and bequeathed his share of that estate to the five named respondents. Before testator's death he had received, after execution of his will, from the Taylor Estate, $4,048.20 in money and 70 shares of the capital stock of the Cincinnati Discount Company. The money received from the Taylor Estate was deposited by the testator to his credit in a bank and was part of the money left by him at his death. His executor sold the 70 shares for $4,200 and also received dividends thereon in the sum of $420. In holding that the bequest of decedent's share in the Taylor Estate was specific, the court said, 200 Cal. at pages 255 and 257, 252 P. at page 1040: "A will speaks from the date of the death of the deceased, and not from the date of its execution. [Cases and authorities.] * * * The receipt by the testator of the money and property from the Taylor estate produced an ademption of the legacies to the respondents in so far as the money and property so received by the testator might have been included in said legacies had said money and property remained a part of the Taylor estate up to and including the date of the testator's death. In re Estate of Goodfellow, 166 Cal. 409, 137 P. 12. The legacies bequeathed to respondents by said will were specific legacies, Civ.Code, sec. 1357. 'Ademption is effected by the extinction of the thing or fund bequeathed. * * *' Kramer v. Kramer, 5 Cir., 201 F. 248."

In Re Estate of Daly, 202 Cal. 284, 260 P. 296, the testator bequeathed one-half of 15,377½ shares of the Dairy Delivery Company, then owned by him, to his wife, and the other half of said shares in trust for his children who were named residuary legatees and devisees. During the course of administration the executors received the dividends on all of said stock. The widow filed a petition praying the probate court to distribute said stock and accrued dividends to her. The court made its order distributing the one-half of the stock to her but denied the petition for the distribution to her of one-half of the income, and her appeal was from that portion of the court's order. In reversing the order of the court below the Supreme Court said, 202 Cal. at page 287, 260 P. at page 297: "The bequest to the widow of one-half of the stock of the Dairy Delivery Company, being a 'legacy of a particular thing, specified and distinguished from all others of the same kind,' was, of course, a specific bequest (Civ.Code, sec. 1357; In re Estate of De Bernal, 165 Cal. 223, 131 P. 375, Ann.Cas.1914D, 26), and 'specific legacies carry with them all accessions by way of dividends or interest that may accrue after the death of the testator.' (2 Schouler on Wills, sec. 1138, p. 1300; In re Estate of De Bernal, supra; Matter of Estate of Woodworth, 31 Cal. 595, 605; Larned v. Adams, 14 Fed.Cas. pages 1155, 1158, No. 8,092; Nash v. Ober, 2 App. D.C. 304, 308; Walton v. Walton, 7 Johns. Ch., [N.Y.] 258, 11 Am.Dec. 456). See 11 Cal.Jur. pp. 484, 486."

In support of her contention that the legacies here involved are general and not specific, appellant relies mainly on Re Estate of Jones, supra. In that case the particular bequest read as follows: "(third) I hereby give and bequeath two one thousand dollar Pacific Gas & Electric five percent bonds to Lyle Hill Presbyterian Church, at Lyle Hill, Templepatrick, County Antrim Ireland, the income from said bonds to be divided equally—between Ballyutoag sunday school, and Lyle Hill sunday school. When the bonds become due, the money to be reinvested by the trustees of Lyle Hill Church, the income to be divided equally between the above mentioned sunday schools."

At the date of the execution of his will the testator owned ten $1,000 5% unregistered bearer bonds of the Pacific Gas & Electric Company. At the time of his death testator owned no Pacific Gas & Electric bonds. The trial court found that the bequest was specific and that said legatee should receive nothing under said bequest. Upon appeal the District Court of Appeal held that the bequest in question was a general bequest and reversed the order of the lower court. No petition for a hearing in the Supreme Court was filed. In the course of its opinion the court said:

"The problem as to whether a particular bequest is specific, general, or demonstrative has many times been considered by the courts. The cases from the various jurisdictions have not been entirely consistent in their determinations. Running through the cases, however, from this and other jurisdictions, are certain fundamental concepts which have been almost universally adopted. Thus, regardless of statutory definitions, see sec. 161, Prob.Code, the fundamental and controlling factor is the intent of the testator at the time the will was drafted as expressed in the will considered as a whole and in light of the surrounding circumstances. (In re Estate of Jepson, 181 Cal. 745, 186 P. 352; see cases collected 26 Cal.Jur. p. 1038, sec. 316; 69 Cor. Jur., p. 925, sec. 2095; 4 Page on Wills, Lifetime Edition, p. 101, sec. 1392. The intention to be determined is whether the testator intended to give a specific thing, and that alone, or whether he intended to give a bequest that, in any event, should be paid out of his general estate. In determining this intent, the courts have held that there is a strong presumption that the bequest was intended to be general and not specific, and, in cases of doubt, the courts will presume that the testator intended to give a general bequest rather than a specific one. (In re Estate of Jepson, 181 Cal. 745, 186 P. 352; see discussion and cases collected 4 Page on Wills, Lifetime Edition, p. 101, sec. 1392 at pp. 105, 106; 69 Cor.Jur., p. 926, sec. 2096.

"In applying these rules to bequests of stocks, bonds and other securities it is quite generally held that 'A gift of a certain number of shares of stock, bonds, and the like, described by the corporation, obligator, and the like, or by value or quantity, but not indicating any specific lot of such securities, is a general legacy; even if testator owned the exact number of such securities, or if such securities were in certificates of deposit of such denominations that any one would satisfy the provisions of the will. * * * Even if the bonds are described by number, the gift may be general, if the language does not show that testator intended to pass bonds which he owned at his death.' (4 Page on Wills, Lifetime Ed., p. 122, sec. 1397.)

* * * * * *

"There are many other cases holding that a bequest of a stated number of shares of stock of a designated corporation without descriptive words of ownership showing an intent to give the specific shares, is general and not specific. A few such cases are Palmer v. Palmer's Estate, 106 Me. 25, 75 A. 130, 19 Ann.Cas. 1184; Johnson v. Goss, 128 Mass. 433; In re Snyder's Estate, 217 Pa. 71, 66 A. 157, 11 L.R.A.,N.S., 49, 118 Am.St.Rep. 900, 10 Ann.Cas. 1188; Benson v. Gerhart, 241 Ill. App. 376; Evans v. Hunter, 86 Iowa 413, 53 N.W. 277, 17 L.R.A. 308, 41 Am.St. Rep. 503; In re Malone's Estate, 143 Misc. 657, 257 N.Y.S. 837.

"If the rules above set forth are applied to the facts here involved there can be no reasonable doubt but that the trial court incorrectly determined that the bequests here involved were specific in nature. The will, when read as a whole, discloses a clear intent on the part of the testator to care for his mother, or, in the event of her death, his brothers, and to leave the church which he attended as a child, substantial bequests. This intent to give these named legatees substantial bequests is clearly indicated by the provision that these bequests were not to be lessened or diminished by payment of inheritance taxes thereon. This interpretation does not lead to a result which will render the rest of the family destitute if the bequests are held general, because the other natural objects of his bounty, his wife and son, are adequately provided for in the disposition of his substantial estate. When these facts are considered, together with the strong presumption in favor of an interpretation in favor of a general bequest, there can be no reasonable doubt but that the bequests are general. As already pointed out, the fact that the testatrix owned ten of the designated bonds when he bequeathed seven of them to the named legatees is not sufficient to overcome the presumption."

Appellant states: "Applying the rules set forth above in Re Estate of Jones it becomes apparent that there are much stronger reasons for holding the bequests in Paragraphs Sixth and Eighth of the will here considered to be general bequests than existed for the same holding in Re Estate of Jones."

We do not believe that the Jones case, properly analyzed and considered, either compels or justifies the conclusion that the bequests involved in the instant case are general and not specific. The bequest in the Jones case was of "two one thousand dollar * * * five percent bonds," and, in view of the fact that the bonds then owned by the testator were unregistered bearer bonds, it could be held reasonably that such bequest was in effect a pecuniary bequest in which the nominal subject matter of the bequest is mentioned as a standard of value, and hence was a general bequest. But if the language of the Jones case must be considered as holding that bequests like the bequests in the instant case are general bequests, then we believe it is contrary to rules laid down in Re Estate of Daly, supra, and the other California cases hereinbefore cited.

[3] As already stated, whether a bequest of a security is specific or general depends on the intentions of the testator at the time the will was drafted, as expressed in the will considered as a whole and in the light of the surrounding circumstances. The plain language of a will may not be disregarded but the surrounding circumstances may aid in its interpretation by throwing light upon the intention of the testator.

In paragraph Sixth testator stated that "as a final and personal bequest, I give and bequeath to each of them [his children] Five Thousand (5,000) shares of the capital stock of the Belridge Oil Company, which shares are now represented in my estate by trustees' certificates." In paragraph Eighth he stated: "I give and bequeath to Helen S. Peterson * * * Five Thousand (5,000) shares of the capital stock of Belridge Oil Company, which shares are now represented by trustees' certificates, and in addition thereto, the sum of Thirty Thousand Dollars ($30,000.00) in cash."

[4] We believe that the language of these bequests comes clearly within the definition of a specific bequest in subdivision 1 of section 161 of the Probate Code, which states that "A legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator, is specific." It is clear to us that the testator intended by said language to make a bequest of 5,000 shares of stock to each of said legatees, and that the particular stock covered by the bequest was the stock that was represented by trustees' certificates. To hold that such bequests, so worded, are general bequests, that the testator only mentioned the 5,000 shares as a standard of value or quantity and did not intend to make a specific bequest of said shares of stock, is not only to do violence to the language itself but also to take a very unrealistic view of the undoubted inintentions of the testator. It is difficult to believe that if the testator had intended to make his bequest to appellant of the 5,000 shares of stock represented by trustees' certificates merely as a standard of value or as a pecuniary bequest, he would have coupled it with a bequest of $30,000 in cash, as his estate was ample enough to have enabled him to make a much larger cash bequest.

Neither does a consideration of the surrounding circumstances as shown by the extrinsic evidence aid the position of appellant. The testator was a lawyer of many years standing. The will was executed on December 7, 1940, in Washington, D. C., where testator was then residing with his wife. The property settlement agreement, under which his wife received 10,000 shares of Belridge Oil Company stock, was not executed until February 26, 1941, and it is recited therein that testator and his wife were living in the same house up to January 2, 1941. Appellant argues that the property settlement agreement under which the number of shares owned by testator was decreased from 40,000 to 30,000 must have been under consideration by testator at the time the will was executed, but it is extremely unlikely that he would have bequeathed 35,000 shares of stock if he had any intention of reducing his holdings below that amount. The fact that testator and his wife were living together for almost a month after the will was executed would indicate that differences arose after the date of the will which resulted in their separation and in the agreement of February 26, 1941. Undoubtedly the testator, an experienced congressman and lawyer, knew when he transferred the 10,000 shares to his wife that his holdings were reduced to 30,000 shares, and also understood the legal effect of such transfer. It may be that he intended thereafter to make some changes in his will, but, although he lived more than a year and a half after transferring the 10,000 shares to his wife, he did not make any changes in his will, and this court has no power to do what the testator himself failed to do.

[5] Another factor which the trial court was entitled to, and doubtless did, take into consideration, as part of the extrinsic evidence in the case, was the fact that the stock of the Belridge Oil Company has never been traded or listed on any stock exchange and that there had been comparatively few sales of such stock. Furthermore, about 61% of the stock of said corporation, including the shares of the testator, was subject to a voting trust agreement and the owners held voting trust certificates. These shares were, on the date of decedent's will, held by the members of only eight families and were in only 33 ownerships, and between the date of the creation of the voting trust in 1937 and September 17, 1942, the date of testator's death, there were no sales of shares subject to the voting trust. The testator was a

director of Belridge Oil Company and a trustee under the voting trust and was, of course, aware that the stock was closely held and not listed or traded on any stock exchange, and that it would be impossible to acquire additional shares except at a price disproportionate to their value. Such a factual situation, which appears from the extrinsic evidence, makes it fairly inferable that the testator, who at the date of the will owned sufficient shares to satisfy the bequest, intended that the bequest should be satisfied out of his own shares and not otherwise.

We conclude, therefore, that the trial court correctly determined that the bequests in both articles "Sixth" and "Eighth" of the will are specific bequests.

In addition to holding that the bequests in paragraphs "Sixth" and "Eighth" were specific the court decreed, in view of the fact that the legatees named in paragraph Sixth are children of decedent and that appellant, the legatee named in paragraph Eighth, is a stranger in blood, "the abovementioned abatement or ademption to the extent of 5,000 shares in the bequests of shares of said Belridge Oil Company * * * should be suffered and borne in toto by said Helen S. Peterson, in accordance with the provisions of Section 752 Probate Code of California."

Said section 752 reads as follows: "Order of abatement of legacies. [Priority of legacies to spouse or kindred.] Unless a different intention is expressed in the will, abatement takes place in any class only as between legacies of that class, and legacies to a spouse or to kindred shall abate only after abatement of legacies to persons not related to the testator."

Appellant argues that if this court should uphold the finding of the probate court that the bequests are specific, then in view of the partial ademption, the children and appellant should share pro-rata in the number of shares remaining, each to take one-seventh of the 30,000 shares. In this connection appellant contends (1) that section 752 of the Probate Code does not apply in a case where there is a deficiency of assets to satisfy legacies but only in a case where there is a deficiency of assets to pay debts, and (2) that if it should be held that the section applies in a case where there is a deficiency of assets to satisfy legacies, the preference which it sets up in favor of the spouse or kindred of a testator as against strangers in blood is not to be applied in the present case for the asserted reason that a "different intention is expressed in the will."

Appellant's argument that section 752 of the Probate Code is not applicable in a case where an abatement becomes necessary because of an insufficiency of assets to satisfy bequests is based upon the decision of the Supreme Court in Re Estate of Apple, 66 Cal. 432, 6 P. 7, with respect to section 1361 of the Civil Code upon which, in part, section 752 of the Probate Code was based. Said section 1361 then read as follows: "Sec. 1361. Legacies, how charged with debts. Legacies to husband, widow, or kindred of any class are chargeable only after legacies to persons not related to the testator."

In Re Estate of Apple decedent was a resident of Nevada. It appeared that after paying the debts of decedent and the expenses of administration there were only $19,000 in bonds to satisfy bequests of $20,000 in bonds to decedent's son and $10,000 in bonds to strangers. The probate court held that there should be a total abatement of the bequests to strangers and an abatement to the extent of $1,000 only in the bequests to the sons. The Supreme Court modified the judgment by requiring a proportional abatement among the two sons and the strangers. It did this upon two grounds: (1) that the devolution of the decedent's estate was dependent upon the law of Nevada because the decedent was a resident of that state, and the law of Nevada did not favor bequests to relatives as against similar bequests to strangers, and (2) that the provisions of section 1361 of the Civil Code which gave preferential rights to kindred applied only to the abatement of legacies made necessary for the payment of debts, and did not apply to an insufficiency of assets to satisfy bequests.

[6] In view of the fact that the court held that the law of Nevada controlled and that the law of that state made no distinc-

tion between legacies to kindred and legacies to those not related, the second ground of the opinion expressing the view that even if the law of California should govern the same result would follow, may well be regarded as obiter dictum. But assuming that it is not, the opinion in Re Estate of Apple is not controlling at this time because of the radical changes in the statutes involved. As hereinbefore set forth, the heading to Civil Code section read: "Legacies, how charged with debts," and, as pointed out in numerous decisions, a heading to a code section is entitled to great weight in determining the meaning of a section. (See Sharon v. Sharon, 1888, 75 Cal. 1, 16, 16 P. 345; Keyes v. Cyrus, 1893, 100 Cal. 322, 325, 34 P. 722, 38 Am.St.Rep. 296; Southlands Co. v. City of San Diego, 1931, 211 Cal. 646, 297 P. 521; Wall Estate Co. v. Standard Box Co., 1912, 20 Cal. App. 311, 128 P. 1020; In re Wilson, 1916, 30 Cal.App. 567, 158 P. 1050; Lynch v. Lynch, 1924, 69 Cal.App. 66, 230 P. 462; In re Forthmann, 1931, 118 Cal.App. 332, 5 P.2d 472; Gonzales v. Superior Court, 1935, 3 Cal.2d 260, 44 P.2d 320.)

[7, 8] But in 1931 the Probate Court was enacted and sections 1361 and 1362 were specifically repealed and were superseded by section 752 of the Probate Code. As originally enacted the final clause of said section 752 read "and legacies to a spouse or to kindred are chargeable only after legacies to persons not related to the testator." Neither in its heading nor in its body did section 752 limit the preference which it accords to relatives, to cases where assets have been used to pay debts. The heading to the section is "Order of abatement of legacies. [Priority of legacies to spouse or kindred.]" This heading is general in character and gives a spouse or kindred priority over strangers for the protection of legacies whenever there is a deficiency of assets whether to pay debts or to satisfy legacies. If there were ever any doubt as to the correctness of this construction of section 752, it is settled by the decision in Re Estate of Wever, 12 Cal. App.2d 237, 55 P.2d 279, in which case a hearing was denied by the Supreme Court.

In the Wever case the general legacies under the will aggregated $59,000. $25,000 was given to kindred and the remainder to persons not related. Values had so decreased that at the time of death there was but $28,000 to meet all bequests. The appellant contended that legacies to persons not related to the testator abated first and the court so held. Referring to the fact that the Apple decision was based on the position of the code sections the court said, 12 Cal.App.2d at page 240, 55 P.2d at page 280: "As the arrangement of the Code sections was relied on in the interpretation given in the Apple opinion, their rearrangement in the Probate Code has a significant bearing upon the interpretation of the sections as they now stand." The court then reviewed sections 750, 751 and 752 of the Probate Code and concluded: "The obvious intention of the sections is that, 'unless a different intention is expressed in the will,' legacies to spouse and kindred shall be preferred over other legacies of the same class when the property is insufficient to pay all such legacies in full." See, also, In re Estate of Flint, 40 Cal.App.2d 132, 104 P.2d 516; In re Estate of De Santi, 53 Cal.App.2d 716, 128 P.2d 434.

It is particularly significant that after the decision in Re Estate of Wever in 1936, the legislature, in 1939, amended the final clause of section 752 by substituting for the words *"are chargeable only after legacies to persons not related to the testator,"* the words "shall abate only after abatement of legacies to persons not related to the testator."

This amendment, coming after the decision in the Wever case, shows that the legislators desired to make it doubly certain that the rule laid down in that case was correct and should be followed.

[9] The final contention of appellant is that the preference which Probate Code section 752 sets up in favor of spouse or kindred should not be applied in the instant case because said section begins with the words "unless a different intention is expressed in the will." Appellant argues that "in this case it very definitely appears that a different intention is so expressed." The probate court found that "the decedent's will expresses no different intention on the part of the decedent with respect to the

persons by whom or the manner in which abatement or ademption should be suffered"; and we believe there is ample support for this finding both in the language of the will itself and in the extrinsic evidence. The facts that the bequest to the children preceded the bequest to appellant in the will, and that testator stated that he was making the bequest to his children "as a final and personal bequest," certainly do not lend weight to the argument of appellant that the language of the will indicates that she should have preferential rights over his children.

No other points made in the briefs require discussion.

In view of the foregoing, we conclude that the probate court correctly determined that the bequest of the Belridge shares made in articles "Sixth" and "Eighth" of the will were specific in character, that because of the deficiency in the estate of 5,000 shares of said stock necessary to satisfy the bequests in the two articles, an ademption resulted and that the ademption of 5,000 shares must be charged in its entirety against appellant's bequest in accordance with the provisions of section 752 of the Probate Code. The decree which gives effect to such determination should be and the same is hereby affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

82 Cal.App.2d 664

## McCLURE v. DONOVAN.

### In re CARUTHERS' ESTATE AND GUARDIANSHIP.

Nos. 16154, 16172.

District Court of Appeal, Second District, Division 2, California.

Dec. 2, 1947.

Rehearing Denied Dec. 19, 1947.

**1. Attorney and client ⇨20**

An attorney stands as a trustee for his client's interests and may not represent claims inconsistent with those of his client or conflicting claims of two clients.

**2. Insane persons ⇨15**

Where attorneys, by their application to the court for permission to see incompetent, were either attempting to represent conflicting interests or to interview incompetent as plaintiff in an action in which they were counsel for defendant, request for interview was properly denied.

**3. Appeal and error ⇨141**

An attorney may not appeal from an order appointing a guardian unless he has been authorized so to do by the incompetent, and an attempted appeal from such an order filed by an unauthorized attorney will be dismissed.

**4. Appeal and error ⇨336(1)**

Attorneys who represented purported wife in annulment proceeding by incompetent and who attempted to appear for incompetent on appeal in guardianship proceedings represented adverse interests, and, where incompetent at time of alleged request that appeal be taken did not know the meaning of what he said, request did not confer authority on attorneys to proceed with appeal, and appeal in the guardianship proceedings would be dismissed but motion to dismiss appeal in annulment action would be denied; no reason for dismissal of that appeal being made to appear.

◆

Action by Martha McClure, on behalf of Jefferson D. Caruthers, against Laura Alpha Donovan, also known as Laura Alpha Caruthers, to annul a purported marriage between Jefferson D. Caruthers and Laura Alpha Donovan. From a judgment for plaintiff, the defendant appeals. Proceeding also in the matter of the estate and guardianship of Jefferson D. Caruthers, also known as Jeff D. Caruthers, an incompetent person. A purported notice of appeal from order appointing guardian was filed by the same attorneys who represented defendant in the first action. On motions to dismiss the appeals.

Motion to dismiss purported appeal in guardianship proceeding granted; motion to dismiss appeal in the annulment action denied.

See also 186 P.2d 720.

Lee J. Myers and William Kay Crawford, both of Los Angeles, for appellant.

Martin, Hahn & Camusi, of Los Angeles, and Eldred E. Wolford, of El Monte, for respondent.

WILSON, Justice.

The above entitled matters are before the court on motions to dismiss the appeals.

Number 16154 is an appeal from a judgment annulling a marriage purporting to have been solemnized between Jefferson D. Caruthers and Laura Alpha Donovan. The action was brought on behalf of Mr. Caruthers by Martha McClure, his sister, upon the ground that at the time of the marriage he was wholly incompetent and incapable by reason of incompetence of contracting the marriage and continued to manifest a state of mind rendering him an incompetent person. It is further alleged that in the purported marriage the defendant took undue advantage of the mental condition and illness of Mr. Caruthers and was seeking to obtain his life savings and earnings.

Number 16172 is a purported appeal from a judgment and order appointing Louis A. Ghiotto as guardian of the person and estate of Mr. Caruthers, in which the court made a finding that for a long time prior to the filing of the petition for guardianship he was and is, by reason of old age, disease and weakness, incapable of properly managing and taking care of himself or his property.

The records of the two proceedings, including the affidavits upon which the motions to dismiss the appeals are based, show that the attorneys who appeared for Mrs. Donovan (or Caruthers) in the trial of the action for annulment of the marriage and who appear for her in this court on the appeal from the judgment in that action, are the same attorneys who filed the purported notice of appeal from the order appointing the guardian. The affidavits also show that an action has been filed on behalf of Mr. Caruthers by his guardian to recover property conveyed by him to his purported wife. Since the alleged incompetent is the plaintiff in the action to annul the marriage and in the action to recover the property, the attorneys plainly represent adverse interests when they attempt to appear for Mr. Caruthers on the appeal in the guardianship proceeding while they are at the same time representing his purported wife in the annulment proceeding. No counsel appeared for him at the hearing of the guardianship proceeding in the superior court.

[1] An attorney has a constant and perpetual rendezvous with ethics. He stands as a trustee for his client's interests—a most sacred and confidential relationship. It is elementary that a conflict of interest between a trustee and his beneficiary is never permissible. As a trustee cannot maintain an attitude adverse to his beneficiary, so an attorney may not represent claims inconsistent with those of his client or conflicting claims of two clients. He cannot serve two masters.

In the annulment action Mrs. Donovan (or Caruthers) maintains that Mr. Caruthers is competent to attend to his business and it is her obvious desire that the order appointing the guardian be reversed and the guardianship proceedings quashed. Such a result would redound to her benefit in the annulment case. On the other hand Mr. Caruthers, by the filing of a nomination of Mr. Ghiotto and requesting his appointment, has indicated, insofar as his mental condition permitted, his wish to be protected by a guardian. A nomination of Mr. Ghiotto was also filed by Martha McClure, Mr. Caruthers' sister who appears in his behalf in the annulment action.

[2] It appears from the affidavits accompanying the notice of motion to dismiss the appeals that the attorneys who filed the purported notice of appeal in the guardianship proceeding are acting without authority. The affidavits recite that no counsel or attorney has been retained or requested by Mr. Caruthers to prosecute an appeal from the order appointing the guardian of his person and estate, nor has any attorney or counsel conferred with him upon the subject. Counsel who filed the appeal assert by affidavit that after the decision was rendered in the trial court Mr. Caruthers gave

them express instructions to appeal both in the annulment case and in the guardianship proceedings. In view of the conflict in the affidavits the issue of fact need not be discussed. Counsel who appealed admit that they have not seen Mr. Caruthers since December 26, 1946, although demand has been made on the guardian for permission to interview him. Application was made to the court for an order allowing counsel to see Mr. Caruthers but the order was refused. Since they were attempting (1) to represent conflicting interests or (2) to interview the plaintiff in an action in which they were counsel for the defendant, the court fittingly denied the request for an interview.

[3] In an affidavit by the physician-psychiatrist who was appointed by the trial judge to make an examination of Mr. Caruthers during the trial, he states that he examined Mr. Caruthers in October, 1946, and in January, March and April, 1947, and in his opinion Mr. Caruthers was and is of unsound mind; that in his presence counsel for respondent questioned Mr. Caruthers regarding the matter of the appeal from the order appointing a guardian, and that Mr. Caruthers indicated no knowledge of any court action involving his person, either past or present. Affiant further states that in his opinion it would be futile for Mr. Caruthers to sign any document indicating an election either to proceed with or to dismiss the appeal since he is incapable of grasping the signficance of any such document or of understanding its meaning.

An attorney may not appeal from an order appointing a guardian unless he has been authorized so to do by the incompetent. Guardianship of Gilman, 23 Cal.2d 862, 864, 147 P.2d 530; Sullivan v. Dunne, 198 Cal. 183, 192, 244 P. 343. An attempted appeal from such an order filed by an unauthorized attorney will be dismissed. Estate of Sullivan, 198 Cal. 195, 196, 244 P. 347.

[4] It is manifest that if Mr. Caruthers made the request that an appeal be taken he was mentally incompetent to know the meaning of what he said and such request therefore did not confer authority on the attorneys to proceed with the appeal. The good faith of counsel in filing the notice of appeal is not brought into question by the attorneys for respondent and is not involved in this ruling.

No reason has been made to appear for the dismissal of the appeal in the annulment case.

The motion to dismiss the appeal in No. 16172 (guardianship) is granted. The motion to dismiss the appeal in No. 16154 (annulment) is denied.

MOORE, P. J., and McCOMB, J., concur.

82 Cal.App.2d 668

## McCLURE v. DONOVAN.

## In re CARUTHERS' ESTATE AND GUARDIANSHIP.

## McCLURE v. DONOVAN.

**Nos. 16154, 16172, 16233.**

District Court of Appeal, Second District, Division 2, California.
Dec. 2, 1947.

**Appeal and error 🔑816**

Appeal by defendant from judgment annulling marriage and appeal from order denying defendant's motion for additional attorneys' fees raised question so related that appeals would be consolidated on defendant's motion.

◆

Action by Martha McClure, on behalf of Jefferson D. Caruthers, against Laura Alpha Donovan, also known as Laura Alpha Caruthers, for annulment of marriage. From a judgment annulling the marriage, and from an order denying defendant's motion for additional attorneys' fees, the defendant appeals. Proceeding also in the matter of the estate and guardianship of Jefferson D. Caruthers, also known as Jeff D. Caruthers, an incompetent person, wherein purported notice of appeal from order appointing guardian was filed by the same attorneys who appeared for defendant in the annulment action. On motion by Laura Alpha Donovan, also known as Laura Alpha Caruthers, to consolidate the three appeals.

Appeal from order denying defendant's motion for additional attorneys' fees, and appeal from judgment annulling the marriage, consolidated.

Lee J. Myers and William Kay Crawford, both of Los Angeles for appellant.

Martin, Hahn & Camusi, of Los Angeles, and Eldred E. Wolford, of El Monte, for respondent.

WILSON, Justice.

Appellant Laura Alpha Donovan, also known as Laura Alpha Caruthers, has made a motion to consolidate the appeals of the three above entitled proceedings.

Number 16154 and Number 16172 are the same annulment and guardianship proceedings, respectively, as are referred to in an opinion filed this date, 82 Cal.App.2d 664, 186 P.2d 718. Number 16233 is an appeal from an order denying defendant's motion for additional attorneys' fees in the annulment case.

The appeal in Number 16154 from the judgment annulling the marriage will present questions appropriate to the proceedings had in the trial of that action, and the question raised by the appeal in Number 16233 is whether the court abused its discretion in refusing additional attorneys' fees. The questions are so related as to make it advisable to consolidate the appeals.

It appears from the affidavit of counsel for respondent that a stipulation was entered into that the reporter's and clerk's transcripts in No. 16154 and in No. 16172 might be used in No. 16233 insofar as the transcripts are applicable, but that such stipulation was entered into with the express understanding that it should in nowise constitute a consolidation of the last numbered appeal with the other two appeals, and that such condition was insisted upon by respondent for the purpose of avoiding consolidation.

It will expedite the consideration of the cases by this court to consolidate the two appeals in the annulment case notwithstanding the objections of respondent. The appeal from the order appointing a guardian in No. 16172 has been dismissed by an order made on this date and is no longer before the court.

The motion to consolidate the appeals in No. 16154 and No. 16233 is granted. The motion to consolidate said appeals with the appeal in No. 16172 is denied.

MOORE, P. J., and McCOMB, J., concur.

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82 Cal.App.2d 702

## PEOPLE v. THOMAS.

Cr. 4152.

District Court of Appeal, Second District,
Division 3, California.
Dec. 3, 1947.

**1. Criminal law 🔑1144(13)**

In determining whether evidence is legally sufficient to support judgment, District Court of Appeal is required to assume truth of facts found and all inferences to be drawn from evidence.

**2. Criminal law 🔑1159(2)**

An appellate court does not weigh evidence.

**3. Larceny 🔑65**

Evidence sustained grand theft conviction of truck driver who failed to deliver to the consignee certain goods which had been loaded on his truck, or to return the goods to his employer.

◆

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

John Charles Thomas was convicted of grand theft, and he appeals.

Judgment affirmed.

Ernest Best, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendant was charged with the crime of grand theft, and it was alleged that he had been convicted previously of burglary. Trial by jury was waived, and the People's case, pursuant to stipulation, was submitted on the transcript of the testimony taken at the preliminary hearing. Defendant admitted the prior conviction. The court found defendant guilty as charged, and he appeals from the judgment on the ground that the evidence was insufficient to support it.

Defendant was employed as a truck driver by the Pacific Transportation & Warehouse Company, Inc., located at 825 East 62nd Street, Los Angeles, which was in the business of delivering shipments of goods. That company sometimes loaded its trucks at night with the goods which were to be delivered the next day. The trucks were then left at the above address during the night, and when the drivers reported for work the next morning each one was given delivery slips, or bills of lading, listing the articles on his particular truck, and showing to whom delivery was to be made. The delivery slips were issued in duplicate, and the truck driver, upon delivering the goods, secured the signature of the consignee on the original slip, left the duplicate with the consignee and returned the original to his employer.

On the night of December 27, 1946, six deliveries of goods were placed on the truck which was to be driven by the defendant on the next day, Saturday—when defendant was to work only one-half day. The goods on his truck included four bales of khaki colored cotton duck of the approximate value of $1,400, which were to be delivered to Downie Brothers at 640 South San Pedro Street. Defendant reported for work about 8 o'clock the next morning, December 28th, and left the premises of his employer with the truck about 9:00 a.m. The truck carried license numbers C. R. C. 17095 and I. C. C. 74—740. He returned to his employer's place of business about 3:30 p.m., at which time some goods were still on the truck. He gave the employer the original delivery slips, bearing the signatures of the consignees, for goods which had been delivered, and he gave the employer the original and duplicate delivery slips for some of the goods which had not been delivered. He did not, however, return delivery slips for the cotton duck. Downie Brothers did not receive the duck and it was not part of the goods returned on the truck. Defendant did not work for this employer again, but he returned on January 10, 1947, and while he was waiting for his check for services rendered on December 28th, a company manager called the police and defendant was arrested on the employer's premises.

A witness, called on behalf of the People, testified that he is employed by the Pacific Transportation & Warehouse Company as the manager or "overseer" of the trucks; that he was present when defendant's truck was loaded on the night of December 27th; that a "medium" load was put on the truck and, in addition to the duck, it was loaded with numerous bales of cotton piece goods, thread and other items; that he saw the bales of khaki duck goods on the truck; that he was not there when the defendant took the truck out the next morning, but he was there when the defendant returned; that the goods on the returned truck were then checked, but the bales of duck were missing; that on the morning of December 28th defendant was given delivery slips for the goods on his truck; that two of those slips were for the cotton duck—one slip for three bales and the other for one bale—and they showed that it was to be delivered to Downie Brothers, at 640 South San Pedro Street; that when the defendant returned to the warehouse with the truck he (the witness) checked the delivery receipts which defendant turned in but those for Downie Brothers were missing; that the next time he saw defendant was in January, 1947, when defendant came in and asked if he could go to work, at which time the witness called the police. He also testified that the truck defendant drove was an open "Autocar" truck with the name "Pacific Transportation Company" over the cab and the name "Pacific Transportation & Warehouse" on the side of the truck.

Robert C. Downie, called on behalf of the People, testified that as a member of the firm of Downie Brothers, Inc., he had ordered cotton duck from a company in Alabama which was to be delivered December 28, 1946; that that particular order consisted of three bales of double filled khaki duck and one bale of single "fill" khaki duck; that each bale was approximately 40 inches high, 30 inches long and 18 inches wide; that the three bales were invoiced at $1,426.50; that he had certified copies of the invoices, and that he never received any of the duck.

Another witness, called on behalf of the People, testified that he does business under the name of L. A. Tarp Company, which business is located at 715 South Central Avenue; that about 12:10 p.m., on December 28, 1946, two men came into his place of business and he talked with one of them whose name was Porter; that he does not recognize defendant; that Porter offered to sell one bale of khaki cotton goods and five cases of thread to the witness for $50, and showed him the "bill of lading" in the name of Downie Brothers, Inc.; that there was another delivery slip made out to Downie Brothers, but he did not know how many bales were listed on that slip; that the witness refused to buy the merchandise, and after Porter left, the witness went to the truck which was parked 25 or 30 feet beyond his front door; that he was quite positive it was an "Autocar" and that it had the name "Pacific Transportation Company" on it; that the license numbers on the truck were C.R.C. 17095 and I.C.C. 74—740; that there were several bales of merchandise on the truck; that the tops were torn off two bales of cotton duck, and one of the bales was "a khaki" material and the other was an awning material; that while he was at the truck he did not see Porter or anyone; that he did not look in the seat; and he did not see the truck drive away, but he knew that the truck was there "until almost 1:00" p.m.

Another witness, called on behalf of the People, testified that he is associated with the preceding witness in business under the name of L. A. Tarp Company; that on December 28, 1946, two men came into their place of business and asked if he would be interested in buying some undelivered freight which was in their (the witness's) "line"; that he told them, "no"; that one of those men was Ray or Roy Porter and the other was a stranger to him; that the stranger resembled the defendant in a general way; that they told him the merchandise consisted of thread and canvas; that they showed him some "bills of lading" and the items were "billed" to Downie Brothers; that he asked them why they didn't deliver it to Downie Brothers, and Porter said, "Do you think we want to do all of that work for nothing?"; that during the time the witness was out for lunch he went to the truck and looked at it; that it was an old model "Autocar"; that it had the name "Pacific Transportation Warehouse Company" on it, which name was on a metal plate; that there were several packages, bales and cartons in the truck; and that he could not see what was in the bales from where he was standing on the sidewalk.

A police officer, called on behalf of the People, testified that he was one of the investigating officers; that he had two conversations with the defendant, one on January 10th, and the other on January 11th; that in the first conversation the defendant stated that he left the Pacific Transportation Company about 9 o'clock on the morning of December 28th; that he had a delivery to make to Downie Brothers; that he made two or three stops; that between Eighth and Ninth on Central Avenue he met a man, with whom he had previously worked, by the name of Ray Porter; that Porter had the "shakes and needed a drink," and asked defendant if he would buy him a drink; that he (the defendant) bought a "bottle" and they drank from it; that Porter suggested selling some of the "khaki stuff" which was on the truck; that the defendant refused to sell it, and they had some more drinks, and then drove to Seventh Street and Central Avenue where he parked the truck; that Porter got out of the truck and defendant waited for him to return, but he didn't come back; and that defendant "dozed off" for a few minutes, and then drove away. He also testified that in the second conversation defendant's statements were in substance the same as in the first conversation except that he stated he did not know what became of the cotton duck or the delivery receipts covering same.

Defendant testified that when he arrived at the warehouse on the morning of the 28th the truck was already loaded; that he did not check the contents of his truck; that he did not know what material he had on his truck and he did not know whether the cotton duck was on it; that previously he had taken merchandise out for which he had no delivery slips, and at times he telephoned to his employer to find out what to do with it, and at other times he returned it to the employer; that he has had delivery slips for goods when the goods were not on the truck; that he did not know whether he had delivery slips for the duck; that he did not look through the delivery slips because they were put in rotation by the dispatcher. After he had testified that he "naturally" looked at the delivery slips, the deputy district attorney said, "Well, the question is: Didn't you have a bill that day to deliver four bales of canvas to Downie Brothers at 640 South San Pedro?" To which defendant replied, "There is 365 days within a year and every day I go different places I get bills." He testified further that on December 28th he made several calls, and one delivery was refused because the customer was taking inventory; that he stopped at Seventh Street and Central Avenue "to get a beer" and met Porter whom he knew casually; that Porter asked him if he (defendant) "had enough for a bottle" and he said that he did and "we went over and got a bottle"; that he and Porter went into an alley and drank there; that they then went back to the truck; that he did not remember how long he slept—the only thing he remembered was "after 10 o'clock some place, along 11:00"; that he remained there "a couple of hours" and when he thought he was able to drive he drove the truck back to the "shop," getting there at 2:30 or 3 o'clock, "something like that," and told his employer to deduct two hours' pay from his salary; that he again reported for work the following Monday but he had chills and a backache; that he told the "dispatcher" that he didn't think he could work that day, and the dispatcher said it was all right for him to leave; that the dispatcher didn't say anything to him about any merchandise missing from the truck; that he (the defendant) was in bed about five days; that on January 10th he went back to his employer to get his salary for December 28th, and was arrested; that he had not seen Porter since December 28th; that he heard he had a "line drive," but he did not know where.

[1] Appellant urges, in support of his contention that the evidence is insufficient to support the judgment, that it is not shown in the transcript that he committed the theft, and asserts, in effect, that at most he is guilty of negligence in becoming intoxicated and thereby permitting his companion to "apparently" take the goods from the truck. In determining whether the evidence is legally sufficient to support the judgment, this court is required to assume the truth of the facts found and all inferences fairly to be drawn from the evidence. People v. Savage, 66 Cal.App.2d 237, 242, 152 P.2d 240. There was evidence that the four bales of duck were placed on the truck which appellant drove on December 28th; that two of the bales, with their top coverings torn off, were on the truck when it was parked near the front of the Tarp Company; that none of the duck was on the truck when appellant returned the truck to his employer's warehouse; that none of it was delivered to Downie Brothers; that the delivery slips for same, which had been in the possession of appellant, were not among those returned by appellant to his employer; that Porter had suggested to appellant that they take some of the duck; that no one else was with appellant and Porter while they were together; that Porter was accompanied by a man, who resembled the appellant, when he entered the office of the Tarp Company and offered to sell some of the duck and showed the delivery slips for it which were made in the name of Downie Brothers; and that the truck was driven away from where it was parked, before 1:00 p.m., but appellant did not return to his place of employment until 3:30 p.m.

Appellant's testimony regarding the time when he went to sleep, how long he slept, and when he awoke, was vague. He testified that the only thing he remembered was "after 10 o'clock some place, along 11:00," and that he slept for two hours. The police officer testified that appellant told him he dozed off a few minutes while waiting for Porter who did not return to the truck. In view of the fact that the truck was an open one (stake body), parked on a public street, and the fact that Porter suggested that they take the duck, the court may well have concluded that if appellant had fallen asleep, as he testified he had, and then had awakened and found that Porter had not returned, he would have checked the goods on his truck and checked the delivery slips to ascertain whether anything was missing. Since the truck carried a "medium" load when it was driven from the warehouse, and appellant had delivered some of the merchandise, and each of the four bales of duck was about 40 inches in length, 30 inches in width and 18 inches in depth, it would seem that even a cursory examination of his load would have revealed that a substantial part of it was missing. Furthermore, considering that the bales were large and bulky, it would not seem reasonable that they could have been removed from the truck without awakening a person who was dozing or sleeping on the seat of the truck. Appellant's testimony as to whether he had delivery slips for the duck was evasive. When he was asked if he had a bill to deliver four bales to Downie Brothers, he said that there were 365 days in the year and every day he went to different places. Before 1:00 p. m. he drove the truck away from where it had been parked (Seventh and Central) and did not arrive at his place of employment (on East 62nd Street) —a distance of approximately 56 blocks— until 3:30 p. m., and he gave no explanation as to his whereabouts during that interval. Although appellant testified otherwise, there was evidence that after he returned the truck on December 28th he did not return to his place of employment again or communicate with his employer until January 10, 1947.

[2, 3] The evidence is sufficient to show that the bales of duck which were to be delivered to Downie Brothers were stolen. Whether appellant participated in the theft was a question for the trial court to determine. It disbelieved appellant's testimony. It is not the province of a court of appeal to determine the weight of the evidence. The evidence was legally sufficient to support the judgment.

The judgment is affirmed.

SHINN, Acting P. J., and VALLEE, Justice pro tem., concur.

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82 Cal.App.2d 550

**In re DA ROZA'S ESTATE.**

**Civ. 7407.**

**Sac. 5851.**

District Court of Appeal, Third District, California.

Nov. 24, 1947.

**1. Executors and administrators 🔑137**

The administratrix of decedent's estate was authorized to sell estate's interest in two city lots at private sale for estate's advantage, regardless of whether there were sufficient funds in estate to pay all debts thereof and administratrix' expenses. Probate Code, §§ 754, 758, 785.

**2. Executors and administrators 🔑137**

The burden was on decedent's heir, contesting administratrix' sale of estate's interest in realty, to prove that sale was not for estate's best interests. Probate Code, §§ 754, 758, 785.

**3. Executors and administrators 🔑137**

A probate court order, confirming or refusing to confirm sale of real property of decedent's estate for estate's best interests, should be affirmed on appeal, if supported by substantial evidence. Probate Code, §§ 754, 758, 785.

**4. Executors and administrators 🔑137**

An administratrix' sale of decedent's realty cannot be defeated on sole ground that it would not be to advantage or best interests of one heir opposing sale, if otherwise for estate's best interests. Probate Code, §§ 754, 758, 785.

**5. Executors and administrators ⚷137**

In determining whether administratrix' sale, rather than distribution of undivided shares, of estate's interest in two vacant city lots, was practical or for estate's advantage, probate court had right to consider, not only estate's condition respecting property on hand and ability to pay debts and administration expenses, but character of lots, estate's interest therein, their actual value, condition of market therefor in vicinity, and dissension among decedent's heirs. Probate Code, §§ 754, 758, 785.

**6. Appeal and error ⚷1011(1)**

Fact issues, on which evidence was conflicting, are solely within trial judge's province to determine, and appellate court may not interfere with his conclusions, if supported by adequate evidence.

**7. Executors and administrators ⚷137**

Evidence supported probate judge's findings that administratrix' sale of estate's interest in two city lots was for estate's best interests and that sale price was not disproportionate to value of lots. Probate Code, §§ 754, 758, 785.

**8. Appeal and error ⚷926(1)**

The appellate court must assume, in support of order appealed from, that appellee's witnesses were sworn, in absence of contrary evidence, and burden of showing that they were not sworn is on appellant complaining of trial court's consideration of their testimony on such ground. Code Civ.Proc. § 1846.

**9. Appeal and error ⚷926(5)**

Where record on appeal shows no objection by defendant to testimony of appellee's witnesses at hearing below on ground that such witnesses were not sworn, appellate court must presume that appellant failed to object to testimony on such ground. Code Civ.Proc. § 1846.

**10. Appeal and error ⚷206(1)**

Appellant, failing to object to witnesses' testimony in trial court on ground that they were not sworn, waived objection to competency of their evidence. Code Civ. Proc. § 1846.

**11. Appeal and error ⚷206(1)**
**New trial ⚷35**
**Witnesses ⚷227**

The right to object to failure to have witness properly sworn may be waived by failing to object in time or by express consent, and to prevent such waiver, objection should be made during trial or before verdict or while defect is capable of being remedied, and, if not then made, it cannot be urged as ground for new trial or on appeal. Code Civ.Proc. § 1846.

◆

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

In the matter of the estate of Frank L. Da Roza, deceased. From an order confirming a sale of realty by the administratrix of the estate, Edward L. Da Roza appeals.

Affirmed.

Ernest Spagnoli, of San Francisco, for appellant.

Wallace Shepard, of Sacramento, for respondent.

THOMPSON, Justice.

Edward L. Da Roza, one of five heirs at law of the estate of Frank L. Da Roza, deceased, has appealed from an order of the probate court confirming the sale of real estate. After a formal hearing at which the appellant appeared with counsel and filed objections to the sale, the court found that "it is for the advantage, benefit, and best interests of said estate and those interested therein that sale be made and confirmed," and thereupon confirmed the sale. The appeal is presented to this court on a settled statement of the proceeding pursuant to Rule 7 of Rules on Appeal.

It is contended the evidence does not support the order confirming the sale; that the court erroneously considered the evidence of two witnesses who were not sworn as required by Section 1846 of the Code of Civil Procedure, and that it was not necessary to sell the real property since there were ample funds in the estate with which to pay all debts and expenses of administration. The regularity of the notice for sale and the sale of the real property in conformity with Section 784 of the Probate Code as amended in 1945 (Stats.1945, p. 2066, Ch. 1070), are not questioned.

The court found that Ida M. Farrell, the duly appointed and qualified administratrix of the estate, after publication of due and legal notice of sale as required by law, sold to Central Counties Company, a corporation, at private sale, all of the interest of said estate, being seventeen twenty-sevenths interest in Lots 7 and 8, in the block bounded by 21st and 22nd streets and L and M streets of the City of Sacramento, according to the official plat thereof, for the sum of $19,000; that said sale price was the highest and best sum bid and the full market value therefor, and was $3,785 in excess of the appraised value which was fixed at $15,215 by an inventory and appraisement filed October 14, 1946; that each of the five heirs of said decedent was entitled to but one-fifth share of the estate's interest therein; that discord and hostility existed between the contestant and the other four heirs, and that it was for the advantage and best interests of the estate and all parties interested therein, to sell the estate's interest in said lot. Based on said findings the sale was accordingly confirmed.

We are of the opinion the order confirming sale of the estate's seventeen twenty-sevenths interest in the lots in question is supported by the evidence, and that we may not interfere with the probate court's discretion in finding that said sale is for the advantage and best interest of the estate and the heirs who are interested therein.

From the settled statement in this case it appears that Frank L. Da Roza died intestate, leaving surviving him five heirs at law, one of whom is the appellant; that the estate included the said interest in the lots above described, which were appraised October 14, 1946, at a value of $15,215; that the appellant, Edward L. Da Roza, owns a one-fifth share of the estate's interest in said lots, subject to his portion of the costs of closing the estate, against which interest executions have been levied for satisfaction of two unpaid judgments which were rendered against him, one for $6,529.66 and interest from August 8, 1944, and the other for $5,428.16 and interest from November 15, 1940; that enmity and dissension exist between the appellant and the other four heirs regarding their respective interests in the estate; that the final account has been filed in said estate, showing cash on hand in the sum of $18,645.67, but that said account does not appear to have been settled or approved; that the administratrix of said estate gave notice by publication as required by law of the sale of the estate's interest in said lots, and sold the same to Central Counties Company, a corporation, for the sum of $19,000, and thereafter petitioned the probate court for confirmation of said sale; that said petition for confirmation came on for hearing on October 21, 1946, and the appellant appeared by counsel and filed his objections thereto, on the chief grounds that the purchase price was disproportionate to the actual value of said lots, and that it was unnecessary to sell the land since the estate possesses adequate funds with which to pay all debts and expenses of administration. Oral and documentary evidence was adduced at that hearing.

[1, 2] The administratrix was authorized to sell the lots in Sacramento at private sale, for the "advantage, benefit, and best interests of said estate," regardless of whether there were funds in the estate sufficient with which to pay all debts and expenses of administration. In re Estate of Wickersham, 139 Cal. 652, 654, 73 P. 541; In re Estate of Kay, 30 Cal.2d 215, 181 P.2d 1, 3; Probate Code, secs. 754, 758, and 785; 11 B Cal.Jur. 149, sec. 754; 2 Bancroft's Probate Practice, p. 1042, sec. 568. We may concede there is a conflict of evidence regarding the question as to whether it was for the best interests of the estate to sell the land. But the burden was on the contestant to prove that it was not for the best interests to sell the property. 11 B Cal.Jur. 146, sec. 751. In the text last cited it is said: "The burden of proof is on the objector as to any facts not appearing by the return and put in issue by his objections."

[3] The order of a probate court confirming or refusing to confirm the sale of real property, "for the best interests of the

estate," should be affirmed on appeal if there is substantial evidence to support the order. In the Kay case, supra, in which an order confirming the sale of real property by a guardian in the estate of an incompetent person was affirmed on appeal, the Supreme Court said: "It is clear, therefore, that the determination whether there was sufficient evidence upon which to base the order lies within the discretion of the probate court."

[4] In the present case the probate court had two questions to determine: First, was the sale of the lots in question for the best interests of the estate, and, Second, was the price for which they were sold disproportionate to their value. Only one of the five heirs of the deceased opposed the sale of the lots. A sale of real estate which would otherwise be for the best interests of the estate could not be defeated on the sole ground that the sale would not be to the advantage or best interests of one heir only who opposes the sale. In Re Estate of Wickersham, supra, it is said in that regard at page 654 of 139 Cal., at page 541 of 73 P.: "* * * An opposition on the sole ground that the sales would not be for the best interests of some particular heir would not have been sufficient."

Likewise, it is said in 2 Bancroft's Probate Practice, at page 1043: "Sale on such ground need not be beneficial to a particular heir, if generally beneficial."

[5] In determining the benefits of the sale, the court had a right to take into consideration not only the condition of the estate with respect to the property on hand and the ability to pay all debts and expenses of administration, but also the character of the vacant lots which were offered for sale, the fact that the estate owned only seventeen twenty-sevenths interest in them, their actual value and the condition of the market for such lots in that vicinity, but also the dissension which existed between the heirs, in determining whether it was practical or for the advantage and best interests of the estate to sell them rather than to distribute them in undivided shares.

[6] The settled statement recites that "the Court received in evidence oral and documentary evidence, * * * and that the same consisted of the following: * * *." (Reciting the evidence of several named witnesses.) The evidence of Wallace Shepard, the attorney for the administratrix, includes the statement that "The market for real estate of this type in Sacramento had reached a peak and was declining." It also appears from that settled statement that the estate's interest in the vacant lots was appraised immediately before the sale at $15,215, and that it was sold for $19,000. It is true that the appellant testified that he did not consider the sale to be for the advantage or best interests of the estate, and that "this particular piece of property will enhance in value and will bring a much greater sum as a sales price within a short period of time, or within a year or so." But the last-mentioned testimony merely created a conflict of evidence upon the issues of the value of the lots and the advantage or best interests of the estate resulting from the sale. Those issues were solely within the province of the trial judge to determine. With his conclusions on those issues we may not interfere on appeal, since there is adequate evidence to support the findings of the court. In 11B Cal.Jur. at page 151, section 756, it is said in that regard: "The court, in confirming a sale, should exercise a sound discretion with a view to the best interests of those who are or may become interested in the proceeds, and its action will stand on appeal, unless an abuse of that discretion appears."

[7] We conclude that no abuse of discretion on the part of the probate judge appears, and that the findings are adequately supported by the evidence.

[8-11] Finally, the appellant contends that the evidence of two witnesses, namely, Wallace Shepard, attorney for the administratrix, and V. L. Diepenbrock, attorney for the purchaser, was considered by the court, in spite of the fact that the record does not show that either of them was first sworn as a witness. The same thing is true of the evidence of the attorney for appellant, which also appears in the settled statement. Counsel for appellant, of course, does not complain of the last-mentioned testimony.

We are of the opinion the objection to the consideration of said evidence is without merit. Section 1846 of the Code of Civil Procedure provides in part that: "A witness can be heard only upon oath or affirmation, * * *." The record affirmatively shows that evidence was adduced. But it fails to show whether said witnesses were or were not duly sworn. In support of the order of the court, in the absence of evidence to the contrary, we must assume the officer performed his duty and that the witnesses were sworn. The burden is on the appellant to show, on appeal, that the witnesses were not sworn. Moreover, the record discloses no objection at the hearing on the part of appellant to their testimony on the ground that the witnesses were not sworn. We must presume that appellant failed to object to the evidence on that ground. He thereby waived his objection to the competency of the evidence. Trigueiro v. Skow, 24 Cal.App.2d 253, 256, 74 P.2d 836; People v. Duffy, 110 Cal.App. 631, 635, 294 P. 496; Tennant v. Civil Service Commission, 77 Cal.App.2d 489, 497, 175 P.2d 568; 70 C.J. 487, sec. 654. The rule in both civil and criminal cases, with respect to waiver of the objection to testimony of witnesses who have not been first sworn, is stated in the text of 70 Corpus Juris at page 487, which is supported by numerous authorities from various jurisdictions, as follows: "The right to object to the failure to have a witness properly sworn may be waived by failing to object in time or by express consent. * * * Accordinglyy it has been held that, in order to prevent waiver of an objection that a witness has not been properly sworn, objection should be made during the trial, or before verdict, or while the defect is capable of being remedied, and cannot be urged as a ground for a new trial."

The foregoing rule appears to be reasonable. Otherwise a litigant who is present at a trial and has full knowledge of an inadvertent omission to swear a witness would be enabled to remain silent and speculate on receiving a favorable judgment or verdict, failing which, he might upset the entire proceeding by either a motion for new trial or an objection on that ground for the first time on appeal. The gist of the reason for the foregoing rule is that the court and adverse litigants are entitled to notice of the omission while there is still an opportunity to correct the oversight in procedure.

The order confirming the sale of real property is affirmed.

ADAMS, P. J., and PEEK, J., concur.

82 Cal.App.2d 560

**ADAMS et al. v. SOUTHERN PAC. CO. et al.**

**Civ. 7437.**

**Sac. 5869.**

**District Court of Appeal, Third District, California.**

**Nov. 24, 1947.**

Rehearing Denied Dec. 22, 1947.

Hearing Denied Jan. 22, 1948.

**1. Appeal and error ⇨1060(1)**
**Trial ⇨127**

In action for injuries sustained in railroad crossing accident defendants' attorney was not guilty of prejudicial misconduct in disclosing on cross-examination existence of compensation insurance carried by employer covering the plaintiffs, where questions relating thereto were asked in good faith, and existence of compensation insurance was shown with express consent of plaintiffs' counsel, and jury was instructed that plaintiffs were entitled to full compensation regardless of amount paid by insurance company to them.

**2. Appeal and error ⇨978(2)**

Denial of plaintiffs' motion for new trial on ground of misconduct of defendants' counsel in improperly injecting insurance into case will be deemed on appeal, a determination of defendants' counsel's good faith and of absence of prejudice to plaintiffs.

**3. Railroads ⇨347(8)**

Where country railroad crossing where collision with truck occurred at daylight and with which crossing truck driver was familiar, was not shown to create an unusual hazard or danger, requiring maintenance of automatic signal and usual cross-arm signal was maintained, refusing to admit a rule of the Railroad Commission specifying automatic wig-wag warning devices was not error.

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Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by Allen Adams and others against Southern Pacific Company and others, for personal injuries allegedly sustained in a crossing collision. From an adverse judgment, plaintiffs appeal.

Affirmed.

Gumpert & Mazzera, of Stockton, for appellants.

Jones and Quinn, of Stockton, for respondents.

THOMPSON, Justice.

Seven individuals joined as plaintiffs in this suit for damages for personal injuries received as the result of a railroad crossing accident. They were workmen on a farm, and were riding in a truck operated by the agent of their employer at the time of the accident. Their employer carried compensation insurance. As the driver of the truck was attempting to cross the railway track ahead of an approaching freight train, the truck was struck and plaintiffs were thrown from the machine and injured. The cause was tried with a jury which returned a verdict in favor of the defendants. From the judgment which was accordingly rendered this appeal was perfected.

The complaint is couched in separate counts for each plaintiff, which causes were united in this action. In each cause general and special damages for medical and hospital expenses and loss of earning capacity were alleged. In the course of the trial evidence of the existence of compensation insurance was adduced by both parties to the action. The appellants present two issues on appeal: First, Was the defendants' attorney guilty of prejudicial misconduct in referring to the compensation insurance, and, Second, Did the court err in refusing to admit in evidence a rule of the Railroad Commission prescribing the specifications of automatic wigwag warning devices when they are required to be installed at certain railroad crossings.

The Southern Pacific Company owns and operates a railroad track and equipment in San Joaquin County. About one mile north of Ripon in that county the roadway crosses the track at an angle. That crossing is open to view from the road for a considerable distance. At 4:30 p. m. on November 2, 1944, the plaintiffs were riding in their employer's Chevrolet truck, in returning from their farm work, along the county road. A freight train was approaching the crossing in full view. The whistle had been blown and the bell was ringing. The driver of the truck attempted to cross the track ahead of the approaching train. The engineer assumed that the truck would stop for the train to pass. The driver of the truck failed to do so. When the engineer realized that the truck was not going to stop, the emergency brakes were applied too late to avoid a collision. The truck was hit and the workmen were thrown out and injured. The appellants do not contend there was insufficient evidence to support the verdict or judgment.

The cause was tried by a jury which returned a verdict in favor of the defendants. A motion for new trial was denied. From the judgment which was rendered against plaintiffs they have appealed.

[1] The defendants' attorney was not guilty of prejudicial misconduct in questioning witnesses on cross-examination with respect to compensation insurance which was carried by plaintiffs' employer, or in referring to that subject in his argument to the jury. Plaintiffs' employer carried indemnity insurance with the Colonial Mutual Insurance Company covering the accident in question. Plaintiffs' attorney first disclosed that fact. He called and examined Floyd Sisk, an attorney and claims manager of that insurance company. Neither plaintiffs' employer nor the indemnity company was a party to this action. Plaintiffs' attorney, Mr. Snyder, asked the witness Floyd Sisk: "Have you direct knowledge of all expenditures that were made *in connection with the insurance situation*

*with the plaintiffs in this case?"* to which he replied, "Yes, I have." The witness was then asked, "I direct your attention first to Allen Adams. Would you tell us what the expenditures were to him that were paid and what they amount to?" To that question defendants' attorney objected. In support of his contention that the evidence was competent, Mr. Snyder, plaintiffs' attorney, quoted from Section 3855 of the Labor Code, as follows: "If the employee joins in or prosecutes such action, either the evidence of the amount of disability indemnity or death benefit paid or to be paid by the employer or the evidence of loss of earning capacity by the employee shall be admissible." After warning counsel for the plaintiffs, and the defendants' objection was overruled, the court said, "You may do so, but I think it also opens this other question [regarding the disclosure of existing compensation insurance] which I thought had been closed." Plaintiffs' attorney then offered in evidence Dr. Sanderson's report of his medical services, included in Exhibits V, S, T and U, which were received. The court then remarked, "Very well. You well remember the Court's former ruling?" These exhibits each contains reference to the compensation insurance in the following language: "Ins. Co. Colonial Mutual Ins. Co. Employer Jalwant Singh" (the employer of plaintiffs). After the witness, Mr. Sisk, upon inquiry from plaintiffs' attorney, over the objection of defendants' counsel, had testified in detail to the items which had been paid by the insurance company, including $758.15 on account of the claim of Adams, $228.70 to Price, and $15,430.33 to Hayes, defendants' attorney, on cross-examination, asked him: "How much money was paid to Adams *for compensation?"* To that question the plaintiffs objected on the ground that it was incompetent and immaterial. That objection was sustained. The jury was admonished to disregard the question.

Continuing the cross-examination of Mr. Sisk, he was asked and gave, without objection, the name of the insurance company which he represented. He was then asked, "Why was the Colonial Insurance Company paying out these sums of money for these men?" The following colloquy then occurred:

The Witness: "A. I can give you the answer to that.

"Mr. Snyder (Addressing the witness): You may answer that; I have no objection to it.

"A. Under the California law, and under the State Labor Code, all employers are required to be insured for injury; the Colonial Insurance Company are the insurance carrier for the employer of these employees, and when they became injured in that accident, it thereby became the duty of Mr. Singh, under the laws, to furnish them with medical care and attention, and they having been injured in that respect, it thereby became our duty to do that which we undertook to do, and we are doing it."

It is true that objections were subsequently sustained to questions propounded by defendants' attorney as to what proportion of the money paid by the insurance company was for compensation as distinguished from costs of medical and hospital expenses. It is also true that an objection was sustained to the question asked of Mr. Sisk, as to whether his insurance company had employed attorneys to try this case in behalf of the plaintiffs. That question was asked to show the interest which the insurance company might have in the outcome of the cause. Subsequently, the last question was answered by the witness, with the consent of plaintiffs' attorney, who said: "Go ahead, Mr. Sisk; I am perfectly willing for you to express it." The witness then replied, "We will have a lien upon any judgment that may be recovered by these injured men to pay us for our expenditures which we have necessarily paid under the law."

Under the record in this case it may not be held that defendants' attorney was guilty of prejudicial misconduct in disclosing the existence of compensation insurance. We are satisfied that defendants' attorney was in good faith in asking the questions of the insurance company's managing agent on cross-examination, to which objections were sustained, and in referring to the subject of compensation insurance in his argument to the jury. He had a right to show the interest of the witness in the outcome of the trial. The existence of compensation insurance was shown with the express consent of plaintiffs' counsel. Plaintiffs may not complain of prejudicial evidence which was adduced by themselves or with their consent. Moreover, we must assume plaintiffs were not prejudiced by that evidence since the jury was clearly instructed at plaintiffs' request that they were entitled to full compensation shown by the evidence regardless of the amounts which were advanced or paid by the insurance company to any of the plaintiffs for medical or hospital expenses, or otherwise. That instruction reads: "It appears from the evidence that plaintiffs have received some payments from the Colonial Mutual Insurance Company *by way of compensation* and that the Colonial Mutual Insurance Company has made expenditures on account of the injuries sustained by plaintiffs in an attempt to cure them. You are instructed that the Colonial Mutual Insurance Company will have a first lien upon any judgment plaintiffs may recover herein, and will be repaid in full for any expenditures made to the plaintiffs or any of them for any medical attention given them. Therefore, if you find for the plaintiffs, or any of them, *you will compensate such plaintiffs for their damage as the Court has instructed, and you will not deduct from the amount you believe they are entitled to because of any compensation they, or any of them, may have received from the Colonial Mutual Insurance Company, or for any expenditures made by Colonial Mutual Insurance Company for medical care and attention furnished them.*" (Italics added.)

[2] Even though there should be a doubt concerning the absence of prejudice, as a result of defendants' attorney asking questions regarding the existence of compensation insurance, or in his argument to the jury, the court's denial of plaintiffs' motion for a new trial in this case is controlling on this court upon that issue. The trial judge was better qualified than is this court to determine whether defendants' counsel acted in good faith, and whether his conduct in that regard was prejudicial to the plaintiffs. Brown v. McGuan, 56 Cal.App.2d 35, 41, 132 P.2d 838; Huber v. Henry J. Kaiser Co., 71 Cal.App.2d 278, 285, 162 P.2d 693, 697. In the case last cited it is said in that regard: "Under all the circumstances of this case the claim of prejudicial misconduct is not well founded. Assuming that defendants' counsel in the argument stepped out of bounds, 'Where counsel is charged with misconduct for improperly injecting insurance into the case, the denial by the trial court of a motion for a new trial made on that ground will be deemed a determination by it of good faith on the part of counsel and that defendants were not prejudiced.' Hatfield v. Levy Brothers, 18 Cal.2d [798], at page 814, 117 P.2d [841], at page 849."

Likewise, all of the cases cited by appellants in this case, in support of their contention that respondents' attorney was guilty of prejudicial misconduct, are referred to in the Brown case, supra, and properly distinguished by calling attention to the fact that motions for new trials were granted in each of those cases, and not denied, as it was in the present action.

We conclude the conduct of defendants' attorney with reference to alleged prejudicial misconduct is not reversible error in this case.

[3] Finally, the appellants contend that the court erred in denying their offer in evidence of the Railroad Commission's General Order, or Rule 75-B, with reference to circumstances under which certain specified crossing signs or signals must be maintained by a railroad company. They argue that "the facts and circumstances existing at the particular crossing required the existence of an automatic signalling device." But appellants fail to call this court's attention to any facts or circumstances disclosed by the record, and we are unable to find any such facts in the evidence, which would make that particular rule contended for by appellants applicable, or which would require a wigwag or automatic signal device to be maintained at that particular crossing. We find no evidence in the record that the crossing in question created "an unusual hazard or danger" which would require the maintenance of an automatic signal. The crossing was in a country district. The usual cross-

arm sign was maintained at that crossing. The appellants recognized the fact that an automatic signal was required only when the conditions "at a crossing create an unusual hazard or danger." At their request the jury was so instructed. The jury was repeatedly instructed that it had the duty to determine whether "under all of the conditions found to exist at the crossing in question," the railroad company was guilty of negligence in "not installing wigwag or other protective devices at the intersection in question." We are unable to perceive how plaintiffs could have been prejudiced by excluding from the evidence the Railroad Commission's Rule 75-B. It is not contended that rule specifically required an automatic signal at that particular crossing regardless of conditions. We assume there was no order from the Railroad Commission, under subdivision IX of that Rule, to place an automatic signal at that crossing. The cross-arm sign which was maintained at that crossing apparently conformed to subdivision V(a) of that Rule. It was daylight when the accident occurred. The plaintiffs were coming from their work. Evidently the driver of their truck was familiar with that crossing.

The cases cited by appellants in support of their contention that the railroad company was guilty of negligence in failing to maintain an automatic device at that crossing are not in point. They are based on facts and physical conditions definitely showing unusual hazards which do not exist in the present case. In Harper v. Northwestern Pacific Railroad Company, 34 Cal.App.2d 451, 93 P.2d 821, a nonsuit was granted by the trial court. That order was reversed. The accident occurred in the City of Petaluma on a dark night. A cross-arm sign at that crossing was obscured by a row of trees extending along Wilson Street. There was no light at the crossing. The only light in that vicinity was a 60 candle-power electric lamp on a pole 300 feet from the crossing. The headlight of the engine was not visible because the train had passed the crossing on a spur track and the freight cars blocked the crossing. The court said, 34 Cal.App.2d at page 453, 93 P.2d at page 823: "During all this time no whistle was sounded nor bell rung." The plaintiffs' father, who was killed in the accident, was not familiar with that crossing. He drove his automobile directly into the freight car which blocked the crossing Clearly that was an unusually hazardous crossing. Under such circumstances the order granting a nonsuit was properly reversed.

In the case of Morris v. Sierra & San Francisco Power Co., 57 Cal.App 281, 207 P. 262, 266, plaintiff recovered judgment for damages for loss by fire of his store and stock of goods at Chinese Camp, on account of alleged defect of defendant's telegraph wires which became charged with high power voltage. The plaintiff, Morris, maintained a private telephone wire which crossed beneath defendant's wires near the vicinity of the store. Shortly before the fire plaintiff had readjusted the poles that supported his telephone wire in such a manner as to bring his wire within about an inch of the high-power wires of the defendant. Order number 26 of the Railroad Commission provided specifically that when one telegraph or telephone wire crosses over or under another similar wire there shall be a "minimum clearance, above or below such lines, of 2 feet, unless suitably supported to prevent contact." Plaintiff had notice and knowledge of that rule. He failed to comply with that order. On appeal it was assumed that proximity of the two wires, contrary to the prescribed rule, caused the fire. This court held that plaintiff's negligence precluded him from recovering damages on that account. The judgment was therefore reversed. Clearly that case is not authority holding that the Railroad Company was guilty of negligence in this case, as a matter of law, in failing to maintain a wigwag signal device at the crossing. No such specific order required the installing of a wigwag system under the physical conditions existing at the crossing.

In the case of Clark v. Pacific Gas & Electric Company, 118 Cal.App. 344, 5 P.2d 58, 6 P.2d 297, upon which appellants also rely, the facts are likewise distinguishable from those of the present case. In that case the defendant maintained high-power wires attached to poles in the City of Eureka. On the pole upon which plaintiff, a twelve-year old boy, was injured by climbing to the top where he came in contact with the charged wires, the defendant fastened cross-cleats or steps which extended to within about 18 inches of the ground, contrary to the express prohibition of Order 64-A of the Railroad Commission. The said order provided that "the lowest step on any pole supporting an electric power line shall not be less than 7 feet 6 inches from the ground." Judgment was rendered for plaintiff on the theory that the ladder became an attractive nuisance which enticed the child to climb to the wires as a result of which he was injured. On appeal that judgment was affirmed. No such specific order of the Railroad Commission is involved in this suit.

We conclude that the trial court in this case did not err in refusing to admit in evidence General Order 75-B of the Railroad Commission.

For the foregoing reasons the judgment is affirmed.

PEEK, J., and ADAMS, P. J., concur.

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82 Cal.App.2d 510

## In re EMERSON'S ESTATE.
## DOUKMEDJIAN et al. v. EMERSON.

Civ. 16059.

District Court of Appeal, Second District,
Division 1, California.

Nov. 21, 1947.

Hearing Denied Jan. 19, 1948.

**1. Wills 🔑439, 440**

Intention of testator as manifested by language used controls in construction of a will.

**2. Evidence 🔑65**

A testator is presumed to have known that his absolute testamentary power extended only to an undivided one-half of the community property.

**3. Wills 🔑782(12)**

Under terms of a will, testator intended to dispose of both his separate estate and that against which any right might be asserted on behalf of the marital community and put his widow to her election to take under the will or take her share of the community property though testator was mistaken in his belief that his widow had no community interest in the property devised.

◆

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Petition for distribution of the estate of Henry K. Emerson, also known as H. K. Emerson, deceased, by Lura Brown Emerson, widow and executrix. From an order and amended findings on motion for new trial made by Krikor Doukmedjian and another, the widow appeals.

Order affirmed.

Henry O. Wackerbarth, of Los Angeles, for appellant.

Astor Elmassian, of Los Angeles, for respondents.

WHITE, Justice.

This is an appeal by Lura Brown Emerson, widow of Henry K. Emerson, deceased, from that portion of an order dated January 23, 1947, wherein the trial court ordered the findings and order made on distribution of the estate amended so as to require appellant widow to elect to take her share of her community property or under the will.

Appellant widow and Henry O. Wackerbarth were appointed and qualified as executrix and executor, respectively, of the decedent's last will and testament. The estate was administered upon, and on December 18, 1945, a final account, report and petition for distribution was filed. In said petition, decedent's widow contended that the whole of said estate was community property of herself and the decedent, and prayed that the court determine her community interest in the estate; that said interest be set aside to her; that the balance of the estate be distributed in accordance with the last will and testament of the decedent, and certain assignments which had been executed by two of the beneficiaries under the will.

To said final account and petition for distribution, objections were filed by the two respondents herein, denying that the whole of said estate was community property.

On the hearing of said final account, petition for distribution and objections thereto, the court found that certain assets of the estate were the separate property of the decedent, and that the balance of the assets was the community property of appellant widow and the decedent. Appropriate findings of fact were thereupon made and it was ordered that one-half of all the community property be distributed to the widow as her separate property and estate, and that the remaining one-half of the community property together with the separate property of the decedent be distributed to the widow during her natural lifetime, or so long as she remained the widow of the testator, and that upon her death or remarriage said estate should be distributed, transferred and conveyed, two-thirds to the heirs of Henry K. Emerson, Jr., and one-third to respondents herein, share and share alike.

Thereafter, respondents filed a notice of intention to move for a new trial. On the hearing thereof, respondents stated that the only matter in dispute was as to whether the widow "is entitled to take a life estate under the will of the deceased, in addition to her community interest under the law." It was respondents' contention in the trial court, as it is here, that appellant widow was put to an election to take either her community interest under the law or to take under the terms of the will.

Following the hearing on the motion for a new trial the court, pursuant to the provisions of section 662 of the Code of Civil Procedure, made the following order:

"The motion for a new trial is denied. The findings and order are to be amended to provide:

"That it clearly appears that the testator intended to dispose of his wife's as well as his own interest in the community property.

"The court having so found and having further found what portion of the estate is community property the widow must now elect to take her community property or under the will."

It is from this order that decedent's widow prosecutes this appeal.

The parts of the will pertinent to the sole question presented to us for decision are as follows:

"Third: I give, devise and bequeath to my said wife, Lura Brown Emerson, an undivided one-half (½) interest in and to all of my property and estate, whether real, personal or mixed, and wheresoever situated, during her natural lifetime, providing she remains my widow, she to have the full and free use and benefit of the rents, issues, profits and income thereof, as herein provided, and upon her death, or remarriage, all of said property and estate shall pass, and I hereby give, devise and bequeath the same, to my said son, Henry K. Emerson, Jr., to be his own sole and separate property and estate.

"Fourth: I give, devise and bequeath the remaining one-half (½) of all of my property and estate, whether real, personal or mixed, and wheresoever situated, to my said son, Henry K. Emerson, Jr., to be his own sole and separate property and estate.

"Fifth: In the event of the death of my said son, Henry K. Emerson, Jr., prior to the termination of the life estate, or the interest of my said wife, Lura Brown Emerson, in and to said undivided one-half (½) interest of my estate, then, and in that event, I give, devise and bequeath all of my property and estate, whether real, personal or mixed, and wheresoever situated, to my said wife, Lura Brown Emerson, during her natural lifetime, providing she remains my widow, she to have the full and free use and benefit of it during said time, and upon her death, or at such time as she ceases to remain my widow, I give, devise and bequeath the whole of said estate and property, to the following named persons and institutions, to-wit:

"(a) An undivided one-third (⅓) thereof, to my brother, Jacob Daukmajian, of Aleppo, Syria, and in the event of his death prior to the contingency provided for in the foregoing part of this paragraph, said undivided one-third (⅓) interest shall go to his children, share and share like; * * *."

[1] In determining whether the testator intended to dispose of his wife's as well as his own interest in the community property and that his widow was thereby put to her election, the controlling question is the intention of the testator, as manifested by the language of his will.

[2, 3] From a reading of the testamentary document here in question, we are satisfied that the language thereof clearly indicates that the testator believed that by the provisions of his will he was disposing of the entire estate, including both his separate estate as well as that against which any right might be asserted on behalf of the marital community. We are in accord with appellant's contention that the testator is presumed to have known that his absolute testamentary power extended only to an undivided one-half of the community property. Fortified with this presumed knowledge, he bequeathed in paragraph two, the definite amount of $100.00 to Harvey Hall, son of appellant widow by a former marriage. He then devised and bequeathed to his wife an undivided one-half interest in and to "all of my property and estate, whether real, personal or mixed, and wheresoever situated, during her natural lifetime, providing she remains my widow." The testator then provided that in the event of the death or remarriage of his widow "all of said property and estate shall pass * * * to my said son Henry K. Emerson, Jr.," as his sole and separate property.

By paragraph four the testator bequeathed and devised the remaining one-half "of all my property and estate" to his aforesaid son. The intention of the testator to dispose of his entire estate, both separate and community, is manifested by the provisions of paragraph five of the will, wherein he provided that in the event of the death of his son, prior to the termination of the life estate or interest of his wife, the latter was given a life estate in the whole estate and the income thereof. Further evidencing what was in the mind of the testator is the declaration contained in the will that "I further declare that all of the property, real and personal, of which I am now possessed, is separate property, said property, or the nucleus thereof, having been owned or acquired by me prior to my marriage to the said Lura Brown Emerson". He thereby makes it clear that in using the term "all of my property and estate" with reference to the interest in one-half thereof which he gave to his wife and the remaining one-half interest which he bequeathed to his son, he was excluding the idea that he was dealing with any undivided portion of the property in question and did not intend to dispose of any portion of the property in which his wife had a community interest. Throughout the testamentary document now before us the language clearly evidences a belief on the part of the testator that "all of the property" of which he made disposition was property that he could devise as he pleased and without embarrassment by any claim which his widow might rightfully assert.

It is of no concern that he was mistaken in his belief that the wife had no community interest in the property devised. His manifest intention to devise the estate as an entirety, and irrespective of any right which might be asserted on behalf of the marital community, is the controlling factor. "It is the testator's intention, and not the ground upon which that intention rests, that must control in the interpretation of his will. A mistaken belief on the part of a testator that he has the unrestricted power to dispose of the property absolutely is immaterial", Estate of Moore, 62 Cal.App. 265, 274, 216 P. 981, 985. The testator's intention that the estate in its entirety, and not merely his community interest therein, should be disposed of by his will was sufficient to put his widow to her election. We are satisfied that the principles enunciated in Estate of Vogt, 154 Cal. 508, 98 P. 265, and Estate of Moore, supra, are determinative of the issues tendered by this appeal.

For the foregoing reasons, that portion of the order of January 23, 1947, from which this appeal was taken, is affirmed.

YORK, P. J., and DORAN, J., concur.

82 Cal.App.2d 528

## BABCOCK v. McCLATCHY NEWSPAPERS.

Civ. 7394.

District Court of Appeal, Third District, California.

Nov. 22, 1947.

Hearing Denied Jan. 19, 1948.

**1. Libel and slander 🔑48(3), 87**

The publication in newspaper of article asking candidate for reelection as district attorney how it was possible for him to buy office building for purported price of $80,000 on a salary of $4,500 per year, since he was dead broke when he took office, presented a fair and legitimate question, if assumed basis for question was truthfully stated, and to state actionable cause for libel it would be necessary specifically to allege that essential elements of question were false and not merely to allege that article was false and malicious. Civ.Code, § 47.

**2. Libel and slander 🔑89(1)**

A complaint charging that newspaper published question asking district attorney, who was seeking re-election, how it was possible for him to buy an office building for purported price of $80,000 on his salary of $4,500 per year when he was dead broke when he took office did not state a cause of action for libel per se and hence was demurrable where special damages were not pleaded. Civ.Code, § 47.

**3. Libel and slander 🔑86(2)**

Where a defamatory meaning is necessarily apparent from language employed in published article, no innuendo is necessary.

**4. Libel and slander 🔑86(4)**

An "innuendo" infers that language is open to reasonable construction and that it is not slanderous per se or actionable.

See Words and Phrases, Permanent Edition, for all other definitions of "Innuendo".

**5. Libel and slander 🔑86(4)**

Newspaper article asking district attorney seeking re-election in effect how he got the money to buy an office building at purported price of $80,000, did not state an actionable cause of libel per se in spite of innuendo that defendants thereby meant to be understood as meaning that plaintiff was dishonest public official and was guilty of corruption as district attorney. Civ. Code, § 47.

**6. Libel and slander 🔑86(4)**

Where newspaper article, in commenting on plaintiff's seeking re-election as district attorney, stated that in contrast to plaintiff's record the deputy state's attorney general had an exemplary record, article was not libelous per se, notwithstanding innuendo that defendant meant thereby that plaintiff was a dishonest public official; "exemplary" primarily meaning serving as example, pattern, model, ideal or superior. Civ.Code, § 47.

See Words and Phrases, Permanent Edition, for all other definitions of "Exemplary".

**7. Libel and slander 🔑86(1)**

An "innuendo" may not enlarge the charge or change import of alleged defamatory language, but it is permitted for purpose of explaining meaning of ambiguous language.

**8. Libel and slander 🔑80**

Whether complaint states actionable cause of libel is for determination of court.

**9. Libel and slander 🔑48(3)**

In the interest of public welfare an individual or newspaper is privileged to challenge the fitness or qualifications of candidate for public office without being subject to action for libel and slander, provided the statements with relation thereto are true. Civ.Code, § 47.

**10. Libel and slander 🔑48(3), 50**

A candidate for public office invites and challenges public criticism so far as it affects his qualifications and it is proper subject of comment, but no one may wrongfully impute dishonesty to him. Civ. Code, § 47.

**11. Libel and slander 🔑101(4)**

The court must presume that newspapers and electors of a particular locality are "interested" in character and fitness of their public offices, including candidates therefor within Penal Code provision that communication made by one "interested" in subject to one also interested therein is not presumed to be malicious. Penal Code, § 256.

See Words and Phrases, Permanent Edition, for all other definitions of "Interested".

**12. Libel and slander ⚷69**

A publication must be both false and unprivileged to constitute it an actionable libel. Civ.Code, § 47.

**13. Libel and slander ⚷100(3)**

Where plaintiff suing newspaper for alleged defamatory article which was not libelous per se, did not deny essential facts upon which article was based, court was required to assume that essential facts stated in the article were true and that complaint therefore failed to state an actionable cause for libel per se. Civ.Code, § 47.

**14. Libel and slander ⚷19, 89(1)**

When offending language in a published article is susceptible of an innocent interpretation it is not actionable per se, and in addition to an innuendo, plaintiff must allege special damages by reason of the meaning gained from the publication.

**15. Libel and slander ⚷89(1)**

Code provision that defamatory language not libelous on its face is not actionable unless plaintiff alleges and proves special damages as proximate result thereof merely enacts the rule previously prevailing in California. Civ.Code, § 45a.

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Appeal from Superior Court, Sacramento County; J. O. Moncur, Judge.

Action by Otis D. Babcock against McClatchy Newspapers, a California corporation, to recover damages for alleged libel. From a judgment for defendant on the pleadings, after plaintiff had been given leave to amend his complaint but refused to do so, plaintiff appeals.

Affirmed.

Frank A. Prior and Otis D. Babcock, both of Sacramento, and George M. Naus, of San Francisco, for appellant.

Downey, Brand & Seymour, of Sacramento, and Sullivan, Roche, Johnson & Farraher, of San Francisco, for respondent.

THOMPSON, Justice.

The plaintiff has appealed from a judgment rendered on the pleadings, after he had been given leave to amend his complaint, but refused to do so.

The complaint purports to charge the defendant with libel in publishing the statement of a citizen, in the form of an inquiry affecting the qualifications of opposing candidates in a political campaign for election to the office of district attorney of Sacramento County. The plaintiff was completing his term as district attorney, and sought reelection. His opponent was John Quincy Brown, the present district attorney. An attorney by the name of A. J. Harder challenged plaintiff to debate, in a public meeting, the qualifications of the respective candidates. Harder said: "The people of this county have a right to ask: 1. How was it possible for you, Mr. Babcock, going into office dead broke, on a salary of $4500 to buy an office building at a purported price of $80,000?" Also: "2. Why do you contend you have cleaned up vice when the public clinic shows an increase of venereal diseases?" and, "3. How can you claim to have efficiently run your office in the face of many dismissals of cases and failures to convict persons accused of crime?" Mr. Harder added that: "In contrast to the record of the incumbent Babcock, John Quincy Brown, deputy state attorney general, has an exemplary record, both as a member of the bar and in his private life. Sacramento needs this man."

The foregoing challenge to debate was published in the defendant's newspaper at Sacramento, in August, 1942, under the caption:

"Harder Issues Challenge, Gets Babcock Reply

"District Attorney Accepts Offer to Debate on Vice, Convictions."

The amended complaint for libel, under Section 45 of the Civil Code, was filed in Sacramento County in January, 1943. It contains the following allegations and also excerpts from the published article:

"That the defendants, knowing the premises, on the 8th day of August, 1942, falsely and maliciously and with intent and design to injure, disgrace and defame this plaintiff and bring him into disgrace and obloquy, composed and published and caused to be published a certain malicious libel in the Sacramento Bee containing among other things the false, libelous and malicious matters following:

> " 'How was it possible for you, Mr. Babcock, going into office dead broke, on a salary of $4,500, to buy an office building at a purported price of $80,000?
>
> * * * * *
>
> " 'In contrast to the record of the incumbent Babcock, John Quincy Brown, deputy state attorney general, has an exemplary record, both as a member of the bar and in his private life. Sacramento County needs this man.' "

As innuendo of the foregoing language, the complaint added the following: "That the defendants meant thereby to be understood as meaning and asserting, and the readers of said publication, in fact, understood as meaning and asserting, that plaintiff was a dishonest public official and that he was guilty of corruption in his official duties while occupying the office of District Attorney of Sacramento County."

The complaint alleges no special damages. It merely alleges general damages in the sum of $30,000 and asks for exemplary damages in the further sum of $20,000. It is not contended that special damages were pleaded.

A demurrer to the sufficiency of the allegations of the complaint was overruled.

The defendant filed its answer, denying the essential allegations of the complaint, and affirmatively alleging that the published article was privileged under Section 47 of the Civil Code, together with other defenses.

[1] Paraphrasing the published question upon which the plaintiff chiefly relies to support his action for alleged slander, it means, substantially, how was it possible for the plaintiff to buy an office building for the purported price of $80,000, on his salary of $4500 per year, since he was dead broke when he took office. Or, in other language, it means where did plaintiff get the money with which he purchased the $80,000 building. That seems to be a fair and legitimate question to ask a public officer who is a candidate for reelection, provided the assumed basis for the question is truthfully stated. It contains the assumption of facts that plaintiff was dead broke when he took office; that his salary was $4500 per year, and that he thereafter bought an office building for which he paid $80,000. Those facts are not denied. To state an actionable cause for libel it would be necessary to specifically allege that the said essential elements of that question were false. It was insufficient to merely allege generally that the published article was false and malicious. Realizing that the the truthfulness of the implied averments upon which the question was based would be a complete defense to the charge of libel, the defendant sought to take the deposition of the plaintiff to elicit evidence upon those possible issues. The plaintiff refused to answer questions on those issues on the ground that they were not material in the suit for libel. Upon citation to show cause why plaintiff should not be required to answer the questions, the trial court held they were immaterial and refused to instruct plaintiff to answer the questions. Upon mandate, this court held that the questions were material and that plaintiff should be required to answer them. A hearing was granted by the Supreme Court in that mandate proceeding. The Supreme Court held McClatchy Newspapers v. Superior Court, 26 Cal.2d 386, at page 395, 159 P.2d 944, 949, that: "If * * * evidence of plaintiff's financial transactions would be relevant to such potential issues, defendant would be entitled to take his deposition along the lines suggested."

Subsequently, upon notice, the defendant moved the trial court for judgment on the pleadings, on the theory that the amended complaint fails to state a cause of action since the gist of the charge relied upon was not alleged to be untrue; that the complaint does not charge libel per se, and that no special damages were alleged therein. That motion was heard December 27, 1946, before the Honorable J. O. Moncur, a visiting judge. He granted the motion, and judgment was accordingly rendered that plaintiff take nothing by his action. From that judgment this appeal was perfected.

[2] Two questions are involved on this appeal. First, does the amended complaint state an action for libel per se? Second, If an action for libel per se is not alleged, is the complaint fatally defective, since no special damages were alleged or claimed?

We are of the opinion the amended complaint fails to state a cause of action for libel per se, and that, since it does not specifically deny the gist of the implied charge, and fails to allege or ask for special damages, the complaint is fatally defective, and the court, therefore, properly rendered judgment on the pleadings. The plaintiff was granted opportunity to amend his complaint, but refused to do so.

The plaintiff relies solely on the two questions previously quoted from the complaint, namely, how could he go into office dead broke and buy an office building for $80,000 on his salary of $4500? and second, in contrast with the record of plaintiff, his opponent, Mr. Brown, has an *exemplary* record as a member of the bar and in his private life.

[3, 4] Those questions were propounded by Mr. Harder, a citizen of Sacramento, as the basis for a challenged public debate between himself and plaintiff upon the qualifications of the respective candidates. It will be observed that nowhere in the published article was the plaintiff specifically charged with dishonesty or corruption as a public officer, or otherwise. We concede that the two questions are open to the construction that dishonesty and corruption may be inferred. But we are convinced both statements are reasonably susceptible of a contrary construction. If that be true, then, under California authorities, the complaint fails to state a cause of libel per se, in spite of the fact that the complaint alleges an innuendo charging defendant with meaning that plaintiff was guilty of dishonesty and corruption as a public officer. Sifted to its essential meaning, the first question is an inquiry as to where plaintiff obtained the money with which he purchased an office building which costs him $80,000. Obviously that question reasonably infers that if it developed that plaintiff secured the money by gift, inheritance or profitable business investments, the purchase of the building was perfectly legitimate. It is true that, emphazing the acquiring of means in excess of plaintiff's salary, the answer, as a defense, charges plaintiff with violating Section 78 of the Sacramento County charter by engaging in private practice of the law contrary to the prohibition that officers "shall not engage in any private practice." But since that is a mere defense, which does not appear in the complaint, we shall disregard it. The innuendo is itself a recognition of the fact that the language may not be considered defamatory on its face. When a defamatory meaning is necessarily apparent from the language employed, no innuendo is necessary. Newell's Libel and Slander 4th Ed., 588, sec. 542; 37 C.J. 147, sec. 671. The innuendo infers that the language is open to the reasonable construction that it is not slanderous per se, or actionable.

[5] It is self-evident, with respect to the first question, that the inquiry may be construed to mean merely, Where did plaintiff procure the means with which he purchased the $80,000 building? Of course it is also open to the inference that the money may have been corruptly or dishonestly acquired. In effect, it may be construed to mean that, since he took office financially broke, the electors have a right to ask the candidate for reelection whether he obtained the funds from gifts, inheritances or profitable investments with which he purchased the property. As the respondent expresses it, the question is reasonably susceptible of the construction, "How did you make your money? How did you increase your worth?" If it is reasonably open to that construction, the complaint does not state an actionable cause of libel per se, in spite of the innuendo. The question is based on the assumption that plaintiff took office "dead broke" and that he subsequently bought a building which cost him $80,000. We must assume both statements are true since plaintiff failed to deny either of them. If those statements be true it would seem to be a legitimate inquiry to ask the plaintiff, in effect, did you get the money from gifts, legacies or profitable investments, or otherwise. We conclude that the question does not constitute an actionable cause of libel per se.

[6-8] The second alleged libelous statement included in the complaint and relied upon by plaintiff is certainly open to the reasonble construction that the *record* of plaintiff's opponent, Mr. Brown, as compared with that of plaintiff, is "exemplary", as a public officer and in private life. It does not impute dishonesty or corruption in office. To say that one man's record, as a prosecuting officer or in private life, is *exemplary* as compared with another, does not ordinarily mean that the less ideal man is corrupt, dishonest or faithless. Merely because a man is not exemplary would not tend to expose him to "hatred, contempt, ridicule, or obloquy," or cause "him to be shunned or avoided." Primarily the word "exemplary" merely means serving as an example, a pattern, a model, ideal or superior. Characterizing the record of a lawyer as exemplary would ordinarily mean he was able, capable, forceful, industrious and successful. It might also mean he is reliable and trustworthy. To say that a lawyer is not ideal or exemplary ordinarily means that he may lack those characteristics in the highest degree, and that he might be careless, negligent, indolent, or possibly unreliable. We think that statement is not libelous per se since it is susceptible of either construction. For the purpose of determining that question the innuendo adds nothing of value to the complaint. An innuendo may not enlarge the charge or change the import of the language employed. It is permitted for the purpose of explaining the meaning of language which is ambiguous or uncertain in its application. Newell on Slander and Libel, supra, pages 588, 589, secs. 542, 543; 16 Cal.Jur. 88, secs. 57-60. The question as to whether a complaint states an actionable cause for libel is a problem for the determination of the court. Mortensen v. Los Angeles Examiner, 112 Cal.App. 194, 202, 296 P. 927.

[9-10] In the interest of public welfare, an individual or a newspaper is privileged to challenge the fitness or qualifications of a candidate for public office, provided the statements with relation thereto are true. In the case of Eva v. Smith, 89 Cal.App. 324, 264 P. 803, 804, a member of the city council of San Mateo published in the "San Mateo Times" regarding the defendant and other candidates for reelection, among other things, that "I am strongly in favor of keeping the city council free from any suspicion or taint of unfairness in the city's contracts. No contractor should be influenced to buy from any one particular firm. * * *" The complaint contained an innuendo alleging that defendant intended thereby to charge plaintiff with dishonesty in performance of his official duties as a member of the city council. A demurrer to the complaint was sustained without leave to amend. The order sustaining the demurrer was affirmed. On appeal the Supreme Court said: "Taking the article as a whole, it seems clear to us that it amounts to no more than a criticism of plaintiff's qualifications for office and one which defendant was entitled to make. No malversation on the part of plaintiff is charged. * * * Nor does the article charge that plaintiff was guilty of dishonest conduct with reference to any public contracts. An individual who seeks or accepts public office invites and challenges public criticism so far as it may relate to his fitness and qualifications, and it is a proper subject of comment. It is therefore justifiable for one to communicate, bona fide, to the constituency any matter respecting a candidate material to the election. * * * No one, of course, has a right to *wrongfully* impute dishonesty to him * * *. The conduct of public officers being open to public criticism, it is for the interest of society that their acts may be freely published with fitting comment or strictures. * * * It would be absurd to hold it libelous to say of a candidate for office that he was utterly unworthy of public confidence. * * * And, again, it has been said that it is one of the infelicities of public life that a public officer is thus exposed to critical and often unjust comment; * * *. The purpose of the rule permitting fair and honest criticism is that it promotes the public good and hence is based upon public policy. Triggs v. Sun Printing & Pub. Ass'n, supra [179 N.Y. 144, 71 N.E. 739, 66 L.R.A. 612, 103 Am.St.Rep. 841, 1 Ann.Cas. 326]. In thus permitting criticism the law gives a wide liberty, there being an honest regard for the truth. Within this limit public journals, speakers, and private individuals may ex-

press opinions and indulge in criticism upon the character or habits, or mental or moral qualifications of official candidates. Cooley on Torts, vol. 1, p. 443."

[11] Section 256 of the Penal Code provides that a communication made by one who is interested in the subject, to one who is also interested therein, is not presumed to be malicious, "and is a privileged communication." We must presume that newspapers and the electors of a particular locality are interested in the character and fitness of their public officers. As the Eva case, supra, from which we have quoted, says, such statements should be made with an "honest regard for the truth."

Concerning the liability for alleged libel in publishing an article involving a labor dispute, it is likewise said in Emde v. San Joaquin County Central Labor Council, 23 Cal.2d 146, at page 154, 143 P.2d 20, 25, 150 A.L.R. 916: "Because, however, the peaceful settlement of labor contention is a matter of vital public concern, the parties to such a controversy must be accorded the right to make fair comment upon the facts involved, at least so long as the criticism *is based upon a true* or privileged statement of fact."

[12] In Snively v. Record Publishing Company, 185 Cal. 565, at page 574, 198 P. 1, 4, it is said: "Since a libel is 'a false and unprivileged communication' (section 45), it follows that the publication must be both false and unprivileged in order that it shall constitute an actionable libel."

[13] From the foregoing it follows that since the plaintiff did not deny the truthfulness of the essential facts upon which the inquiry complained of was clearly based, we must assume those facts were true, and that the complaint, therefore, fails to state an actionable cause for libel per se.

The complaint in this case fails to allege special damages. The rule is established in California and in other jurisdictions that, where no special damages by reason of the publication are alleged, the existence of an actionable cause for libel depends upon whether or not the complaint alleges facts which are libelous per se. In other words, if the complaint fails to allege an action which is libelous per se, it is necessary to plead special damages or the complaint is fatally defective for failure to state an actionable cause based on libel. Peabody v. Barham, 52 Cal.App,2d 581, 126 P.2d 668; Washer v. Bank of America, 21 Cal.2d 822, 136 P.2d 297, 155 A.L.R. 1338; Ruble v. Kirkwood, 125 Or. 316, 266 P. 252, 254; Thompson v. Osawatomie Pub. Co., 159 Kan. 562, 156 P. 2d 506; Knapp v. Post Printing & Pub. Co., 111 Colo. 492, 144 P.2d 981; 37 C.J. 35, § 358; 86 A.L.R. 848, note; 12 Southern Cal. Law Review, p. 239.

Other California cases recognize the foregoing rule by holding either directly, or in effect, that it is only when the complaint fails to state an action which is libelous per se, that it is necessary to plead special damages. Pollock v. Evening Herald Pub. Co., 28 Cal.App. 786, 789, 154 P. 30; Harris v. Curtis Pub. Co., 49 Cal.App.2d 340, 344, 121 P.2d 761; Schomberg v. Walker, 132 Cal. 224, 64 P. 290; Layne v. Kirby, 208 Cal. 694, 284 P. 441; Bates v. Campbell, 213 Cal. 438, 2 P.2d 383. In the Schomberg case, the court said, 132 Cal. at page 227, 64 P. at page 291: "It is only when the libelous meaning of the publication is covert—not apparent on the face of the language used—that averment and proof of special damage is required." In that case the Supreme Court held that the alleged publication was libelous per se, and that it was, therefore, not necessary to have alleged special damages. For that reason the judgment in favor of the defendant was reversed. In the Pollock case a judgment in favor of the defendant was affirmed on appeal. The Appellate Court said, 28 Cal.App. at page 788, 154 P. at page 31: "It appears to be the rule that 'in order to maintain an action upon words which are not libelous * * * per se, the plaintiff must have suffered some special damage, and the recovery is limited to compensation therefor.'" In the Harris case a judgment of nonsuit was affirmed on appeal. The court said [49 Cal.App.2d 340, 121 P.2d 763]: "Where the publication is not libelous per se, the matters referred to must be alleged in order to state a cause of action." In the Layne case an order sustaining a demurrer to the complaint was reversed on appeal. The Supreme Court held that the alleged defamatory matter was libelous per se. The same proceeding and conclusion was reached in the Bates case.

In the Peabody case, supra, upon which the respondent in this case chiefly relies, a judgment of nonsuit was affirmed on appeal. A hearing was denied by the Supreme Court. In determining that a complaint for libel fails to state an actionable cause, unless the defamatory matter relied upon consists of libel per se, or alleges special damages, the Appellate Court said [52 Cal.App. 2d 581, 126 P.2d 669]:

> "A publication is libelous per se when on its face and without the aid of innuendo, it exposes a person to hatred, contempt, * * *. Whether the language used is libelous per se must be determined from the language itself. Mortensen v. Los Angeles Examiner, 112 Cal.App. 194, 296 P. 927. In order to determine whether it is libelous per se no resort may be had to any declaration as to the meaning of the words or as to the intention of their author; it must be construed apart from allegations of innuendo and inducement. [Citing authorities.] Also in determining whether a publication is libelous per se, its language must be given the natural, and popular construction of the average reader. * * *
>
> "When offending language is susceptible of an innocent interpretation it is not actionable per se. Neither will language be given a libelous character unless such is its plain and obvious import. * * * Neither is it actionable per se if the offending language has more than one meaning. [Citing authorities.] * * *
>
> "* * * But in addition to an allegation of the inducement [when the defamatory matter is not libelous per se] it is also necessary for plaintiff to allege special damages by reason of the meaning gained from the publication by specifically designated parties affected by the publication with the items of losses suffered in each instance. * * *
>
> "* * * The absence of such allegation and of the allegation of special damages renders plaintiff's complaint utterly inadequate to warrant an inquiry into the results of the publication."

[14] In the Washer case, supra, the Supreme Court reversed an order sustaining a demurrer to the complaint for failure to state a cause of action. The Supreme Court held that the complaint adequately alleged facts sufficient to state a cause for special damages. It, however, specifically referred to the Peabody case with entire approval, from which case we have previously quoted. In the Washer case, at page 828 of 21 Cal.2d, at page 301 of 136 P.2d, it is said: "* * * And when the offending language is susceptible of an innocent interpretation, it is not actionable per se, but, in addition to an innuendo, it is necessary for the plaintiff to allege special damages by reason of the meaning gained from the publication."

In support of the foregoing rule, which appears to be firmly established in this state, the respondent in this case has cited numerous authorities from a score of other jurisdictions. But it is not necessary to discuss those cases, or the numerous cases to the contrary from other jurisdictions, upon which the appellant relies.

[15] In support of the aforesaid rule of pleading with respect to the sufficiency of a complaint for libel, it is interesting to note that the legislature adopted Section 45a of the Civil Code (Stats.1945, Chapter 1489, page 2762) after this suit was commenced. That section provides: "A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. *Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof.* * * *" (Italics added.)

We assume the legislature adopted the preceding section in recognition of the established rule of pleadings which prevails in California. The adoption of Section 45a of the Civil Code merely enacts, in code form, the rule which has long been in force in this State. 1 Witkin's Summary of California Law, 6th Ed., p. 674, sec. 85; 19 Southern Cal.Law Review, p. 121.

We conclude that the complaint in this case fails to state an actionable cause for libel per se, and that since no special damages are alleged, and plaintiff refused to amend his complaint in that respect, the motion for judgment on the pleadings was properly granted.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

WEST KEY NUMBER SYSTEM

82 Cal.App.2d 521

## ANDREWS v. ANDREWS.

Civ. 7368.

Sac. 5827.

District Court of Appeal, Third District, California.

Nov. 22, 1947.

**1. Evidence 🔑426**

Generally, evidence may be admitted to establish that realty is community property, even though title has been acquired under a deed executed in a form that ordinarily creates in the grantee a common-law estate with incidents unlike those under the law of community property.

**2. Evidence 🔑426**

Land may be shown to be community property even though it is granted to one spouse alone as his or her property in fee simple.

**3. Evidence 🔑426, 461(4)**

Evidence may be admitted to establish that husband and wife intended to take property as community property even though they accepted deed drawn to them as tenants in common or as joint tenants.

**4. Husband and wife 🔑266**

Property may be converted into community property at any time by oral agreement between the spouses, and an agreement at the time the property is acquired has the same effect.

**5. Evidence 🔑426**

In divorce suit, wherein husband contended that apartment house was his property and not community property, trial court properly heard testimony tending to show that parties intended to take apartment house as community property, and that though original deed conveyed lot to husband as his separate property, it was converted into community property by oral agreement between the spouses.

**6. Appeal and error 🔑989**

In reviewing evidence on appeal, District Court of Appeal was required to disregard conflicts, and give to the evidence, and proper inferences therefrom, their fullest effect in support of the findings and judgment.

**7. Husband and wife 🔑264**

In divorce suit, evidence sustained finding that apartment house was community property rather than husband's separate property, though original deed conveyed lot, on which apartment house was subsequently constructed, to husband as his separate property.

**8. Husband and wife 🔑14(4)**

In divorce suit, evidence sustained finding that spouses were tenants in common of home property, on ground that it was intended to be a wedding gift by husband's aunt to both husband and wife and was not intended merely as a gift to the husband alone.

◆

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Suit for divorce by Averil C. Andrews, sometimes known as Averil C. Weisenhofer, against Frank X. Andrews, Sr., sometimes known as Frank X. Weisenhofer. From a judgment in favor of the plaintiff, in so far as it held that certain property was not defendant's separate property, the defendant appeals.

Judgment affirmed.

Emerson W. Read, of Sacramento, for appellant.

Henry & Bedeau, of Sacramento, for respondent.

ADAMS, Presiding Justice.

In this case an interlocutory decree of divorce was awarded to plaintiff on the ground of defendant's extreme cruelty.

Defendant has appealed therefrom, but states in his brief that he is "not appealing as far as the divorce is concerned." He does, however, urge that the decree should be "reversed and modified to hold" that two certain pieces of real property and certain personal property which were disposed of by the decree were his separate property, free and clear of interests of any kind in plaintiff.

The evidence shows that plaintiff and defendant were married in Modesto on June 14, 1923. The only issue of such marriage was a son, who, at the time of the trial in April, 1946, was about six years of age. The parties separated in December, 1945, at which time defendant left the family home at 4700 T Street, Sacramento, telling plaintiff that he wanted a divorce because he wanted to marry another woman. At that time the parties owned the said home and also an apartment house in Sacramento, which is referred to as the Andrews Apartments. They also owned personal property consisting of furniture and furnishings in the home as well as in the apartment house, an automobile, certain bonds, cash, etc.

At the conclusion of the trial the court made findings which recited that property constituting the Andrews Apartments and the furniture and furnishings therein and used in connection with its operation was community property; also that the furniture and furnishings in the home on T Street (with certain exceptions not pertinent here), the automobile, the bonds, etc., were community property, but that the home on T Street was held and owned by the parties as tenants in common. In its decree it adjudged that the apartment house and its furnishings be awarded to the parties in equal shares. The furniture and furnishings in the home were awarded to plaintiff, and the other property was awarded in part to one or the other, or to both, equally. The custody of the child was awarded to plaintiff, and defendant was directed to make to her for her support and that of the child a monthly payment, the amount thereof to depend upon whether defendant did or did not permit plaintiff to continue to live in the T Street home.

It is the court's determination that the home property was owned by plaintiff and defendant as tenants in common, and that the apartment house and its furniture and furnishings were community property, that appellant attacks upon this appeal, it being his contention that both were his separate property.

Regarding the Andrews Apartments, appellant asserts that the lot was conveyed to him by an aunt by deed of gift dated April 10, 1939; that he built and furnished the apartment house with funds acquired by effecting a loan from a bank in the sum of $12,000; that he borrowed $900 from his wife's mother, $1500 from California State Employees Association, $2500 from a bank on credit of his wife's mother's realty, and that he had "several thousand dollars of his own from inheritances"; and that he never conveyed any interest in the property to plaintiff.

[1-4] The rule laid down in Tomaier v. Tomaier, 23 Cal.2d 754, 757, 758, 146 P.2d 905, 906, is directly applicable to this case. There the court said: "It is the general rule that evidence may be admitted to establish that real property is community property even though title has been acquired under a deed executed in a form that ordinarily creates in the grantee a common law estate with incidents unlike those under the law of community property. Thus land may be shown to be community property even though it is granted to one spouse alone as his or her property in fee simple. Jaegel v. Johnson, 148 Cal. 695, 84 P. 175; Hammond v. McCollough, 159 Cal. 639, 115 P. 216; Hibernia Sav. & Loan Soc. v. DeRyana, 210 Cal. 532, 292 P. 632; Estate of Cronvall, 220 Cal. 503, 31 P.2d 372. Again, it may be shown that husband and wife intended to take property as community property even though they accepted a deed drawn to them as tenants in common. Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477; Steere v. Barnet, 54 Cal.App. 589, 202 P. 166. It has in fact been held unequivocally that evidence is admissible to show that husband and wife who took property as joint tenants actually intended it to be community property. Hulse v. Lawson, 212 Cal. 614, 299 P. 525; Jansen v. Jansen, 127 Cal.App. 294, 15 P.2d 777; see Minnich v. Minnich, 127 Cal.App. 1, 8, 15 P.2d 804; Horsman v. Maden, 48 Cal.App.2d 635, 640, 120 P.2d 92. Such

rulings are designed to prevent the use of common law forms of conveyance to alter the community character of real property contrary to the intention of the parties. Moreover, it is well settled that property may be converted into community property at any time by oral agreement between the spouses (Kenney v. Kenney, 220 Cal. 134, 30 P.2d 398; Estate of Watkins, 16 Cal.2d 793, 797, 108 P.2d 417, 109 P.2d 1; Title Insurance & Trust Co. v. Ingersoll, 153 Cal. 1, 94 P. 94; Estate of Kelpsch, 203 Cal. 613, 265 P. 214), and an agreement at the time the property is acquired has the same effect."

[5] Therefore, it was proper for the trial court in this case to hear testimony tending to show that the parties intended to take the apartment house lot as community property, and likewise testimony tending to show that, even if the original deed conveyed the lot to defendant as his separate property, it was converted into community property by oral agreement between the spouses. Such evidence was admitted, and the court found that the property was community property. Therefore the only question before this court, as an appellate tribunal, is whether there is evidence in the record to sustain its conclusion.

[6, 7] Disregarding conflicts, and giving to the evidence, and proper inferences therefrom, their fullest effect in support of the findings and judgment as we are obliged to do (Estate of Bristol, 23 Cal.2d 221, 223, 224, 143 P.2d 689; Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183; Fackrell v. City of San Diego, 26 Cal.2d 196, 207, 157 P.2d 625, 158 A.L.R. 773; Pewitt v. Riley, 27 Cal.2d 310, 313, 163 P.2d 873), we cannot say that such judgment is without substantial support.

Mrs. Andrews testified that before the acquisition of the lot she and defendant had a conversation about the ownership of the property and the building of an apartment house thereon; that defendant said that they would take their savings, that defendant would try to borrow from the State Credit Association, and that plaintiff should see if her mother would put a mortgage on her home, and they would then see if they could raise enough money by going to the bank to erect an apartment house on the lot, and that if they did it would belong to both of them and they would have something to take care of them in their old age; that they had many such conversations, and that whenever the apartments were referred to they were called "our apartments." Plaintiff further testified that it was she who induced her mother to put a mortgage on her home by which $2500 was raised, and to lend them $900 out of $1000 in cash she had in a savings account. The record shows that a bank loan of $12,000 was obtained which was secured by a note and deed of trust which were signed by both plaintiff and defendant.

Plaintiff also testified that in addition to raising money as above stated she further performed her part of the agreement by being almost continuously at the apartment house (many more times than appellant) until December 3, 1945, the date of the separation, at which time appellant moved from the family home to the apartment house. Before construction, which was about six weeks after the money was raised, she did physical work in clearing the lot of weeds and wild blackberry vines, and worked there almost daily. As soon as Mr. Gould started to construct the apartments she was there every day—sometimes five or six times a day—advising and consulting with the contractor, furnishing suggestions and performing other acts, the same as any other owner would do. She sewed and made all the linens that were in the building—made the curtains and did the shopping and buying to furnish the apartments. She bought the linens a few at a time. She selected the lights and other fixtures, the bedding, chiffoniers, carpets, stoves, refrigerators, dishes, silverware, linens and all other furniture that were placed in the apartments. After the building was constructed, she was there almost continuously, practically every day, performing some act, and doing some duty that could be expected of an owner. She was there practically every day until Mr. Andrews left the family home. She helped and assisted in taking care of the place, planted everything that was in the yard except the grass; remade the curtains for each apartment, fixed the shower curtains, cleaned the venetian blinds and did everything extra that it was possible for her to do.

Her testimony was corroborated by her mother, Mrs. Reese, who testified that her daughter solicited her to raise all the money the bank would lend on her home and to lend them $900 from her savings account—the money to be used to construct the apartment house; and that Mr. Andrews, at that time, stated that the property would belong to both of them. Mrs. Reese, at first, did not agree to lend the money, but when respondent and appellant made a proposition that if she would let the rent from her home be used to make payments on the apartment house and would go to live at the apartments, have an apartment furnished free of charge, and do the work of managing the apartments until they could get the apartments paid for, then they would pay her something, and that she was to have a home there the rest of her life. She said that the money was lent to respondent, and no one else. This witness also testified in detail as to the work done by respondent at the apartment house, both before and after construction.

L. F. Gould, the contractor who built the apartment house, testified in substance that he was present when respondent and appellant discussed the ownership of this property. This conversation occurred when appellant asked the witness what he could do with such a piece of property, stating that his aunt owned it with an old shack on it; that it was a nice piece of property and he thought something could be done with it in the way of apartments. The witness drew for Andrews a rough sketch of the type of an apartment house to be put on this property. Appellant then stated: "Well, my idea in doing this, my aunt says she will give me the property providing we will improve it." The witness stated: "Well, it will make a nice income for the years to come," to which appellant replied: "That's what I want; we will have something there we can get along on if anything happens to me in my job in the future; we will have those apartments to live on." Appellant further told the witness: "If we can go through with the deal and get it financed, will go ahead with it, so you go ahead and work out some tentative plans and tentative figures, and I will have something definite to submit to the bank, and if we can go ahead with it, you have a job." This witness testified that he had conversations at different times in which the ownership or title to the property was discussed, at which time appellant stated: "We can get along nicely on that amount of money and we hope eventually the rent can be shoved up a little more as time goes on." The plans for the apartment house bore the names of both spouses, printed thereon by the architect.

The evidence indicates that no question arose between plaintiff and defendant as to the ownership of this property and that appellant made no claim that it was his separate property until after he left plaintiff and the home on T Street and went to live in the apartment house, and after he had told plaintiff that he wanted a divorce as he desired to marry another woman.

[8] The next question is whether there is sufficient evidence in the record to sustain the trial court's finding that the home property was held by the spouses as tenants in common, which finding recites that said property was a gift from defendant's aunt to plaintiff and defendant. We think it finds sufficient support in the testimony of plaintiff. She stated that when she and defendant were married Mrs. Kilday, defendant's aunt, who owned a home at 39th and K Streets, asked plaintiff and defendant if they wanted that place to live in or wanted a new home; that plaintiff preferred a new home so Mrs. Kilday sold said property, and told plaintiff she could select a lot, which plaintiff did, and Mrs. Kilday paid for it; that Mrs. Kilday gave plaintiff permission to design the kind of house she wanted; that she and defendant decided on the plans, and built the house which Mrs. Kilday paid for; but not having enough money for that purpose a mortgage was put on it in Mrs. Kilday's name, defendant agreeing to pay off the mortgage; that later Mrs. Kilday put another mortgage on the place, which Mr. Andrews paid off in part out of his salary and then secured a F. H. A. loan. She further stated that the property was given to her and defendant as a wedding present; that defendant had urged Mrs. Kilday to give him a deed but she refused, until 1929, at which time she executed a deed but

directed defendant not to record it until after her death, but that he disobeyed her and recorded it in 1934, and then secured the F. H. A. loan of which $700 remained unpaid.

We think that in view of the foregoing evidence and the rules enunciated in Tomaier v. Tomaier, supra, and Kenney v. Kenney, 220 Cal. 134, 30 P.2d 398, the trial court was justified in its conclusion that plaintiff and defendant were tenants in common of the home property in that it was intended to be a wedding gift to both plaintiff and defendant and was not intended as a gift to defendant alone. While there is testimony on the part of appellant which contradicts that of plaintiff, it is apparent that the trial court did not accept same as true; and since that court saw and heard the parties, it was in a better position than we are to evaluate their testimony. The question was one of fact for that court (Marvin v. Marvin, 46 Cal.App.2d 551, 557, 116 P.2d 151); and since its findings are not without sufficient support, the judgment should be and it is hereby affirmed.

PEEK and THOMPSON, JJ., concur.

82 Cal.App.2d 578

## PALPAR, Inc., v. THAYER.

## MILLER v. PALPAR, Inc., et al.

Civ. 13425.

District Court of Appeal, First District, Division 2, California.

Nov. 25, 1947.

Hearing Denied Jan. 22, 1948.

**1. Appeal and error ⇨1173(1)**

In action for partition of a tractor by sale, where interest of intervener was derived from defendant and intervener did not put in issue allegations of original complaint, only issues as to plaintiff's title being those tendered by defendant's answer, error in disposal of such issues required a reversal of judgment for intervener.

**2. Pleading ⇨166**

Affirmative allegations of answer are in issue because deemed controverted under statute. Code Civ.Proc. § 462.

**3. Appeal and error ⇨907(3)**

Under new rules on appeal, reviewing court can no longer indulge presumption in support of judgment that on a judgment roll appeal issues were enlarged upon trial by conduct of parties to embrace findings outside the issues. Rules on Appeal, rule 52.

**4. Appeal and error ⇨659(3)**

Where issues were enlarged at trial, on appeal, respondent, in support of a judgment based on findings outside issues made by pleadings, may show enlargement by augmentation of record. Rules on Appeal, rules 5(f), 52.

**5. Appeal and error ⇨176**

An admission of fact contained in answer must be treated as an admission on appeal.

**6. Pleading ⇨8(11), 9**

Although pleading of ownership may be that of an ultimate fact, when it appears that allegation of ownership is based on evidentiary facts likewise pleaded, allegation becomes a mere conclusion of law.

**7. Partition ⇨71**

In action for partition of a tractor by sale, wherein mortgagee, whose rights were derived from defendant, intervened to foreclose, findings outside issues raised by pleadings and contrary to facts admitted in answer did not support adjudication for intervener that plaintiff's assignor was not a co-owner with defendant.

**8. Pleading ⇨9**

In action for partition of a tractor by sale, where complaint alleged the purchase of tractor by defendant and plaintiff's assignor under contract and that purchase price was fully paid, plaintiff's allegation of co-ownership was a conclusion from facts theretofore pleaded, and defendant's denial of co-ownership with plaintiff's assignor, following admission of joint purchase, was a conclusion from allegation that he had become owner by virtue of his performance of alleged verbal agreement with plaintiff's assignor.

**9. Trial** ⚷396(2)

In action for partition of a tractor by sale, where only findings to support conclusion that plaintiff's assignor was not a co-owner with defendant were either contradictory of expressly admitted facts or were wholly outside issues, findings furnished no support for judgment for intervener, whose rights were derived from those of defendant.

**10. Appeal and error** ⚷277

Appellant by statute is deemed to have excepted to final decision and may urge insufficiency of findings to support judgment although appellant neither excepted to the findings nor sought their amendment. Code Civ.Proc. § 647.

**11. Appeal and error** ⚷150(2)

The fact that tractor, which plaintiff sought to have partitioned by sale, was sold on foreclosure pursuant to judgment for intervener, did not deprive plaintiff from right to appeal.

**12. Partition** ⚷49

In action by assignee of one who claimed an interest in tractor for partition thereof by sale, chattel mortgagee, whose interest ran through defendant, had not only the right, but also the duty, to intervene. Code Civ.Proc. § 387.

**13. Parties** ⚷40(2)

A claim to or lien upon property which is subject of litigation generally gives a right to intervene. Code Civ.Proc. § 387.

◆

Appeal from Superior Court, San Mateo County; Andrew R. Schottky, Judge.

Action by Palpar, Inc., against W. H. Thayer, Jr., and others for partition by sale of a certain tractor and for other relief, wherein Edward Miller intervened to foreclose a chattel mortgage. From a judgment for intervener, Palpar, Inc., and H. Morton appeal.

Reversed.

Alfred J. Harwood, of San Francisco, for appellant.

Elizabeth Cassidy, of San Francisco, for respondent.

DOOLING, Justice.

This appeal is taken on the judgment roll. The plaintiff and appellant, Palpar, Inc., filed its complaint as vendee and assignee of Morton. The complaint alleged the purchase by Morton and respondent Thayer in 1941 under a contract of conditional sale of a certain tractor and equipment; the full payment of the purchase price; the co-ownership of Morton and Thayer; an arrangement between Morton and Thayer for Thayer's use of the tractor with an agreement to pay Morton one-half of the profits received by Thayer from its use and operation; and the transfer by Morton of all of his rights to the plaintiff. The complaint further alleged that the defendant Bank of America National Trust and Savings Association claimed an interest in the property under chattel mortgage, contract, or assignment claimed to have been made by Thayer. Plaintiff prayed for a partition by sale, an accounting from Thayer and such other relief as might be proper.

Thayer filed an answer the allegations and denials of which will be discussed in the consideration of the questions raised on the appeal. Bank of America National Trust and Savings Association filed an answer alleging the execution by Thayer to it of a chattel mortgage on the property to secure the repayment of a loan. Thereafter, by leave of court, Miller filed a complaint in intervention alleging that he, solely as an accommodation maker, had joined with Thayer in the execution of a promissory note to Bank to America National Trust and Savings Associationn; that to secure the payment of this note Thayer had given the bank a chattel mortgage on the property in litigation; that plaintiff in intervention later was given a bill of sale of said property by Thayer to secure him against loss from his liability on the note; and that plaintiff in intervention paid the full amount due on the note to the bank and received from it an assignment of the note and chattel mortgage. Plaintiff in intervention prayed that, if the court adjudicates that plaintiff has an interest in the property and orders it sold, it further order the repayment from the proceeds to plaintiff in intervention of the amount of said note; and, if the court determines that plaintiff has no interest, for judgment against Thayer for the amount of the note and sale of the property by way of foreclosure of the chattel mortgage. Thayer filed no answer to the complaint in intervention. Palpar, Inc. and Morton filed an answer thereto. The court gave judgment denying all relief to appellant Palpar, Inc. on its complaint and in favor of Miller on his complaint in intervention against Thayer on the promissory note and directing the foreclosure sale of the property involved.

[1] For clarity of discussion it is noted that Bank of America Trust and Savings Association is no longer asserting any interest in the litigation and that the interest of plaintiff in intervention is purely a derivative one, since all the rights that are asserted by him in the property stem ultimately from Thayer and depend upon Thayer's title. Neither by answer nor in his complaint in intervention did Miller put in issue any of the allegations of appellant's complaint, the only issues on the complaint being those tendered by Thayer's answer. Since the only issues as to appellant's title were made by Thayer's answer the judgment must be reversed if error is shown in the disposition of those issues.

The complaint alleges in paragraphs 1 and 2 that Morton and Thayer on June 11, 1941 purchased the property for a total price of $4120 from Mechanical Farm Equipment Distributors under a contract of conditional sale which is set out in haec verba. These allegations are expressly admitted in Thayer's answer. The complaint alleges in paragraph 3 that the sum of $1000 was paid upon the execution of the contract, $800 by Morton and $200 by Thayer; and further that the full purchase price has since been paid. The answer "denies that said sum of $800 was paid by H. Morton, or that any other sum was paid by said H. Morton other than the sum of $1000.00"; admits the full payment of the purchase price and alleges that upon the execution of the contract Thayer paid $1000.

The complaint in paragraph 4 alleges an agreement between Morton and Thayer for Thayer's use of the property, Morton to receive one-half of the profits therefrom. The answer denies these allegations and alleges that at the time of the purchase of the property Morton and Thayer verbally agreed that Thayer "would be the owner of said personal property upon his payment to H. Morton, either in services or in cash, the said sum of $1000.00 paid by said H. Morton on the purchase price of said personal property as hereinabove admitted"; and that Thayer "has paid said H. Morton the said amount of $1000.00 by rendering services to him of the value of $1000.00, and in accordance with said verbal agreement."

In paragraph 5 the complaint alleges that ever since June 11, 1941, and until the date of the sale and assignment to the plaintiff by Morton, Morton and Thayer "were co-owners of said personal property and each owned an individual one-half interest therein." The answer denies these allegations and alleges sole ownership at all times in Thayer.

[2] The issues and admissions on the question of title may be summarized as follows: It was admitted that Morton and Thayer as purchasers entered into a contract of conditional sale with Mechanical Farm Equipment Distributors as seller, that Morton paid at least $800 on the purchase price (Thayer alleged $1000) and that the purchase price had been fully paid. It followed as a matter of law from these admitted facts that (in the absence of other facts) title vested in Morton and Thayer as purchasers under the terms of the contract of conditional sale upon the admitted payment of the purchase price in full. To countervail the effect of these admissions Thayer alleged a verbal contract with Morton that Thayer would be the owner of the property upon payment to Morton of $1000 in services or cash and that Thayer performed this contract by rendering services to Morton of the value of $1000 in accordance with this agreement. These affirmative allegations of the answer were put in issue, being "deemed controverted" under Code Civ.Proc. sec. 462.

The trial court found in contradiction of the admitted facts "that it is not true that on the 11th day of June, 1941 the plaintiff's assignor, H. Morton, and the defendant purchased from Mechanical

Farm Equipment Distributors" the property in litigation.

The trial court found, outside of any issue made by the pleadings, that Morton's name "was placed upon the Bill of Sale for said tractor with the intention of the parties of providing security for the purchase price of said tractor to the vendor * * *."

The court further found, outside of any issue made, that at the time of the purchase Morton was indebted to Thayer in the sum of $1962.71; that Morton paid $1800 of the purchase price but that it was the intention of the parties that such payment should go toward reducing the debt owing from Morton to Thayer.

[3, 4] As to these findings it is argued by counsel for respondents that we must presume on a judgment roll appeal in support of the judgment that the issues were enlarged upon the trial to embrace them by the conduct of the parties. Under Rule 52 of the Rules on Appeal we can no longer indulge such presumption. Alkus v. Johnson-Pacific Co., 80 Cal.App.2d 1, 181 P.2d 72. If in fact the issues were enlarged on the trial respondents may make that showing by asking for an augmentation of the record under Rule 5(f) (Id., page 13 et seq., 181 P.2d 79), but in the absence of such request for augmentation we must presume under Rule 52 that the record "includes all matters material to a determination of the points on appeal."

[5] An allegation of fact which is admitted in the answer must be treated as admitted on appeal (Sterling v. Title Ins. & Trust Co., 53 Cal.App.2d 736, 742, 128 P.2d 31) and a finding contradicting an admission in the pleadings is erroneous and must be disregarded. Welch v. Alcott, 185 Cal. 731, 754, 198 P. 626; Stoneman v. Fritz, 34 Cal.App.2d 26, 31, 32, 92 P.2d 1035; Gardenswartz v. Equitable etc. Soc., 23 Cal.App.2d Supp. 745, 752, 68 P.2d 322; Ortega v. Cordero, 88 Cal. 221, 26 P. 80; 21 Cal.Jur. 157; 2 Cal.Jur. 1032. Nor can findings outside the issues support a judgment. Crescent Lumber Co. v. Larson, 166 Cal. 168, 171, 135 P. 502; Simmons v. Simmons, 166 Cal. 438, 440, 137 P. 20; Berg v. Berg, 56 Cal.App.2d 495, 497, 132 P.2d 871; Hart v. Merchants' Trust Co., 120 Cal.App. 231, 234, 8 P.2d 162; 24 Cal. Jur. 983-984; 2 Cal.Jur. 1031.

[6-9] Respondents point to the allegation and denial of ownership and a finding of the court that it is not true that Morton and Thayer were co-owners but that Thayer was the sole owner of the tractor. While the pleading of ownership may be that of an ultimate fact (21 Cal.Jur. 37) this is not true when it appears that the allegation of ownership is based on evidentiary facts likewise pleaded, in which case it becomes a mere conclusion of law. Morel v. Morel, 203 Cal. 417, 264 P. 760; Cohn v. Klein, 209 Cal. 421, 425, 287 P. 459; Prudential Petroleum Co. v. Peck, 132 Cal.App. 4, 8, 22 P.2d 559; Davies v. Ramsdell, 40 Cal.App. 424, 430, 431, 181 P. 94; 21 Cal.Jur. 37, 38. It is clear that the allegation of co-ownership in Morton found in the complaint was the pleader's conclusion from the facts theretofore pleaded, the purchase of the tractor by Morton and Thayer under contract of conditional sale and the fact that the purchase price was fully paid; it is equally clear that Thayer's denial of co-ownership in Morton, following as it does the admission of the joint purchase by Morton and Thayer, is the pleader's conclusion from his allegation that Thayer had become owner by virtue of his performance of the alleged verbal agreement to repay Morton $1000 advanced by him. There was no finding on this affirmative allegation of Thayer's answer, and the only findings to support the conclusion that Morton was not a co-owner of the property are the findings above discussed which were either contradictory of expressly admitted facts or wholly outside the issues made by the pleadings. Under the authorities cited these findings furnish no legal support for the judgment.

[10] Under Code Civ.Proc. § 647 "the final decision" is "deemed to have been excepted to" and the insufficiency of the findings to support the judgment may be urged on appeal although appellant neither excepted to the findings nor sought their amendment. Wilcox v. Sway, 69 Cal.App. 2d 560, 564, 160 P.2d 154.

[11] By augmentation of the record it appears that the property has been sold on foreclosure pursuant to the judgment. This fact cannot deprive appellant of the right of appeal. Boggs v. North American Bond, etc., Co., 6 Cal.2d 523, 58 P.2d 918; Di Nola v. Allison, 143 Cal. 106, 76 P. 976, 65 L.R.A. 419, 101 Am.St.Rep. 84.

[12, 13] The right of Miller to intervene in the partition suit is questioned by appellant. It was not only the right (Code Civ.Proc. sec. 387) but the duty of Miller to intervene. Towle Bros. Co. v. Quinn, 141 Cal. 382, 385, 74 P. 1046. "A claim to or lien upon the property which is the subject of the litigation generally gives a right to intervene." Elms v. Elms, 4 Cal.2d 681, 684, 52 P.2d 223, 225, 102 A.L.R. 811.

The judgment is reversed.

NOURSE, P. J., and GOODELL, J., concur.

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82 Cal.App.2d 610

## WHITLOW et al. v. WOLFE.

Civ. 3483.

District Court of Appeal, Fourth District, California.

Nov. 25, 1947.

Hearing Denied Jan. 22, 1948.

**1. Appeal and error 🔑1008(3)**

Where meaning and intent of a writing is doubtful, interpretation placed thereon by the trial court, if reasonable, will not be disturbed.

**2. Specific performance 🔑64**
**Vendor and purchaser 🔑18(1)**

Contract between real estate dealers and owner of realty providing that owner agreed to sell realty to dealers, that "option" should be for 30 days, that dealers should make a $5,000 deposit of good faith, that owner should sub-divide realty and sell all lots at $200 a lot, and permit dealers to erect dwellings, and that owner must accept, as payment for each lot, a part of last payment of loan used to erect dwelling, was not an option to purchase, but merely an agreement to execute a further trust agreement and was not subject to specific enforcement.

**3. Evidence 🔑589**

Court, as trier of facts, was not obliged to accept certain testimony of plaintiff at its face value or as necessarily controlling, where testimony was inherently improbable, especially in light of allegations of complaint and of other testimony given by plaintiffs.

**4. Specific performance 🔑121(4, 10)**

Evidence justified denial of specific performance of option agreement on ground that no consideration passed from plaintiffs to defendant, that any offer was revoked, and that all possible covenants were cancelled.

◆

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by William Austin Whitlow and Earl Hamilton Fritchman, real estate agents, against Nathan Wolfe for declaratory relief concerning an alleged option agreement, for specific performance of alleged option, and for damages in event that specific performance was impossible. From a judgment for defendant, plaintiffs appeal.

Judgment affirmed.

Aaron Sapiro, of Los Angeles, for appellants.

Aaron B. Rosenthal and Wilson & Wilson, all of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an action for declaratory relief involving some sort of an option agreement executed by the parties on March 27, 1946.

The defendant was the owner of some 80 acres of unsubdivided land in the outskirts of San Bernardino. The plaintiffs were real estate agents of long experience, with an office in Los Angeles. For some eight months they had been trying, without success, to sell this property for the defendant. Finally, on March 27, 1946, the instrument in question was signed by the parties. On April 24, 1946, the plaintiffs sent a letter to the defendant stating that they thereby exercised the option "granted in the said agreement," demanding that he comply therewith and enclosing a certified check for $5,000. The defendant immediately replied stating that no binding agreement existed or had ever existed between them, that any arrangements pending had been cancelled, and returning the check.

This action followed. The complaint alleged, among other things, that the plaintiffs were licensed and operating as real estate agents; that the parties had entered into the agreement in question whereby the defendant agreed to sell this property to the plaintiffs for the consideration named therein; that the plaintiffs had paid $5,000 within 30 days and had performed all other obligations imposed upon them by the agreement; and that after the contract was executed they had proceeded to make oral arrangements for the purpose of carrying out its provisions and looking toward the sale of the lots after the subdivision was completed and the improvements installed. It is then alleged that in carrying out the agreement they had investigated as to what could be done in connection with financing the project and as to what was required in order to subdivide the property. Also, that they talked to several contractors who expressed a willingness to contract with the plaintiffs for the development of the property on terms acceptable to the plaintiffs, to pay the plaintiffs for the lots at the rate of $800 per lot, and to appoint the plaintiffs as their exclusive agents for the sale of the homes to be built on the lots. It was further alleged that the defendant attempted to repudiate the contract on April 15, 1946, and that the agreement was a fair and equitable one. The prayer was that the agreement to sell be declared to be valid, that it be specifically enforced, and for damages in the event specific performance is impossible.

The answer denied the construction placed on the agreement by the plaintiffs and alleged want of consideration, revocation on April 9, and cancellation and rescission by mutual consent.

With respect to the intention of the parties, one of the plaintiffs testified that before signing the option the defendant told them that "he had originally preferred to sell the property outright, but he was convinced he would have to put in the necessary improvements to subdivide the property before it was saleable." The other plaintiff testified that the defendant stated he would be willing to give them an option for 30 days as outlined in the agreement, providing they would use their best efforts in helping him to subdivide the property; that they would check the contractors' work and see that they did not overcharge; that they would help him get the approval of the proper authorities for the subdivision of the land; and that they would secure the best possible financing so he would not have to put up too much money. Also, that he stated that he wanted them to have a financial interest in the deal so he would not be left in the "lurch"; that he would require a deposit of $5,000 as a token of good faith on their part; and that this amount would be returned to them only after all the houses were constructed and then pro rata out of the mortgage payments as the last houses were built.

The court found, among other things, that the defendant had not agreed to sell this tract to the plaintiffs; that by the instrument the parties intended and agreed that the plaintiffs, as real estate brokers, should assist the defendant in the sale and subdivision of this tract; that the $5,000 deposit was intended to secure the faithful performance by the plaintiffs of their obligations as brokers in assisting the defendant in the subdivision and sale of the tract; and that any offer contained in the option had been revoked, cancelled and rescinded. Judgment was entered to the same effect and decreeing that the plaintiffs recover nothing. This appeal followed.

[1] Appellants' main contentions are that this instrument gave them an option to purchase this property in its entirety; that they exercised this option within the 30 days allowed; that a valid and binding contract for the purchase of the property by them then existed; that the court entirely misconstrued the instrument and its terms; and that the court's findings and conclusions are supported neither by the facts nor the law. While the appellants concede the usual and well-established rule that where

the meaning and intent of a writing is doubtful the interpretation placed thereon by the trial court, if reasonable, will not be disturbed on appeal, they contend that the meaning and intent of the instrument here in question is not doubtful, that it gave them a right to buy this entire property at the rate of $200 per lot, that they exercised that option thereby completing a clear and definite contract to that effect, and that no other interpretation is reasonable or possible.

The instrument in question was drawn by the appellants. We cannot agree that its language is so clear and definite as to call for no interpretation as to the meaning and intent of the parties, nor that it clearly provides for the exercise of an option within 30 days which would result in a binding agreement for the purchase and sale of this property.

While the instrument is called an option and recites that the respondent agrees to sell and convey the property to the appellants, this is qualified by the phrase "on the following terms and conditions." The instrument then provides that this option shall be for 30 days and that upon the payment of $5,000, which "shall be used as a deposit of good faith and also as a guarantee of 'Bond of Completion' ", the respondent "agrees to open a trust agreement embracing all the terms and conditions herein contained." These terms and conditions are as follows: The respondent agrees to subdivide the entire property into lots, meeting all regulations as to sewers, curbs and paving; to sell all of the lots to the appellants "when the aforementioned work of subdividing has been completed" at a price of $200 per lot, plus the actual cost of grading, paving, curbing and sewers; to subdivide Davidson Street first; to then subdivide Garner Street, at the option of the appellants, providing the lots on Davidson Street "have been sold"; to subdivide Turrill Street provided the lots on Garner Street have been sold; that it is understood that construction will commence on the property within 30 days after grading on Davidson Street is completed; that the respondent will permit the appellants to erect, or cause to be erected, dwellings on said lots and furnish title to the lots as buildings are completed; and that he must accept, as payment for each lot, a part of the last payment on the loan used to erect the building thereon.

Aside from the uncertainties and inconsistencies of some of these provisions it appears, both from the terms of the instrument and the evidence, that the $5,000 deposit was not intended to apply on the purchase price of this property or any part thereof, but was for other purposes and was to be returned if and when the entire project was finally completed. The fact that such a deposit was required as a guarantee of good faith, to be later returned, and not as a payment on any purchase price, is much more consistent with the court's interpretation of this agreement than with appellants' contention that it was intended to complete a contract whereby a present purchase and sale of the property was agreed upon.

[2] The 30-day option given to the appellants by the instrument was not one to purchase the property at the price indicated but was one to have a further trust agreement "opened" upon terms which were still uncertain and somewhat inconsistent, which called for certain things to be done by the respondent, and which required nothing to be done by the appellants. The effect of the instrument, at best, was to give the appellants, upon the exercise of an option within 30 days, the right to have something done which would give them a series of further options which they were free to act upon or not, as they chose. If the further trust agreement had been "opened" by the respondent the appellants would still not have obligated themselves to purchase this entire property or any part thereof, with the possible exception of one lot under the provision that it was understood that building would commence within 30 days from the grading of one street. The purported agreement is not only indefinite, uncertain and lacking in mutuality, but if there is one clear thing about it it is that the appellants would not, by exercising their option within 30 days, bind themselves to purchase this property or any considerable part of it, or to pay any part of the purchase price therefor. It even appears if they should later elect to take one lot and build one house, or

have it built, the respondent must look to the mortgage loan, and not to the appellants, for the purchase price of the lot.

Under well-established rules, it clearly appears that the appellants were not entitled to specific performance in any form. It clearly appears that these parties, in executing this instrument, did not intend the effect now contended for by the appellants. While the real meaning and intent may be a matter of doubt, the conclusion reached by the trial court in this regard is not only a reasonable one but appears to be the most reasonable one, and no reason here appears for disturbing it. Incidentally, while the complaint contained the necessary allegation that this agreement was a fair and equitable one, and while the appellants are now contending that they agreed to pay $80,000 for this property, they also contend, in discussing the alternative matter of damages, that the evidence clearly discloses that this property was worth $412,800 at the time in question. See Cisco v. Van Lew, 60 Cal.App.2d 575, 141 P.2d 433.

In view of the fact that no contract of the nature relied on by the appellants here existed or could be enforced in this action, the further question as to the revocation of whatever offer had been made is not of great importance. While the evidence is conflicting in this regard, it is sufficient to show a revocation of any such offer by the respondent on April 9, 1946, and to further show the cancellation and rescission by mutual consent either on that date or between then and April 15.

[3, 4] However, it is further contended that this offer could not be revoked, under the law, because some consideration had passed. This is based on a portion of the appellants' own testimony as to the reason why they made certain investigations, most of which occurred after April 9. The claim thus made is little less than fantastic and appears, upon its face, to be inherently improbable, especially in the light of the allegations of the complaint and of other testimony given by the appellants. The court was not obliged to accept this testimony at its face value or as necessarily controlling. The evidence, as a whole, is sufficient to sustain the court's findings to the effect that no consideration passed, that any offer made was revoked, and that all possible covenants of the parties were cancelled and rescinded.

Under the views already expressed, several other points raised by the appellants require no further consideration.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

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82 Cal.App.2d 156

**In re REINHERTZ' ESTATE.**
**LEVE v. REINHERTZ.**
**Civ. 13386.**

District Court of Appeal, First District, Division 2, California.
Nov. 25, 1947.

**Wills 🔑848**

A petition by devisee of apartment house, sold at probate sale, to determine devisee's interest in testatrix' estate, was governed by section of the Probate Code requiring legatees to contribute amounts determined by distribution decree to one whose legacy is sold for payment of debts or expenses. Probate Code, § 753.

◆

On petition for rehearing.

Petition for rehearing denied.

Prior opinion, 185 P.2d 858.

A. Don Duncan, of San Francisco, for appellant.

G. C. Ringole, of San Francisco, for respondent.

PER CURIAM.

On petition for rehearing respondent questions the correctness of our construction of Probate Code, section 753 as authorizing a distribution to appellant by way of contribution of a portion of the property remaining in the estate. We can place no other reasonable construction on the language of the section: "The court * * * must * * * decree the amount each person shall contribute, and reserve the same from his distributive share for the purpose of such contribution."

In Re Estate of Stevens, 27 Cal.2d 108, 118, 162 P.2d 918, 923, the court said (referring to this section): "If a right of contribution is eventually established, the total of the assets remaining in the estate from which contribution would be made should presumably be greater than if a compromise had not been effected, and thus the appellant's ultimate distributive share of the estate will be greater."

Respondent's petition for rehearing is denied.

## HUGHES et al. v. SUPERIOR COURT IN AND FOR CONTRA COSTA COUNTY.*

Civ. 13535.

District Court of Appeal, First District, Division 1, California.

Nov. 20, 1947.

Hearing Granted Jan. 15, 1948.

**1. Contempt 🔑67**

Certiorari is appropriate method to test jurisdiction of Superior Court where validity of a contempt adjudication is challenged on constitutional grounds.

**2. Certiorari 🔑1, 65**

The province of writ of "certiorari" is to review record of an inferior court and to determine therefrom and from that record alone whether such court has exceeded its jurisdiction, and evidence dehors the record is not permitted.

See Words and Phrases, Permanent Edition, for all other definitions of "Certiorari".

**3. Certiorari 🔑65**

Where jurisdictional facts are in fact before trial court but do not appear in the record, such facts may be shown to appellate court on return to writ of certiorari to review trial court's jurisdiction.

**4. Courts 🔑92**

Statement in opinion of district court of appeal, on certiorari review in another case, that certain evidence not presented to trial court could be considered by appellate court in determining whether trial court had exceeded its jurisdiction was erroneous "dicta", where independently of such new evidence record in such case demonstrated that trial court had exceeded its jurisdiction.

See Words and Phrases, Permanent Edition, for all other definitions of "Dicta".

**5. Contempt 🔑67**

In certiorari proceeding to review a judgment of Superior Court adjudging petitioner in contempt for violating temporary restraining order against picketing, District Court of Appeal was limited to factual record presented to superior court and could not consider portions of return and supporting affidavits seeking to present facts not presented to trial court.

**6. Injunction 🔑231**

An adjudication that petitioners were in contempt of court for violating preliminary injunction against peacefully picketing a store catering to Negro trade to induce operators to hire Negro workers in proportion to Negro patronage could not be sustained on theory that petitioners' conduct tended to induce breach of contract between operators and retail clerks' union, where no facts were pleaded to show that petitioners' actions would necessarily result in breach of such contract.

**7. Torts 🔑12**

A person is justified in inducing a breach of contract to protect an interest which has a greater social value than insuring stability of the contract, or where enforcement of the contract would be injurious to health, safety, or good morals.

**8. Master and servant 🔑339**
**Torts 🔑12**

The interest of labor in improving working conditions is of sufficient social importance to justify peaceful labor tactics otherwise unlawful, though they may have effect of inducing breaches of contract between employer and employee or employer and customer.

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* Subsequent opinion 198 P.2d 885.

**9. Torts** ⚷12

Economic interest of Negroes in securing employment for members of their race and in attempting to alleviate results of discriminatory employment policy are of sufficient social importance to justify attempted inducement of breach of a contract of employer with labor union excluding employment of Negroes.

**10. Torts** ⚷10

Where a group, such as Negroes, that has been discriminated against in employment in a certain industry band together and try to secure abandonment of those discriminatory practices, and employers refuse to abandon such practices, the dispute between employer and such group is a "labor dispute", not a "racial dispute", authorizing peaceful picketing.

See Words and Phrases, Permanent Edition, for all other definitions of "Labor Dispute" and "Racial Dispute".

**11. Injunction** ⚷101(1)

The term "labor dispute" should be broadly interpreted if it is necessary to find existence of such a dispute before picketing can be justified and injunction against such picketing precluded.

**12. Torts** ⚷10

Picketing is justified even though relationship of employer and employee does not exist and though no dispute exists between employer and employee.

**13. Torts** ⚷10

Where picketers of a place of business have a direct economic interest to protect and the protection of such interest is in accord with public policy they may lawfully picket regardless of existence or nonexistence of a labor dispute.

**14. Injunction** ⚷101(1)

That peaceful picketing of store by Negroes to induce operators, in course of personnel changes, to hire Negro workers in proportion to Negro patronage may lead to some violence is no ground to deny the right of such picketing by injunction where, in accordance with sound public policy, Negroes are entitled to that form of self-help to secure economic equality and fairness in employment.

**15. Torts** ⚷10

The courts are liberal in upholding the right of labor to picket an employer because the raising of living standards of any large subjugated groups that otherwise may become an economic burden on the community as a whole is in accord with sound public policy.

**16. Torts** ⚷10

Negroes may lawfully and peacefully picket a place of business to induce operators thereof catering to Negro trade, in course of personnel changes, to hire Negro workers in proportion to Negro patronage, and this right is granted, not because picketers are members of a minority group, but because that minority group is economically discriminated against and is attempting to rectify that condition.

**17. Injunction** ⚷101(1)

When Negroes, in seeking to prevent discrimination in employment practices, demand the hiring of Negroes in proportion to Negro patronage, such demand does not violate any principle or public policy and will not be enjoined when demand is sought to be enforced by peaceful picketing.

**18. Injunction** ⚷101(1)

Even if picketing of store by Negroes to induce operators, in course of personnel changes, to hire Negro workers in proportion to Negro patronage, to the extent that such picketing sought the discharge of a certain white employee because he had been instrumental in securing arrest of Negro charged with shop lifting, was unlawful, this would not justify a total injunction against the lawful as well as the assumed unlawful picketing.

**19. Torts** ⚷10

The lawful and peaceful picketing by Negroes of a retail store to secure economic equality was not rendered unlawful because the picketing Negroes sought, in the course of personnel changes, to induce store operators to hire Negro workers in proportion to Negro patronage.

◆

Certiorari to Superior Court, Contra Costa County; Hugh H. Donovan, Judge.

Proceeding by John Hughes and another for a writ of certiorari to review a judgment of the Superior Court of the State of California, in and for the County of Contra Costa, adjudging petitioners to be guilty of contempt for violating a preliminary injunction against picketing a certain store.

Judgment annulled.

Edises, Truehaft & Condon, of Oakland, for appellant.

Hoey & Hoey, of Martinez, for respondent.

PETERS, Presiding Justice.

[1] Petitioners were adjudged guilty of contempt in that, in violation of the terms of a preliminary injunction, they admittedly continued to picket a certain grocery store located in Richmond, California, and operated by Lucky Stores, Inc. They seek by this proceeding in certiorari to have this adjudication of contempt annulled, it being their contention that the preliminary injunction upon which the adjudication of contempt depends was violative of their constitutional rights. Certiorari is the appropriate method to test the jurisdiction of the Superior Court where the validity of a contempt adjudication is challenged on constitutional grounds. Fortenbury v. Superior Court, 16 Cal.2d 405, 106 P.2d 411; Kreling v. Superior Court, 18 Cal.2d 884, 118 P.2d 470.

The main problem presented in this proceeding is whether Negroes may be lawfully enjoined from peacefully picketing a retail establishment that caters to Negro trade, for the purpose of inducing the operators of that establishment, in the course of personnel changes, to hire Negro workers in proportion to Negro patronage.

A chronological summary of events as disclosed by the clerk's transcript, filed by way of return, is as follows:

May 20, 1947—Lucky Stores filed in the Superior Court of Contra Costa County a verified complaint for injunction, naming various organizations and individuals as defendants. So far as pertinent here, the complaint alleges that there exists a collective bargaining contract between a designated clerk's union and the plaintiff under which the union is recognized as the sole collective bargaining agent for all employees working for plaintiff; that the contract provides that the plaintiff will only employ members of the union through the union unless the union cannot meet the request of the plaintiff or unless the persons on the unemployed list of the union are not satisfactory to the employer, in which events the plaintiff may employ non-union employees, who, however, must join the union within a specified time; that the defendants have demanded that plaintiff "agree to hire Negro clerks, such hiring to be based upon the proportion of white and Negro customers patronizing plaintiff's stores, and that the plaintiff discharge those employees participating in the apprehension and arrest of McKennly Jackson," who had been accused of shoplifting; that these demands were refused by plaintiff; that such demands, if complied with, would violate the contract of plaintiff with the union; that no labor dispute exists between plaintiff and the retail clerks' union; that by reason of the refusal of plaintiff to comply with their demands defendants have picketed plaintiff's store; that unless such picketing is restrained, plaintiff will suffer irreparable injury and be forced to close the store in question; that such picketing for such a purpose is an infringement upon plaintiff's right to do business, and would require plaintiff to violate the union contract above mentioned; that plaintiff has no adequate remedy at law. The prayer is for a permanent injunction restraining such picketing for such purposes, and for a temporary restraining order until the hearing. The union agreement is attached as an exhibit to this complaint.

May 26, 1947—John Hughes, one of the petitioners in the present proceeding, filed a counter-affidavit in the injunction proceedings. He therein avers that he is a member and an officer in several of the organizations sought to be enjoined; that he makes the affidavit in both his representative and personal capacities; that on May 17, 1947, he and Louis Richardson, the other petitioner, and others, met with some officials of Lucky Stores; that affiant protested against the actions of certain employees of Lucky Stores in arresting one Jackson, charged with petty theft; that the protest was based on claimed unnecessary force, including the firing of a pistol shot in a crowded area, by one of Lucky's employees, in effecting the arrest; that affiant and the others with him requested the discharge of the employee that fired the shot; that one of the officials of Lucky Stores stated that the employee who fired the shot was no longer working at the store in question; that affiant later learned this representation was false; that affiant and those with him also requested that Lucky Stores, so far as the store here involved is concerned, "hire gradually * * * Negro clerks until the proportion of Negro clerks to white clerks approximated the proportion of Negro and white customers. Your affiant and those with him requested that the increase in the proportion of Negro to white clerks take place as white clerks quit their employ or were transferred by plaintiff. Your affiant and those with him explicitly stated that they were not requesting the discharge of any of the present employees of the Canal Store [the store in question], but were requesting only the vacancies be filled with Negroes until the approximate proportion was reached"; that about fifty per cent of Lucky's customers at this store are Negroes; that Lucky's representatives refused to discuss the proposal and the discussion ended; that affiant and those with him had no knowledge of the union contract mentioned in the complaint; that subsequently the officials of the union in question have informed affiant that such union accepts Negroes as members and have no objection to the hiring of Negro clerks by Lucky Stores as long as such clerks join the union; that the union in question has Negro members presently unemployed, and can supply qualified Negro clerks to any employer requesting such help; that on May 19, 1947, members of several of the organizations sought to be enjoined picketed the Canal Store and continued to do so until May 21, 1947, when the picketing ceased; that there never were more than six pickets patrolling an area more than 100 feet wide; that the pickets were peaceful and there was no violence; that the employees and customers of Lucky's had free ingress and egress to and from the store without molestation; that the pickets were orderly and made no comments to customers or employees; that the placards carried by the pickets were truthful; that the words on the placards were to the effect that Lucky Stores refused to hire at its Canal Street store a proportion of Negro and white clerks approximating the proportion of Negro and white customers of the store.

Louis Richardson, the other petitioner herein, filed an affidavit containing essentially the same averments contained in the Hughes affidavit. These affidavits were not controverted by the plaintiff in the trial court.

On this same day—May 26, 1947—a hearing on the order to show cause and temporary restraining order was had. The matter was submitted to the court on the complaint, counter-affidavits, points and authorities, and argument. No affidavits at all were filed by the plaintiff. The court determined that plaintiff was entitled to the preliminary injunction.

June 5, 1947—The trial court made and issued its formal order granting the preliminary injunction. By the terms of that order the various persons and organizations, including petitioners, named in the complaint were enjoined from picketing for the purpose of compelling Lucky Stores to hire a proportional number of Negro clerks or discharging those employees participating in the arrest of Jackson, and Lucky Stores was required to post a $1,000 bond, which was done.

June 21, 1947—A citation issued from the trial court to petitioners and others ordering them to show cause on June 23, 1947, why they should not be punished for contempt for violating the injunction. This was duly served on petitioners the day of its issuance.

It was stipulated between the parties that on June 21, 1947, the two petitioners picketed the Canal Street store carrying a placard reading: "Lucky won't hire Negro Clerks in proportion to Negro trade, don't patronize," and while so picketing petitioners were served with a citation, it having been agreed that petitioners would waive the affidavit normally required.

June 23, 1947—Petitioners moved the court to vacate the preliminary injunction. This motion was denied. The court then found that the two petitioners wilfully violated the injunction, and adjudged that they should be imprisoned for two days and pay a fine of $20. A ten-day stay of execution was granted. On the same day—June 23, 1947—this petition for certiorari was filed in this court.

After this court had granted the writ, the Superior Court filed its return and answer in which it is admitted that the picketing was without force or violence. In addition, Lucky Stores, through its attorney, filed what purports to be an answer and return to the writ of certiorari to which are attached certain affidavits. By this pleading and by these affidavits Lucky Stores seeks to present to this court certain facts and factual issues that were not presented to, were not considered by, and were not before the trial court. It is not necessary to summarize these factual matters because they are not properly before this court.

[2, 3] It is elementary law that the province of the writ of certiorari is to review the record of an inferior court and to determine from that record, and from that record alone, whether such court has exceeded its jurisdiction. Evidence dehors that record is not permitted. See discussion and many cases collected 4 Cal.Jur. p. 1107, § 69. It is true that where certain jurisdictional facts were in fact before the trial court but do not appear in the record, those facts may be shown to the appellate court on the return to the writ. See discussion 4 Cal.Jur. p. 1110, § 71. But this is not an exception to the general rule. It is merely permitting a party to show what actually was before the inferior tribunal even though that particular fact does not appear formally in the record. Most of the cases cited by Lucky Stores to substantiate its position that we should consider the questioned affidavits fall within the category last mentioned. Such cases do not support the contention that an appellate court on such a writ may consider facts and factual issues not presented to or considered by the trial court.

[4, 5] There are two cases cited by Lucky Stores that do contain language that tends to support its contention that this court may properly consider the affidavits asserting the existence of facts never presented to the trial court. The first of these is Wilde v. Superior Court, 53 Cal.App.2d 168, 127 P.2d 560, a proceeding in certiorari to review a contempt adjudication for practicing law in violation of a disbarment order. The appellate court did take testimony not considered or presented below, and held that such procedure was proper, citing certain habeas corpus proceedings that were not in fact review proceedings, but, in a real sense, were original proceedings in the appellate court. The Wilde case held, however, that, independent of such new evidence, the record introduced below demonstrated that the trial court had exceeded its jurisdiction. What was said about the taking of factual testimony in the appellate court that was not presented below must be held to have been dicta, and, in view of the many cases announcing the rule stated above, it must be held to have been erroneous dicta. In the other case relied upon—Triplett v. Superior Court, 57 Cal.App.2d 536, 135 P.2d 4—the appellate court in a certiorari proceeding did receive in evidence and did consider and rely upon an affidavit not presented to the trial court. The authority relied upon for such procedure was the dicta in the Wilde case. These two cases are completely out of line with an otherwise unbroken line of authorities, and, in our opinion, should be disregarded. We, therefore, hold that we are limited in our consideration of the problems here involved to the factual record presented to the trial court, and may not consider the portions of the return of Lucky Stores and its supporting affidavits seeking to present factual issues and facts not presented to the trial court.

[6] The respondent first seeks to support the adjudication of contempt on the theory that petitioners' conduct tended to induce a breach of contract between Lucky Stores and the retail clerks' union. The verified complaint for an injunction is primarily based on this theory, and this point was fully briefed before the trial court.

As will later appear, the trial judge rendered an oral opinion in support of the adjudication of contempt, and he therein justified the order on grounds other than inducement of breach of contract. The reasons why the trial judge did not attempt to base his decision on this ground are quite apparent.

In the first place, there are no facts pleaded that demonstrate that petitioners' actions in picketing to secure the proportional hiring of Negro clerks would necessarily result in a breach of contract between the union and Lucky Stores. The picketing Negroes did not demand the discharge of any existing employees, except the employee who had fired the shot in arresting Jackson, and the picketing was not directed at this last-mentioned objective. The demand was that, as white help quit or was transferred, they be replaced with Negroes. The evidence shows that the union is willing to accept Negro clerks, and that, in fact, at all times here pertinent, it had qualified Negro clerks in the union who were unemployed.

[7-9] In the second place, and this is a complete answer to this contention, while it is now the law of California that, under certain circumstances, a deliberate and intentional interference with an existing contract is tortious and actionable (Imperial Ice Company v. Rossier, 18 Cal.2d 33, 112 P.2d 631), it is clearly the law that such interference may, in a proper case, be justified and therefore privileged. The Rossier case expressly recognizes that justification may exist for such an interference with the contract rights of others. It is there stated (18 Cal.2d at page 35, 112 P.2d at page 632): "Such justification exists when a person induces a breach of contract to protect an interest that has greater social value than insuring the stability of the contract. Rest. Torts, sec. 767. Thus, a person is justified in inducing the breach of a contract the enforcement of which would be injurious to health, safety, or good morals. [Citing two cases and the Restatement of Torts, § 767(d).] The interest of labor in improving working conditions is of sufficient social importance to justify peaceful labor tactics otherwise lawful, though they have the effect of inducing breaches of contracts between employer and employee or employer and customer. [Citing many cases.] In numerous other situations justification exists (See Rest.Torts, sec. 766 to 774) depending upon the importance of the interest protected." It should be noted that in the comment on clause (d) of § 767 of the Restatement of Torts, cited supra, which is the section that enumerates the interests that create the privilege, it is stated that attempts to prevent racial discrimination come within the privilege. That this is so would seem quite clear. The economic interest of Negroes in securing employment for members of their race, and in attempting to alleviate the results of a discriminatory employment policy, are of sufficient social importance to justify the interference with the type of contract here involved.

This brings us to the main question presented on this appeal, namely, whether Negroes lawfully and peacefully may picket for the purpose of inducing the operators of a retail establishment that caters to Negro trade, in the course of personnel changes, to hire Negro workers in proportion to Negro patronage. The trial court has held that such picketing should be enjoined. The court rendered an oral opinion in which the grounds of the decision are fully set forth. The court first stated that it was convinced that this state should follow a decision of the trial court in New York—A. S. Beck Shoe Corporation v. Johnson, 153 Misc. 363, 274 N.Y.S. 946, 953—holding that the right of picketing is limited to labor disputes in the limited sense of those words, and that picketing for the purpose here involved was not in the furtherance of a labor dispute. The judge in the instant case then stated: "The controversy here is not a labor dispute. The defendants do not constitute a labor union or a labor organization of any kind. I don't think there is any question about that. They do not propose, [to be] nor are they all members, of any single trade or class of trades. Their demands are not connected with any one industry. The questions about which they are now picketing have no connection with wages, hours of labor, unionization, or betterment of working conditions." As a second ground for the issuance of the injunction the trial court then stated:

"It is solely a racial dispute. Assuming that the means were peaceful and were devoid of misrepresentation, disorder and violence, the Court is still of the opinion that the purpose sought does not justify the means used, and that injunctive relief is warranted. The acts of the defendants are irreparably injuring the plaintiff's business. Not only do they tend to keep prospective colored customers out of the stores of the plaintiff but they must necessarily have the effect of keeping out white customers also. The purpose of the defendants in having members of one race discharged in order to employ the members of another race will not justify this direct damage to the plaintiff in the conduct of its business. The acts here shown are also contrary to sound public policy. If they were permitted and if they succeeded in their purpose it would then become equally proper for some organization composed of white persons to picket the premises, insisting that all Negro employees be discharged and that white employees be re-employed. If this were permitted there is substantial danger that race riots and race reprisals might result in this and other communities. They would serve as precedent for similar activities in the interests of various racial or religious groups and the effect upon the social well being of communities throughout the state would be far reaching. A balancing of advantages to the defendants as against the disadvantages to this plaintiff and to the social order as a whole clearly points to disapproval of the acts complained of.

"As a matter of principle, based upon a sound public policy, the Court cannot lend its assistance to this movement. It must protect not only this plaintiff but the community as a whole from the dangers which exsit in continued activity along these lines. I should like very much to see this position tested in the Appellate Courts."

This opinion fully states the strongest arguments that can be advanced in support of the view that such picketing should be enjoined. Contained therein is every major argument made by the respondents and the various amici curiæ who have filed briefs in support of the trial court. The trial judge is to be commended for thus setting forth in full his reasons for granting the injunction. There can be no doubt at all that the views expressed by the trial judge find direct support in the Beck case, supra. That case is a one-man opinion of a trial judge. It is factually on all fours with the present case. There, an association of Negroes had made demands on the proprietor of a Harlem shoe store that he hire a percentage of Negro clerks. The proprietor refused to accede to these demands and certain Negroes began to picket the store. The opinion shows, unlike the present case, that the picketing was accompanied by violence. The court granted the injunction, however, without reference to the fact of violence. In his opinion the judge gave as his reasons exactly the same reasons given by the trial judge in the instant case. The Beck case has been the subject of much discussion. See 83 Univ. of Pa. L.Rev. 383; 35 Colum.L.Rev. 121; 48 Harv.L.Rev. 691.

There is at least one case from an appellate court that supports the conclusions of the trial court in the instant case, and that is Green v. Samuelson, 168 Md. 421, 178 A. 109, 99 A.L.R. 528. In that case certain individuals and organizations made demands for the hiring of Negroes in certain stores operated by the white plaintiffs in a section of Baltimore where Negroes outnumbered whites. When these demands were not met, picketing commenced, and an action was brought to restrain such activities. The trial court enjoined the picketing and the Court of Appeals affirmed that portion of the judgment. The following observations were made by the court.

"The defendants contend that this case is, or is akin to, a labor dispute, because their purpose is to secure employment for members of their race and thus improve its condition, * * * Their grievance is that the * * * merchants depend almost wholly on colored patronage for their existence and that these merchants do nothing for them in return. That there is some merit in their complaint cannot be disputed, as the planting of a white store in an exclusively colored community is an exploitation of the inhabitants for profit, but the defendants cannot right their wrongs by means that are unlawful. * * *" (178 A. at page 111.)

"The general purpose of colored persons to improve the condition of their race may not be improper, but they must adopt lawful means to accomplish this end, and must not resort to intimidation and threats which may easily lead to breach of the peace and physical violence. * * *" (178 A. at page 112.)

"They may, by organization, public meetings, propaganda, and by personal solicitation, persuade white employers to engage colored employees and to induce their people to confine their trade to those who accede to their wishes, * * * The complaint here is not with the thing intended to be done but the means employed to do it. * * *" (178 A. at page 112.)

"In our opinion, this is a racial or social question, and as such, the rules heretofore announced and applied to labor disputes have no application, and the things complained of were properly enjoined, * * *" (178 A. at page 113.)

These are the strongest authorities and arguments relied upon by respondents. They are all predicated upon the basic premises that the right of picketing is limited to labor disputes, in the most limited sense of those terms; that picketing to secure the employment of Negroes in Negro occupied areas does not involve a labor dispute; that the interests sought to be protected by such picketing are racial and not economic; and that such picketing based on racial considerations is against public policy. In our opinion every one of these premises is demonstrably unsound, both on principle and authority.

[10] In the first place, when a group that has been discriminated against in employment in a certain industry band together and try to secure an abandonment of those discriminatory policies and practices, and the employers refuse to abandon such practices, the dispute between the employer and this group in a very real sense is a "labor dispute." The United States Supreme Court has expressly so held in the case of New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 58 S.Ct. 703, 82 L.Ed. 1012. That case arose in the District of Columbia. The District Court enjoined the petitioners, and the Circuit Court of Appeals affirmed, from picketing a certain store for the purpose of inducing the hiring of Negro personnel. The United States Supreme Court reversed. The petitioners in that case were a corporation composed of colored persons, organized for the mutual improvement of its members and the promotion of civic, educational and charitable purposes, and the officers of that corporation. The court stated the problem involved as follows (303 U.S. at page 559, 58 S.Ct. at page 706, 82 L.Ed. 1012): "The case, then, as it stood for judgment, was this: the petitioners requested the respondent to adopt a policy of employing negro clerks in certain of its stores in the course of personnel changes; the respondent ignored the request and the petitioners caused one person to patrol in front of one of the respondent's stores on one day carrying a placard which said: 'Do Your Part! Buy Where You Can Work! No Negroes Employed Here!' and caused or threatened a similar patrol of two other stores of respondent. The information borne by the placard was true. The patrolling did not coerce or intimidate respondent's customers; did not physically obstruct, interfere with, or harass persons desiring to enter the store; the picket acted in an orderly manner, and his conduct did not cause crowds to gather in front of the store."

The focal point of the case was whether the Norris-LaGuardia Act, 29 U.S.C.A. § 101 et seq., prohibiting the use of injunctions in labor disputes, applied so as to make improper the action of the District Court in granting the injunction in this case. The Court stated (303 U.S. at page 559, 58 S.Ct. at page 706, 82 L.Ed. 1012): "The trial judge was of the view that the laws relating to labor disputes had no application to the case. * * * The Court of Appeals thought that the dispute was not a labor dispute within the Norris-LaGuardia Act because it did not involve terms and conditions of employment such as wages, hours, unionization or betterment of working conditions, and that the trial court, therefore, had jurisdiction to issue the injunction. We think the conclusion that the dispute was not a labor dispute within the meaning of the act, because it did not involve terms and conditions of employment in the sense of wages, hours, unionization or betterment of working conditions is erroneous."

The Court had previously pointed out that "The relation of employer and employees does not exist between the respondent and the petitioners or any of them. The petitioners are not engaged in any business competitive with that of respondent, and the officers, members, or representatives of the Alliance are not engaged in the same business or occupation as the respondent or its employees." (303 U.S. at page 555, 58 S.Ct. at page 704, 82 L.Ed. 1012.)

The Court then analyzed some of the pertinent provisions of the statute and then stated (303 U.S. at page 561, 58 S.Ct. at page 707, 82 L.Ed. 1012): "The desire for fair and equitable conditions of employment on the part of persons of any race, color, or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association. Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliations. There is no justification in the apparent purposes or the express terms of the act for limiting its definition of labor disputes and cases arising therefrom by excluding those which arise with respect to discrimination in terms and conditions of employment based upon differences of race or color."

At page 562 of 303 U.S., at page 707 of 58 S.Ct., 82 L.Ed. 1012, the Court said: "It was intended [by the Act] that peaceful and orderly dissemination of information by those defined as persons interested in a labor dispute concerning 'terms and conditions of employment' in an industry or a plant or a place of business should be lawful; that, short of fraud, breach of the peace, violence, or conduct otherwise unlawful, those having a direct or indirect interest in such terms and conditions of employment should be at liberty to advertise and disseminate facts and information with respect to terms and conditions of employment, and peacefully to persuade others to concur in their views respecting an employer's practices." See, also, Milk Wagon Drivers' Union v. Lake Valley Farm Products Co., 311 U.S. 91, 61 S.Ct. 122, 85 L.Ed. 63.

[11] It is true, of course, that this case is one interpreting the words "labor dispute" as those terms were used in the statute, but the rationale of that opinion supports the conclusion that if it is necessary to find the existence of a "labor dispute" before picketing can be justified, then such terms should be broadly interpreted and, so interpreted, the type of dispute here involved is a "labor dispute." See Rotwein on Labor Law, p. 80, § 96.

[12] The public policy of this state, as declared by the courts, is in exact accord with the statutory policy of the Norris-La-Guardia Act as interpreted in the New Negro Alliance case. The courts of this state have unequivocally determined that picketing is justified even though the relationship of employer-employee does not exist and where no dispute at all exists between the employer and employee. Thus in McKay v. Retail Auto. Salesman's Local Union No. 1067, 16 Cal.2d 311, 106 P.2d 373, the sales employees of the Howard Automobile Company had entered into a mutually satisfactory bargaining contract with their employer. The salesmen did not want to join a union, and they were entirely satisfied with the terms of their employment. Nevertheless, the union picketed the plant for the purpose of compelling the employees to join their union, or compelling the employer to discharge the employees. The non-union employees sought an injunction. It was held that the union had the right peacefully to picket, that the union had a direct interest in the betterment of labor conditions, and that a dispute between employer and employee was not essential to justify peaceful picketing. At page 324 of 16 Cal.2d, at page 380 of 106 P.2d, the Supreme Court, after citing many authorities upholding the right to picket where a bona fide labor dispute exists, stated, in reference to the point under discussion: "The plaintiffs do not challenge the soundness of

these principles but urge that they do not apply here because there is no 'strike' and no 'labor dispute'. It is said that the related craft members 'only ceased working because of the penalty imposed for passing a picket line' placed around the company's premises by the 'irresponsible' Salesmen's Union. Such an interpretation of the facts assumes a lack of solidarity among the affiliated crafts and an unwillingness on the part of the members to co-operate in the action directed against the employer—an assumption which is negatived by every circumstance in the case. Moreover, as has been pointed out in Smith Metropolitan Mkt. Co. v. Lyons, 16 Cal.2d 389, 106 P.2d 414, the term 'labor dispute' is a broad one, and, in the absence of statutory definition, may be properly applied to any controversy 'which is reasonably related to employment and to the purposes of collective bargaining'." See, also, Park & Tilford Import Corp. v. International etc. of Teamsters, 27 Cal.2d 599, 165 P.2d 891, 162 A.L.R. 1426.

Thus, if it were necessary to hold that in order to justify peaceful picketing, a "labor dispute" must exist, we would be compelled to hold that the controversy here involved is "reasonably related to employment" and is therefore a "labor dispute" within the broad meaning of those terms. But we do not desire to hold that the right to picket is limited to labor disputes.

[13-16] In the first place, from a standpoint of principle there can be no such limitation on the right to picket. Whatever the true constitutional basis of the right to picket may be, we are convinced that where the picketers have a direct economic interest to protect, and the protection of such interest is in accord with public policy, they may lawfully picket regardless of the existence or nonexistence of a labor dispute. That Negroes have such an economic interest to protect is obvious. That they are an economically discriminated against group is too clear to require discussion. We are here faced with a situation where the employment policy of Lucky Stores, and of other employers, some of whom appear here as amici curiæ, has resulted in discrimination in the hiring of Negroes. Not only are they the last to be hired and the first to be fired, but many of the group can secure employment in only the most menial positions. Thus, white employers, operating in Negro districts, economically exploiting this group, making their profits from it, now urge that the Negroes should not be permitted to picket for the purpose of securing economic equality and fairness in employment, because, forsooth, such a dispute is not a "labor dispute," but a "racial" dispute. The argument contains its own refutation. Obviously, the Negroes have an economic interest to protect every bit as important as that of a union that desires to compel nonconsenting employees to join the union or to compel the employer to fire them. That interest is entitled to protection, is in accord with sound public policy, and, in our opinion, justifies that form of self-help known as picketing. The fact, if it be a fact, that such disputes may lead to some violence is no ground to deny the right. While, of course, race conflicts are to be discouraged, so is racial discrimination to be discouraged, and the prevention of the latter is a most important part of our public policy. James v. Marinship Corp., 25 Cal.2d 721, 155 P.2d 329; Williams v. International etc. of Boilermakers, 27 Cal.2d 586, 165 P.2d 903; Thompson v. Moore Drydock Co., 27 Cal.2d 595, 165 P.2d 901. Some violence is a possible concomitant of any attempt to improve by self-help the lot of previously subjected groups, as the turbulence of some labor disputes indicates. If violence occurs the courts possess full power to enjoin the violence even to the extent of enjoining completely the right to picket. Milk Wagon Drivers' Union v. Meadowmoor Dairies, 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836, 132, A.L.R. 1200. The courts of the various states in general and of this state in particular have been quite liberal in upholding the right of labor to picket. This is so because the courts have believed, and quite properly so, that the raising of the living standards of any large subjugated group that otherwise may become an economic burden on the community as a whole is in accord with sound public policy. Every argument that can and has been made in support of the right of labor to picket can properly be made in support of the right of the Negro race to secure economic equality. The essential public

policy behind both demands is identical. But, say respondent and the supporting amici curiæ, if Negroes may picket to secure fair employment practices, then whites may also picket to secure the discharge of Negroes, and other racial, religious and minority groups may picket to secure rights claimed by them. Those questions are not now before us. Those problems can be decided when and if they arise. Each case must be decided upon its own facts. All that we are here holding is that it is in accord with sound public policy to permit Negroes, a discriminated against and subjugated group in our society, to picket to attempt to secure equality in employment practices from those employers who cater to Negro patronage. The right is granted not because the picketers are members of a minority group, but because that minority group is economically discriminated against, and is attempting to rectify that condition. Beyond that we do not have to and do not go in this case. We conclude therefore that on principle the right to picket is not limited to labor disputes but may be exercised whenever the economic interest of the picketers is sufficiently important to warrant this interference with the rights of those against whom the picketers are operating.

In the second place, the cases clearly demonstrate that the right to picket is not limited to labor disputes. In Bakery and Pastry Drivers and Helpers Local v. Wohl, 315 U.S. 769, 62 S.Ct. 816, 86 L.Ed. 1178, the New York courts had enjoined certain union members from picketing some independent bakery goods peddlers to induce those peddlers not to work seven days a week, and to hire a union man one day a week. The Supreme Court stated (315 U.S. at page 774, 62 S.Ct. at page 818, 86 L.Ed. 1178): "So far as we can ascertain from the opinions delivered by the state courts in this case, those courts were concerned only with the question whether there was involved a labor dispute within the meaning of the New York statutes and assumed that the legality of the injunction followed from a determination that such a dispute was not involved. Of course that does not follow: one need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive."

In the case of In re Lyons, 27 Cal.App.2d 293, 81 P.2d 190, the members of two unions sought to induce the owners of independent grocery stores not to operate on Sunday, and when this demand was refused, started to picket. The trial court issued a restraining order which Lyons violated, and he was found in contempt. On habeas corpus the appellate court, in speaking of the store owners, stated (27 Cal.App.2d at page 294, 81 P.2d at page 191):

"They had no dispute nor difference with organized labor concerning wages, hours or conditions of employment, unionization of employees, employing nonunion labor or any other matter that usually gives rise to labor troubles or differences. The only controversy was over the closing of their places of business on Sunday. * * *

"This case is simply one in which a group of citizens attempted to force the shopkeepers to close their places of business on Sundays. That the group composed the membership of two labor unions is unimportant. Union members have no greater right to attempt to force a place of business to close on Sunday than has any other group of citizens and at the same time no less right. We must measure the rights of the respective parties to the Sunday closing controversy by general principles, and insofar as the cases dealing with picketing in labor disputes announce those general principles, they are applicable here."

The court also said (27 Cal.App.2d at pages 298, 299, 81 P.2d at page 193): "We cannot see how the right peacefully picket, under the guaranty of free speech, could be confined to cases in which there exists a dispute between an employer and organized labor over hours or conditions of employment, rate of pay, unionization of employees or employment of non-union men and not extended to a dispute between a businessman and any citizen or group of citizens who may differ with him on a question of business policy. The guaranty of the right of free speech is general and extends to every class or group of citizens.

As that guaranty is not confined to labor organizations, decisions in those cases announcing the principles upon which the right rests in the cases involving the ordinary labor dispute are important and controlling here. Because we have a difference of opinion on the question of closing a mercantile establishment on Sunday as the cause of the peaceful picketing, that fact should not make the rules announced in those decisions any less applicable. Citizens have just as much and no less right to differ on the wisdom of Sunday closing as they have to entertain different opinions on conditions of employment or rates of pay. The exact method used in conveying these opinions to the public is unimportant provided they are peacefully and quietly done in an orderly manner and not in violation of the provisions of a statute or an ordinance."

The same rules were announced in Re Bell, 37 Cal.App.2d 582, 585, 100 P.2d 339, 340, where it was stated: "There is no doubt that peaceable picketing is recognized as lawful under the Fourteenth Amendment to the federal Constitution, and article I, sections 9 and 10 of the California Constitution. [Citing cases.] The right to picket by lawful means is not confined to particular groups or unions, but may be enjoyed by all individuals or classes who desire to thereby convey to the public their opinions regarding labor controversies or to promote their causes by presenting persuasive facts to other workmen, in a legitimate manner, free from force, violence, intimidation or threats. The constitutional privilege may not be conferred upon one class and denied to others. It is guaranteed to all on the same basis, upon the theory that it is a lawful exercise of the constitutional guaranty of freedom of speech, press and assemblage."

[17] These cases stand unequivocally for the proposition that the right to picket is not and constitutionally cannot be limited to labor unions and to labor disputes. It will be noted that in some of the opinions quoted the right to picket is placed directly and without limitation on the state and federal constitutional guarantees of free speech. We have intentionally refrained from discussing the constitutional source of the right. The Supreme Court of this state and of the United States have both frequently announced that the right to picket finds its protection in, and is measured by, the constitutionally guaranteed right of free speech. See McKay v. Retail Auto. S. L. Union No. 1067, 16 Cal.2d 311, 106 P.2d 373; In re Blaney, 30 Cal.2d 643, 184 P.2d 892; Senn v. Tile Layers Union, 301 U.S. 468, 57 S.Ct. 857, 81 L.Ed. 1229; Carlson v. State of California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104; Thornhill v. State of Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; A. F. of L. v. Swing, 312 U.S. 321, 61 S.Ct 568, 85 L. Ed. 855; Cafeteria Employees Union, etc. v. Angelos, 320 U.S. 293, 64 S.Ct. 126, 88 L.Ed. 58. If the extent of the right is measured by this test then all peaceful, nonviolent, truthful picketing would be lawful, where not accompanied by a great and present danger to the public, and the object or purpose of the picketing would be a false factor. But the Supreme Court of the United States has also indicated that the right to picket is not as broad as the right of free speech, and has held that considerations of public policy may limit the right—see Carpenters and Joiners Union v. Ritter's Cafe, 315 U.S. 722, 62 S.Ct. 807, 86 L.Ed. 1143. There are several most interesting articles discussing these and other cases. See Teller, Picketing and Free Speech, 56 Harv.L.Rev. 180; Dodd, Picketing and Free Speech: a Dissent, 56 Harv. L.Rev. 513; Teller, Picketing and Free Speech: a Reply, 56 Harv.L.Rev. 532. In many of the state cases the right to picket is not based on such broad grounds. These cases hold that picketing, being a form of self-help and of economic coercion, is prima facie a tort but may be justified or privileged if the interest sought to be protected, when weighed against the injury to the employer, from a standpoint of public policy, should be protected. Under this theory the right to picket is measured by the yardstick of social and economic consequences. This is the view adopted by the Restatement of Torts, § 775 et seq. See, also, 1 Teller on Labor Disputes and Collective Bargaining, Chapter Eight, p. 319 et seq.; 1947 Cumulative Supplement, p. 69,

§ 136. We do not find it necessary to choose between these two concepts. In the present case, even if the most limited concept of the nature of the right to picket, as set forth in the Restatement, be accepted, it must be held that the picketing here involved was lawful. The attempt to secure economic equality has long been recognized as the basis of labor's right to picket. Such a purpose is a lawful one. That is exactly what petitioners are seeking here. Even Mr. Teller, who is the most articulate champion of the limited view of the nature of the right to picket as set forth in the Restatement, has stated: "Aggravating circumstances surrounding the Negro's search for work reflect the proximate connection between the Negro's demands and the labor contract. * * * Insecure, dispossessed, intensely exploited, the American Negro worker clings to the crags of life in the face of overwhelming counter availing forces. Abolition of slavery has not meant emancipation of the Negro. * * * Within the framework of the labor contract, therefore, and as limited by the subject matter of employment conditions, race, color and creed ought to be accorded the privilege of picketing upon the reasonable assumption that its benefit to the individuals involved is worth more than its cost to society." 1 Teller, Labor Disputes and Collective Bargaining, § 136, at page 427. Mr. Justice Murphy expressed this same thought in his concurring opinion in Steele v. Louisville & Nashville R. Co., 323 U.S. 192, at page 209, 65 S.Ct. 226, 235, 89 L.Ed. 173, in the following language: "The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color. A sound democracy cannot allow such discrimination to go unchallenged." In James v. Marinship Corp., 25 Cal.2d 721, 155 P.2d 329, our State Supreme Court recognized a definite national and state public policy to prevent unequal treatment of persons because of their color. See, also, Williams v. International, etc. of Boilermakers, 27 Cal.2d 586, 165 P.2d 903; Thompson v. Moore Drydock Co., 27 Cal. 2d 595, 165 P.2d 901. It follows, of course, that when Negroes seek to prevent discrimination in employment practices by demanding the hiring of Negroes in proportion to Negro patronage, such demand does not violate any principle of public policy. To the contrary, if the Negro is to rise to a position of economic integrity, that being a desirable public aim, he must be afforded the means by which to achieve such elevation. The right to protest peacefully against those who would deny him economic equality is the most elementary tool with which he should be permitted to commence his ascent. The alternative—the economic shackling of Negroes to their present economic status—is far more dangerous to our social development than the imaginary difficulties envisaged by the trial court in this case.

[18] There are several minor points that should be discussed. It will be remembered that, in their original demands, the organizations and individuals enjoined requested not only the gradual hiring of Negro clerks in proportion to Negro patronage, but also the discharge of a particular worker who had allegedly used undue force in arresting a Negro accused of the theft of bacon from the store in question. Picketing for this purpose as well as for the purpose of securing employment for Negroes was enjoined. The actual picketing, however, did not publicize this phase of the dispute and did not seek this result. The placards displayed merely referred to the failure of the store proportionally to employ Negroes. Even if picketing to secure the discharge of this employee were unlawful (a point we do not decide), this would not justify a total injunction against lawful as well as the assumed unlawful picketing. As was said in Park & Tilford Import Corp. v. International, etc. of Teamsters, 27 Cal.2d 599, at page 607, 165 P.2d 891, 896, 162 A.L.R. 1426: "Unlawful conduct in connection with concerted activities does not necessarily call for an injunction totally prohibiting the activities. A union may continue its concerted activities if they can be purged of the elements that make them unlawful." Here the two elements are severable. Moreover, the complete answer to this phase of the case is that petitioners were adjudged to be in contempt not because they picketed to secure the discharge of this employee, but because they

carried placards demanding the proportional hiring of Negro clerks.

[19] The respondent also urges that even if picketing to secure economic equality were lawful, picketing to secure "proportional" hiring of Negroes is unlawful. Such an argument disregards the realities. Carried to its logical conclusion it would mean that a store whose patronage is entirely Negro, and where many clerks were hired, by the token hiring of one Negro, could prevent the picketing of such establishment aimed at preventing such discrimination and exploitation. Even if it be assumed that a demand for a mathematical quota, discrimination being absent, would be an unlawful demand, in the present case it is the fact that discrimination here exists that makes what otherwise, it may be assumed would be unlawful, lawful. Beyond that we need not go.

The judgment of contempt is annulled.

BRAY, J., and FINLEY, J. pro tem., concur.

82 Cal.App.2d 675

## In re DOW'S ESTATE.

### BRUSH v. DOW et al.

Civ. 15869.

District Court of Appeal, Second District,
Division 1, California.
Dec. 3, 1947.

**1. Wills 🔑800**

Whether realty was separate property of testatrix or community property of testatrix and deceased husband was immaterial in proceeding involving estate of testatrix, where husband devised life estate in realty to testatrix with remainder to three children, and testatrix believed that she had only life estate therein and that the children would take in equal shares under husband's will.

**2. Bills and notes 🔑119**
**Executors and administrators 🔑49**

Where note was payable to mother and her three children, estate of mother was entitled to a one-fourth interest in the note, and any oral agreement to contrary must be deemed to have been merged in the final contract or note.

**3. Wills 🔑6**

The title to ranch and to family home acquired by testatrix and deceased husband as joint tenants with the right of survivorship vested in testatrix by right of survivorship, and ranch and home never became part of husband's estate but were separate property of testatrix and assets of her estate, and home could be devised by testatrix. Probate Code, § 581.

**4. Wills 🔑727, 728**

Children to whom testatrix bequeathed home and its contents would not be ousted from possession or required to pay rent where time for filing claims had expired and showing had not been made that rent would be required to pay debts or expenses of administration.

◆

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Proceeding in the matter of the estate of Susan S. Dow, deceased, wherein Bernice E. Brush filed a petition, opposed by George H. Dow and Illa Dow, for removal of executor and appointment of administrator with will annexed and for other relief. From an order, George H. Dow and Illa Dow appeal.

Order affirmed in part and reversed in part.

John F. Poole, of Los Angeles, for appellants.

Morton H. Eddy, of Pasadena (Vernon M. Brydolf, of Pasadena, of counsel), for respondent.

YORK, Presiding Justice.

Mrs. Susan Dow died November 26, 1944, and left surviving her three children, appellants George H. and Illa Dow, and respondent Bernice E. Brush. She executed a will on July 27, 1938, and two codicils dated June 5, 1939 and November 22, 1943, respectively. By the terms of the codicils testatrix left to appellants all her personal property, as well as the family home at 1801 Court Street, South Pasadena, together with its contents.

Letters testamentary were issued to appellant George H. Dow on December 26, 1944, and on June 20, 1945, respondent Bernice E. Brush filed a contest to the probate of the two codicils, which never came to trial and was later dismissed. On October 25, 1945, respondent Brush petitioned the court for the removal of the executor for alleged illegal acts, and for other relief, to which appellants directed an answer. Before the matter was heard, the executor, resigned and rendered his account, to which respondent filed objections. In the meantime, Citizens National Trust & Savings Bank was appointed administrator of the estate.

In his inventory, George H. Dow, as executor, listed as assets of the estate of Susan S. Dow, deceased, the family home at 1801 Court Street, South Pasadena and certain of the contents; an equity of redemption in the Imperial Valley ranch; the Norwalk ranch, located in Los Angeles County; and a one-half interest in a $1,500 mortgage, Thompson to Dow.

In his report and account dated March 9, 1946, George H. Dow, as executor, alleged that both the family home and the Imperial Valley ranch had been acquired in 1917 by testatrix, Susan S. Dow, and her predeceased husband, George Dow, as joint tenants with the right of survivorship and that title thereto vested in said testatrix at that date; that a $5,000 cash payment on the purchase price of the Norwalk ranch was the separate property of said testatrix, and that her estate was the owner of a $5,000 interest therein, in addition to a one-half interest in the remaining value over and above the said $5,000.

In her exceptions to the report and account of the executor, respondent Brush alleged that the Norwalk Ranch was not an asset of testatrix' estate and that testatrix had only a life estate therein; further that she owned only a ¼ interest in the $1,500 mortgage, Thompson to Dow. This claim is based upon the will and decree of distribution in the estate of George Dow, the predeceased husband of testatrix. Said will devised a life estate to Susan Dow in "all of my estate", she to have "the privilege and right to use the principal or corpus of my estate in addition to the income therefrom, as she may desire and need." After making various bequests to members of his family, said testator devised "all the rest, residue and remainder of my estate * * * upon the death of my wife" to his three children, to-wit: appellants, George H. and Illa Dow, and respondent Bernice E. Brush, share and share alike. The widow, Susan S. Dow, as executrix of her husband's estate filed an inventory in which she listed the Norwalk Ranch, a one-half interest in the family home, 1801 Court Street, South Pasadena, and a one-half interest in the Imperial Valley Ranch, as well as two other parcels of realty and certain personal property, not necessary to describe herein. The decree of distribution in the estate of George Dow, deceased, was made on July 21, 1924, and distributed the property listed in the inventory in accordance with the terms of the will.

The instant petition of respondent (for the removal of executor and appointment of administrator w.w.a., to strike inventory and executor's account from the file, to disallow claim of Illa B. Dow for $2,491, to strike claims allowed by executor from the files and to compel occupants of estate property to pay rent) came on for hearing before the trial court sitting in probate, after which, on May 3, 1946, the order from which this appeal is prosecuted was entered, to-wit:

(a) Disallowing the claim of $5,000 as the separate property of decedent Susan in the Norwalk ranch, because "deceased had only a life estate in said property" which "is not an asset of the Estate of Susan S. Dow."

(b) Overruling petitioner's claim that deceased did not own the equity of redemption in the Imperial County ranch "as said property was held in joint tenancy by deceased and her late husband, George Dow."

(c) Denying petitioner's exception to the claim of Illa B. Dow in the sum of $2,491.

(d) Upholding petitioner's claim that the estate had only a one-fourth interest in the Thompson note.

(e) Granting petitioner's demand to strike the inventory and executor's account.

(f) Decreeing that Illa and George H. Dow were chargeable with rent on the family home in the amount of one-sixth of $85 per month from November 6, 1944, in favor of respondent Brush.

(g) Denying petitioner's demand to strike claims already allowed by executor.

(h) Ordering executor to include automobile in new inventory.

(i) Decreeing with respect to the family home as follows:

"As to the half interest in the home place, 1801 Court Street:

While the deed to the home property created a joint tenancy and should have been so treated in that estate, apparently it was treated as though it were community property or as though the husband and wife were owners as tenants in common and only his half interest was disposed of in his estate. The decree of distribution gives his half interest to Susan S. Dow for life with the remainder to the three children in equal shares, subject to several legacies. Her half interest she left by last codicil to George and Illa. They will thus receive five-sixths of the whole, the daughter Bernice Brush receiving one-sixth of the whole; and so she would be entitled to one-sixth of the $85.00 a month rental from the date of the death of her mother."

(j) Ordering executor to prepare and file a new inventory and a complete executor's account "in harmony with this order".

Upon hearing appellants' motion for a rehearing or a substitution of another and different order in place of the order of May 3, 1946, it was "ordered by the Court that the (minute) order of April 5, 1946, hereby be set aside and that the order of May 3, 1946 be sustained.

[1] Appellants urge that the $5,000 invested in the Norwalk Ranch was separate property of testatrix Susan S. Dow. As hereinbefore stated, under the decree of distribution in the estate of George Dow, a life estate in this property was devised to Susan with remainder over to the three children, share and share alike. The last will of Susan S. Dow is not before this court, and only portions of it are referred to in the briefs on appeal. However, no place in the record is mention made as to how this particular piece of property is disposed of by such will if at all; therefore it must be assumed that said testatrix believed that she had only a life estate therein and that her three surviving children, George, Illa and Bernice, would take it in equal shares under the terms of the decree of distribution in her predeceased husband's estate. As a result, it would be immaterial whether it was separate property or the community property of testatrix and her late husband.

[2] Appellants claim that a one-half interest in the Thompson note and mortgage is the property of the estate. This note was made payable to Susan S. Dow, George H. Dow, Illa B. Dow and Bernice E. Brush; consequently the estate is entitled to a one-fourth interest therein only. Any oral agreement to the contrary must be deemed to have merged in the final contract, i. e., the note, which speaks for itself.

It is undisputed that the family home at 1801 Court Street, South Pasadena, was acquired by testatrix and her late husband as joint tenants with the right of survivorship in 1917 and that testatrix occupied the premises until her death. While the will of her husband devised only his estate without specific description of any property, the decree of distribution in his estate distributed to testatrix a life estate in a one-half interest of the home place which was held in joint tenancy. As a matter of fact, the title to said property vested in testatrix by operation of law at the time of the original grant. Moreover, that testatrix considered this particular piece of property as her separate property is fortified by the fact that she executed a codicil to her last will and testament and devised it to appellants.

As stated in Zeigler v. Bonnell, 52 Cal. App.2d 217, 219, 126 P.2d 118, 119: "The right of survivorship is the chief characteristic that distinguishes a joint tenancy from other interests in property. The surviving joint tenant does not secure that right from the deceased joint tenant, but from the devise or conveyance by which the joint tenancy was first created. Green v. Skinner, 185 Cal. 435, 197 P. 60. While both joint tenants are alive each has a specialized form of a life estate, with what amounts to a contingent remainder in the fee, the contingency being dependent upon which joint tenant survives."

"The interest of a joint tenant, either in realty or personalty, ceases upon his death and the estate devolves upon the survivor or survivors by right of the grant and the fact of survival and not by descent; it is no part of the decedent's estate. An unsevered joint tenancy is inconsistent moreover with any presumption of community property, and the laws of descent cannot justly be applied to the devolution of the title upon the survivor." 11-A Cal.Jur. p. 455, sec. 330. See, also, Estate of Fritz, 140 Cal.App. 487, 488, 35 P.2d 643.

In an annotated article in 5 Southern California Law Review 148, the following is quoted as a general rule with respect to joint tenancy property: "'A last will of a deceased joint tenant does not sever a joint tenancy, for upon his death the right of survivorship immediately accrues, and as the devise can not take effect until after the death of the testator, there is nothing on which the will can attach.' Moyse v. Gyles, 2 Vern. 385 (Ch. 1891)."

In Estate of Fritz, 130 Cal.App. 725, 729, 730, 20 P.2d 361, 363, the testatrix during her lifetime created a joint tenancy in a bank deposit in favor of herself and one Muller, who was named executor of her will. The latter failed to include said deposit in his account, claiming that upon testatrix' death the same vested in him as surviving joint tenant, despite the fact that testatrix inserted in her will the following provision:

"My money standing in my name and the name of C. Alvin Muller is all my own but as Mr. C. Alvin Muller is my executor, I added his name to my Bank Book in the Bank of California on California St. near Sansome St. for his convenience so that he can pay all honest debts of my funeral, etc. Then he may keep the balance for his services."

The trial court's judgment that Muller had no interest in the joint tenancy account was reversed on appeal, it being held that "where a person deposits money belonging to himself in a joint account in the name of himself and another, and signs a written agreement with that other constituting himself and the other joint tenants therein, in the absence of fraud, undue influence, or mistake, a joint tenancy with right of survivorship is created, and that no evidence outside the writing itself is admissible to explain or vary its effect." Also, that "the statement of testatrix in her will that this money 'is all my own,' etc., cannot be considered to contradict the writing by which the joint tenancy was created. * * * It must be held under the authorities that the testatrix and appellant held this account in joint tenancy, and that upon the death of the testatrix it vested in appellant by right of survivorship."

[3] Likewise, in the instant proceeding, both the Imperial County Ranch and and the family home at 1801 Court Street, South Pasadena, vested in testatrix, Susan S. Dow, by right of survivorship. They never became a part of the estate of George Dow, deceased, and the court sitting in probate in that estate never acquired jurisdiction over them. As a result, these two properties were the separate property of Susan S. Dow, duly became assets of her estate and the home place was effectively devised to appellants by the codicil to her last will.

Appellants urge that the court erred in ordering them to pay rent to the estate for the use of the home place.

Under section 581 of the Probate Code, an executor is entitled to possession of all real and personal property of the decedent "and to receive the rents, issues and profits thereof until the estate is settled or until delivered over by order of the court to the heirs, devisees or legatees * * *. After the time to file or present claims has expired, he is not entitled to recover the possession of any property of the estate from any heir who has succeeded to the property in his possession, or from any devisee or legatee to whom the property has been devised or bequeathed, * * * unless he proves that the same is necessary for the payment of debts, or legacies, or of expenses of administration already accrued, or for distribution to some other heir, devisee or legatee entitled thereto * * *."

[4] In the instant litigation, the six month period for filing claims had expired before respondent petitioned the court for the removal of appellant George H. Dow, as executor, and also before she filed her exceptions to his account; hence it was not incumbent upon the representative of the estate to oust appellants from possession of the home where they had lived with their mother for many years previous to her death, and which she devised to them by the codicil heretofore mentioned. Testatrix also bequeathed to appellants, George H. and Illa Dow, all of her personal property of every kind and nature, share and share alike. Therefore, in the absence of a showing that the potential income from said home place would be required to pay debts or expenses of administration, it would be a useless act to collect rent from appellants only to return it to them upon final distribution of the estate.

For the reasons stated those portions of the order appealed from, decreeing (1) that appellants are chargeable with rent on the family home at 1801 Court Street; and (2) that a one-half interest in said family home was disposed of in the estate of George

Dow, deceased, and as a result that respondent would be entitled to a one-sixth interest of the whole thereof,—are reversed. In all other respects, said order is affirmed.

DORAN and WHITE, JJ., concur.

82 Cal.App.2d 496

**BAKER v. GAWTHORNE et al.**

**Civ. 15991.**

District Court of Appeal, Second District,
Division 2, California.
Nov. 20, 1947.

As Modified Dec. 10, 1947.

Rehearing Denied Dec. 11, 1947.
Hearing Denied Jan. 15, 1948.

**1. Malicious prosecution 🔑73**

In tenant's action for malicious prosecution of unlawful detainer action, court's finding that defendant landlords did not disclose to their attorney before filing detainer action, any facts supporting their allegations that tenant used her apartment for immoral purposes, and that neither defendants nor their attorney knew sufficient facts to warrant such allegations, supported judgment for plaintiff, though court also found that defendants disclosed to attorney all facts known to them or their agents and filed detainer action on attorney's advice.

**2. Malicious prosecution 🔑64(2)**

In action for malicious prosecution, evidence supported findings that defendants did not disclose to their attorney, before filing unlawful detainer action against plaintiff, any facts supporting their allegations that plaintiff used her apartment for immoral purposes, and that neither defendants nor their attorney knew sufficient facts to warrant such allegations.

**3. Malicious prosecution 🔑25(2)**

A landlord, failing fully and fairly to disclose to his attorney facts, which landlord knew or should have known, indicating that tenant did not use her apartment for immoral purposes, before bringing unlawful detainer action against her on ground of such use, could not successfully plead advice of counsel as defense to tenant's action for malicious prosecution of detainer action.

**4. Malicious prosecution 🔑25(2)**

A person, before accusing another of committing immoral act by complaint in judicial proceeding, owes duty, not only to make full and fair disclosure to his attorney of all facts within his knowledge tending to prove or disprove such charge, but also to find out and acquaint attorney with all pertinent facts known to accuser's agents and facts readily ascertainable.

**5. Malicious prosecution 🔑31**

Since malice may be shown by proof of accuser's lack of good faith, his indifference toward knowledge of others, acting for him in his dealings with accused, may justify inference of his bad faith or malice in accused's action for malicious prosecution.

**6. Malicious prosecution 🔑31**

Paucity of proof of tenant's violation of lease by using her apartment for immoral purposes, testimony as to apartment house manager's statement that he would like to get tenant out of house, and testimony that landlord told witness that rental paid by tenant was too low, warranted inference of landlord's malice in bringing unlawful detainer action against tenant on ground of such violation.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Muriel Baker against F. A. Gawthorne and another for malicious prosecution of an unlawful detainer action. From a judgment for plaintiff against named defendant, he appeals.

Affirmed.

Milton M. Cohen and Milton M. Cohen, Jr., both of Los Angeles, for appellant.

Arthur V. Kaufman, of Los Angeles, for respondent.

MOORE, Presiding Justice.

Appeal from a judgment in the sum of $1,100 awarded respondent for the malicious prosecution of an unlawful detainer action.

On March 20, 1946, the Gawthornes as owners of an apartment house in the city of Los Angeles sued respondent in the municipal court for her alleged detainer of apartment D-2 which she at that time occupied as tenant. They accused her of using the apartment for immoral purposes and of housing others without the owners' consent. On April 4, 1946, the unlawful detainer action was regularly tried, resulting in a judgment of nonsuit. By her complaint herein respondent alleged that by reason of such action the tenants in the apartment house and many other persons heard of the charges which had been made against her and that by reason thereof she had been greatly injured in her good name and reputation and had suffered humiliation and mortification to her damage in the sum of $25,000; that because of the scarcity of apartments, rooms and dwelling accommodations in the city of Los Angeles, and by reason of the filing of such action by the Gawthornes, respondent became frightened and worried at the prospect that she might not be able to obtain a fit habitation in the event of her eviction; that she became sick, nervous and sleepless and lost about 10 pounds in weight between the time of the service of the summons and the trial of the detinue action.

[1] Judgment having gone against appellant in the instant action he now contends that the findings do not support the judgment. This attack is reinforced by the fact that two findings are ostensibly contradictory, one of which, appellant contends, exonerates him from culpable tort. Finding IV-a is as follows: "That defendants caused to be disclosed to their attorney, William Ellis Lady, all facts of which the defendants or their agents had knowledge concerning plaintiff's tenancy, and thereafter acting upon the advice of said attorney, said action of unlawful detainer was verified, and filed." Because this finding declares that defendants disclosed to their attorney all the facts of which they had knowledge "concerning plaintiff's tenancy" and filed the action in reliance upon such advice, appellant contends that the judgment is without support. He cites authorities (Levy v. Brannan, 39 Cal. 485, 488; Richter v. Neilson, 11 Cal.App.2d 503, 508, 54 P.2d 54) to establish that advice of counsel is a defense against a suit to recover for malicious prosecution "where the answer is in form of general denial." He follows such argument with the propositions (1) that in order for the plaintiff in such action to recover he must establish both malice and want of probable cause, and (2) that when he, the defendant, shows he has in good faith consulted a lawyer and has been advised that he has a good cause of action and has acted honestly upon such advice, probable cause is established and the injured party cannot thereafter recover damages on account of such prosecution, citing Black v. Knight, 44 Cal.App. 756, 769, 187 P. 89; Citizens State Bank of Long Beach v. Hoffman, 44 Cal.App.2d. 854, 857, 113 P. 2d 221.

But appellant finds himself in the unfortunate situation whereby another finding convicts him either of a brazen disregard for the rights of his tenant or of crass recklessness in making serious charges against her. Finding VI declares that it is untrue that prior to the filing of such detainer action the Gawthornes caused to be disclosed to their attorney any facts in support of the charge that Muriel Baker had used or permitted the use of her apartment for an immoral or illegal purpose, and that neither the defendants nor their attorney had sufficient facts upon which to base the allegations "that during one year last past, said Muriel Baker has used or permitted use of said housing accommodations for an immoral or illegal purpose, in this, that she has kept and housed in said apartment D-2, overnight, at least one man over the age of eighteen years; that said man was not the lawful husband of said Muriel Baker, and that the said Muriel has kept said man in said apartment D-2 overnight for immoral purposes and not otherwise." When on the trial of an action for malicious prosecution against a defendant for having accused the plaintiff in an unlawful detainer action of having used her apartment for immoral purposes the court finds that such charges were false it cannot be successfully contended that appellant acted honestly, in good faith on the advice of counsel or that he had probable cause for filing the suit to oust respondent from her apartment when the defendant did not prove a single immoral act or any other violation of her tenancy agreement. Stevens v. Chisholm, 179 Cal. 557, 560, 178 P. 128; Hudson v. Zumwalt, 64 Cal.App.2d 866, 872, 149 P.2d 457; Singleton v. Singleton, 68 Cal.App. 2d 681, 691, 157 P.2d 886.

[2] The evidence abundantly supports the findings. Mrs. Goldberg who occupied the apartment beneath that of respondent, complained to Mr. Carroll, manager of the house, that respondent had made "so much racket and noise" in her apartment three or four nights in succession. Carroll told Attorney Lady nothing more than the substance of the complaint which Mrs. Goldberg had made to him. Mrs. Bishop, who had been manager of the building until November, 1945, testified that she had the authority to and did permit respondent to have her father, her sister and her son reside with her; that once or twice respondent had a guest, but never did entertain any men in her apartment; that her conduct was irreproachable at all times. Mr. Lady had the house shadowed by detectives but they did not detect the commission of an immoral act by respondent.

[3-5] Such facts appellant knew or should have known and have imparted to his attorney. Having failed fully and fairly to disclose such facts to him whose legal advice he sought, appellant was not in a position successfully to plead advice of counsel as a defense. Hudson v. Zumwalt, supra, 64 Cal.App.2d 875, 149 P.2d 457; Singleton v. Singleton, supra, 68 Cal.App. 2d 695, 157 P.2d 886; Gooding v. McAlister, 114 Cal.App. 284, 286, 299 P. 774; also, see Schubkegel v. Gordino, 56 Cal.App.2d 667, 672, 133 P.2d 475. Before a person accuses another in a judicial proceeding of having committed an unlawful, a base or immoral act, it is his duty not only to make a full and fair disclosure of "all the facts within his knowledge tending to prove or disprove the criminal charge," but it is also incumbent upon him to find out all of the pertinent facts known to his own agents and such facts as are readily ascertainable and to acquaint his attorney with them. (Schubkegel v. Gordino, supra.) Inasmuch as malice may be shown by proof of lack of good faith upon the part of an accuser (Richter v. Neilson, 11 Cal.App. 2d 503, 507, 54 P.2d 54), the latter's indifference toward the knowledge of others who have acted for him in his dealings with the accused may justify the inference of bad faith or malice. Not only did appellant have no evidence of one immoral act committed by respondent in her apartment, but by a conference with Mrs. Bishop appellant might have learned the constant facts of the uprightness and regularity of respondent's conduct and would not have found himself chagrined at the trial of his lawsuit by a destitution of proof. The totality of the proof was that Mrs. Goldberg had heard noises in respondent's room all night long; it was the footsteps of a number of people. Her complaint having been reported by Mr. Carroll to appellant the latter directed him to discuss the matter with Mr. Lady. The latter employed a detective agency to check the Goldberg complaint and then drew the complaint for unlawful detainer. Although appellant knew nothing of the charges made and never discussed them with his lawyer he instructed the latter that, if satisfied with the case, he should proceed. His attorney advised him that he had evidence obtained by "a recognized detective agency" which he had employed to check on the accusatory reports of Mrs. Goldberg. But after appellant had read the complaint's accusation of respondent's using her apartment for immoral purposes he did not attempt to ascertain whether the attorney had proof of the charge. All that was reported by the detective was that one man had remained in respondent's apartment all night. He made no attempt to learn that the visitor was respondent's son or father and reported no immoral or unlawful act by her. With no evidence of improper conduct on the part of respondent appellant filed his vicious complaint without probable cause.

[6] From such paucity of proof of violation of her lease by respondent the court was warranted in inferring malice on the part of appellant. Peebler v. Olds, 71 Cal.App.2d 382, 387, 162 P.2d 953; Singleton v. Singleton, supra, 68 Cal.App.2d 696, 157 P.2d 886. In addition to such deduction it may reasonably have been supplemented by unfavorable inferences from the testimony of Mrs. Houck to whom about December, 1945, Mr. Carroll stated that he would like to get respondent out of the house, and from the testimony of Mrs. Bishop that appellant had told her that the monthly rental of $40 paid by respondent was too low; that all the tenants should "be moved on and get a new set of tenants in."

Judgment affirmed.

WILSON, J., concurs.

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82 Cal.App.2d 486

## BARTOSH v. BOARD OF OSTEOPATHIC EXAMINERS OF THE STATE.

Civ. 15926.

District Court of Appeal, Second District, Division 2, California.

Nov. 20, 1947.

As Amended Dec. 16, 1947.

**1. Statutes 🔑133, 149**

The only provisions of the Osteopathic Act making State Medical Practice Act and acts amendatory thereof applicable to Board of Osteopathic Examiners which are not to be disturbed by legislation because Osteopathic Act was adopted by initiative without special provision for amendment are those which prescribe its administration. Gen.Laws, Act 5727, § 2; Const. art. 4, § 1.

**2. Administrative law and procedure 🔑1**

The legislature possesses inherent power to authorize improvements in procedure of an administrative board which is obliged to deal with vested interests of citizens, and it should do so unless distinctly forbidden by organic law.

**3. Statutes 🔑51**

An act which adopts by reference the whole or a portion of another act means the law existing at time of adoption, and does not include subsequent additions or modifications of the statute so adopted unless it does so by express language or strongly implied intent.

**4. Statutes 🔑133, 149**

Construction of Osteopathic Act making State Medical Practice Act and acts amendatory thereof applicable to Board of Osteopathic Examiners, as requiring hearing officer in disciplinary proceeding conducted by State Board of Osteopathic Examiners pursuant to legislative amendment in State Medical Practice Act so providing, does not render Osteopathic Act invalid as violative of initiative provisions of Constitution, though Osteopathic Act was adopted by initiative without special provision for amendment, since matters changed by legislative amendment refer to procedural and not substantive law. Gen.Laws, Act 5727, §§ 1, 2; Business and Professions Code, §§ 2360, 2364; Government Code, §§ 11500 to 11528, 11501, 11502, 11503, 11506, 11512; Const. art. 4, § 1.

**5. Physicians and surgeons 🔑11(3)**

Under Osteopathic Act making State Medical Practice Act and acts amendatory thereof applicable to Board of Osteopathic Examiners, Board must use services of a hearing officer at trial of physician accused of unprofessional conduct, in view of amendment to State Medical Practice Act so providing. Gen.Laws, Act 5727, §§ 1, 2; Business and Professions Code, §§ 2360, 2364, 2377; Government Code, §§ 11500 to 11528.

**6. Administrative law and procedure 🔑13**
**Physicians and surgeons 🔑2**

The powers of Board of Osteopathic Examiners at trial of a physician accused of unprofessional conduct are not abridged by having unlawful evidence excluded from Board's consideration, nor does presence of a hearing officer at such trial to rule upon admission of evidence deprive Board of power to make final decision. Gen.Laws, Act 5727, §§ 1, 2; Business and Professions Code, §§ 102, 2377.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Proceeding by William Bartosh against the Board of Osteopathic Examiners of the State of California for a writ of prohibition commanding board to desist from any further proceedings in matter wherein petitioner was accused of unprofessional conduct. From a judgment granting the writ, the Board appeals.

Affirmed.

J. Robert Meserve, of Los Angeles, for appellant.

Maddox & Vaughn, of Los Angeles (Jack O. Goldsmith, of Los Angeles, of counsel), for respondent.

MOORE, Presiding Justice.

The question for decision is whether the board of osteopathic examiners is required to use the services of a hearing officer at the trial of a physician accused of unprofessional conduct.

On September 16, 1946, petitioner was accused of unprofessional conduct, to wit, a violation of section 2377 of the Business and Professions Code which declares it to be unprofessional conduct for a physician in any way to aid or abet the procuring of a criminal abortion.[1] With a copy of the accusation petitioner received a notice that a hearing thereon would be had before the board of osteopathic examiners on October 25 at a place in Los Angeles designated "for the purpose of revoking petitioner's license." Thereupon petitioner filed with the board his notice of defense and request for a hearing.

The board having failed to appoint a hearing officer to preside over such hearing as provided by sections 11500 to 11528 of the Government Code, and having threatened to proceed with the hearing without first having appointed a hearing officer, the petitioner, acting on his belief that the board would proceed with such trial and render a judgment adverse to him, sought to have the superior court issue its writ of prohibition commanding the board "to desist from any further proceedings in said action." Having admitted the declarations of the petition and having alleged that sections 11500 to 11528 do not apply to the board of osteopathic examiners in so far as they pertain to the use of hearing officers by administrative boards, the answer alleged that the initiative act which created appellant prohibits the board from appointing a hearing officer. The court below by its judgment commanded appellant to desist from further proceedings until it shall have complied with such code provisions in so far as they relate to the appointment of the hearing officer referred to in the last mentioned code sections. The sole purpose of this appeal is to determine the validity of such judgment. A scrutiny of pertinent statutes and a constitutional provision leaves assurance of its correctness.

By initiative measure adopted November 7, 1922, a self-sustaining board of osteopathic examiners consisting of five members was created. By its provisions the board is "directed to carry out the terms and provisions of the state medical practice act, approved June 2, 1913, and all acts amendatory thereof, and all laws hereafter enacted prescribing and regulating the approval of schools, the qualifications of applicants for examination for any form of certificate * * * shall * * * take over, exercise and perform all functions and duties imposed upon and heretofore exercised or performed by the board of medical examiners * * * under the provisions of the state medical practice act * * * and acts amendatory thereof. The provisions of said medical practice act * * * and acts amendatory thereof are hereby declared to be applicable to said board of osteopathic examiners in respect to all of the aforesaid matters * * * now or hereafter prescribed by law relating to the graduates of osteopathic colleges." (2 Deering's General Laws, Act 5727, sec. 2, p. 2138.)

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[1] This section is a part of Article 13, Division 2, Chapter 5, dealing with the revocation of licenses.

In 1945 pursuant to a popular demand for improvement in the procedure of administrative boards the Government Code was amended by the enactment of sections 11500 to 11528 inclusive.[2] Section 11502 provides that any of the 37 agencies (including the medical as well as osteopathic examiners) enumerated in section 11501 "requiring full-time hearing officers for the purposes of this act has power to appoint them for the particular agency. Each hearing officer shall have been admitted to practice law in this State for at least five years immediately preceding his appointment." Other sections provide for an accusation to be in writing, service thereof, respondent's request for a hearing, the board's privilege to proceed in 15 days if the accused fails to send to the board a written request for a hearing (11503); procedure of the accused after service and his right to a hearing conditioned on his filing a notice of defense (11506). Section 11512 provides: "(a) Every hearing in a contested case shall be presided over by a hearing officer. The agency itself shall determine whether the hearing officer is to hear the case alone or whether the agency itself is to hear the case with the hearing officer. (b) When the agency itself hears the case the hearing officer shall preside at the hearing, rule on the admission and exclusion of evidence, and advise the agency on matters of law; the agency itself shall exercise all other powers relating to the conduct of the hearing but may delegate any or all of them to the hearing officer."

Also, in 1945 the legislature amended the state medical practice act by so revising the language of section 2360 of the Business and Professions Code[3] as to require that "the proceedings under this article [Article 13, Division 2, Chapter 5] shall be conducted in accordance" with the Government Code (Secs. 11500 et seq.), and by conferring upon "the board * * * all the powers granted therein." Section 2364 of the same code was also amended to provide that no action shall be taken against "the holder of any certificate" until the board follows the provisions of sections 11500 to 11528.

The contention of appellant is that the above cited provisions of both the Government Code and the Business and Professions Code are void for the following reasons: (1) section 1 of Article IV of the Constitution provides that "No act * * * adopted by the people at the polls under the initiative provisions of this section shall be amended or repealed except by a vote of the electors, unless otherwise provided in said initiative measure"; (2) the acts of the legislature in adopting sections 11500 et seq. of the Government Code and in adopting sections 2360 and 2364 of the Business and Professions Code violated the above quoted constitutional inhibition; (3) the only amendments to the state medical practice act of 1913 St. 1913, p. 722, which are binding upon appellant are those enacted prior to the adoption of the osteopathic act; (4) since the above cited code provisions were not enacted until 1937 and 1945, they violate section 1 of Article IV and are therefore not binding upon appellant.

The answer to such contentions is found in the osteopathic act itself. Section 2 thereof (2 Deering's General Laws, Act 5727, p. 2138) provides that the provisions of the medical practice act of June, 1913, and acts amendatory thereof are made applicable to the board of osteopathic examiners in respect to "all of the aforesaid matters and all other matters now or hereafter prescribed by law" relating to licensed osteopathic graduates. From the language of the osteopathic act it was the clear intent of the electors that the state medical practice act of 1913 should be made applicable to osteopathic practitioners as well as to medical doctors; that the phrase "acts amendatory thereof" is made applicable to the osteopathic examiners "in respect to all of the aforesaid matters and all other matters now or hereafter prescribed by law relating to the graduates of osteopathic colleges holding * * * any form of certificate or license." From such language it cannot be inferred that the framers of the osteopathic act were seeking any special privilege for osteopathic practitioners or purposed to avoid the application of the medical practice act. To reason so would be to fly in the face of the initiative act itself. This conclusion is supported by the arguments made by its supporters during the campaign of 1922 for the adoption of the osteopathic act. They inveighed against the unfairness of the administrators of the state medical practice act who "arbitrarily refused to examine any more osteopaths for physicians and surgeons licenses," and declared: "We cannot get justice from the medical doctors. They are competitors of osteopathic physicians and surgeons * * * The only issue is fair and intelligent administration. The present physician and surgeon law is all right. Its administration is all wrong. The law is non-partisan. Its administration is deadly partisan."

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[2] These sections comprise Chapter 5, Part 1, Division 3, Title 2, dealing with "Administrative Procedure."

[3] This code was adopted in 1937 "consolidating and revising the law regulating and protecting private business and licensed professions and callings and penalizing violations thereof."

[1] From the language of the act, then, as well as from the sentiment of its proponents, it is a fair deduction, if indeed it is not inescapable, that the only provisions of the osteopathic act which are not to be disturbed by legislation are those which prescribe its administration. So long as an amendatory statute does not alter the initiative act by attempting to frustrate its administration by osteopathic physicians such amendments are not violative of the inhibitions of the cited constitutional section. The appointment of a hearing officer and the provisions for an intelligible procedure (secs. 11500 to 11528) do not in the slightest degree deprive the board of the privilege of making any decision in the conduct of its affairs. By section 11512 the board is required to exercise all powers at a hearing except that of ruling upon the admissibility of evidence. The hearing officer is needful for the purpose of conducting all hearings after such fashion as will safeguard the legal rights of those concerned. His sole power is to determine legal questions that may arise upon the offer of or objection to evidence or that might otherwise arise in the conduct of the board's business. His functions in no respect transgress the authority of the board which is vested with the exclusive power to adopt rules to effectuate the provisions of the act. An administrator of any business requires the service of legal counsel to the end that he may avoid the pitfalls which inhere in the complexities of the modern state. That this is the universal voice is attested by the personnel who sit at the tables of directors of commercial institutions as well as in the midst of administrative, quasi-public boards in every community in the Union. The employment of such technical expert does not signify that any power of the board which he advises is transferred to him. His office is merely to give expression to the existing state of the law of which the layman has but a casual knowledge. By reason of the important if not paramount interests delegated to the administrative tribunal the participation of a lawyer in its deliberations as well as in the conduct of its affairs would appear indispensable. Such necessity was impressed upon the legislature as a means not only of preventing injustices but also of lessening the burdens cast upon the courts in reviewing the proceedings of administrative boards.

[2, 3] As the organ of sovereignty the legislature possesses the inherent power to authorize improvements in the procedure of an administrative board which is obliged to deal with the vested interests of citizens. It should do so unless distinctly forbidden by the organic law. In this regard appellant's attacks upon the new statutes are not to be disdained. It contends that the initiative act in adopting the existing medical practice act could not by such method adopt "laws hereafter enacted." By this it means amendments to the medical practice act that might be enacted in the future. See In re Opinion of the Justices, 239 Mass. 606, 133 N.E. 453, 454. Indeed it is the law that an act which adopts by reference the whole or a portion of another act means the law existing at the time of the adoption, and does not include subsequent additions or modifications of the statute so adopted unless it does so by express language or strongly implied intent. Vallejo & N. R. Co. v. Reed Orchard Co., 177 Cal. 249, 254, 170 P. 426; People ex rel. v.

Crossley, 261 Ill. 78, 103 N.E. 537, 540; Crohn v. Kansas City, etc., Co., 131 Mo. App. 313, 109 S.W. 1068, 1070; Savage v. Wallace, 165 Ala. 572, 51 So. 605, 607; Culver v. People, 161 Ill. 89, 43 N.E. 812, 814; City of Charleston v. Johnston, 170 Ill. 336, 48 N.E. 985, 986; Town of Cicero v. McCarthy, 172 Ill. 279, 50 N.E. 188, 190; Knapp v. City of Brooklyn, 97 N.Y. 520, 525; Darmstaetter v. Maloney, 45 Mich. 621, 8 N.W. 574, 576; In re Main Street, 98 N.Y. 454, 457. Also, see In re Burke, 190 Cal. 326, 328, 212 P. 193, which intimates the nullity of a statute purporting to adopt future laws.

[4, 5] However, inasmuch as the language of the osteopathic act in attempting to adopt future enacted laws as to specified matters must have referred to procedural and not to substantive law, there is no violation of the "initiative" concept by the legislature's enactment of procedural amendments. Therefore the power of the legislature is not frustrated by section 1 of the osteopathic act which empowered the board of osteopathic examiners to "adopt such rules as may be necessary to enable it to carry into effect the provisions of this act." Since the right to use the power to adopt rules is permissive and not mandatory, the board is bound to act with discretion in adopting any rule in conflict with the medical practice act which, in the matter of disciplining licentiates, is the law governing osteopathic physicians and the board of osteopathic examiners. (Sec. 2, Act 5727, Deering's General Laws, second, fourth and fifth sentences.) Therefore since that part of the medical practice act which deals with the trials of osteopathic practioners is merely procedural, the enactment of sections 2360 and 2364 of the Business and Professions Code was not contrary to the provisions of the initiative act itself or to the inhibitions of section 1 of Article IV of the Constitution. It follows that the legislature possessed the power to modify all existing rules for the procedure of appellant or to enact a totally new procedure for any of the 37 agencies specified in section 11501.

That the lawmakers had in mind that osteopathic physicians are to be disciplined according to the state medical practice act is evidenced by the report of the Judicial Council to the Governor and the legislature under date of December 31, 1944, wherein (page 153) appears the following: "Board of Osteopathic Examiners * * * No change is required since the amendments relating to the Board of Medical Examiners will bring proceedings for the revocation, suspension or denial of osteopathic physicians and surgeons' licenses, within the Council's proposals." On page 12 of the council's report it is emphasized that by reason of the terms used and their definitions in section 11500 the specification of the powers that may be delegated is unnecessary. On page 20 it is pointed out (1) that the improved procedure does not deprive the agency of its authority and (2) that the agency may reserve to itself any powers other than those of passing upon the admissibility of evidence and of giving legal advice to the board. Withal, it must be borne in mind that the legislature is without power to amend the substantive provisions of the osteopathic act since an initiative statute can be amended only by a vote of the electors "unless otherwise provided in said initiative measure." Const. art. IV, sec. 1.

[6] Appellant argues that it is precluded by section 102, Business and Professions Code, from "allowing such a hearing officer to assume any of the duties imposed upon appellant." That section does not apply to appellant. It was enacted for the purpose of enabling the director of the department of professional and vocational standards to take over the duties of any board created by an initiative act "under the same conditions and in the same manner as provided in this code for other boards of like character."

Appellant invokes the principle embodied in the ancient maxim, to wit: Potestas delegatus non delegandus potest. It is argued that since (1) the act requires the board to exercise all the functions and to perform all the duties imposed upon and heretofore exercised by the board of medical examiners under the state medical practice act, and (2) since it authorizes the board to adopt rules that may be necessary to enable it to effectuate the provisions of the act, legislative action directing appellant to use hearing officers is an unauthorized interference with the board which receives its powers directly from the people. From this pronouncement and the provision of the initiative act that appellant "shall have authority to take evidence in any matter cognizable by it" the conclusion is derived that the legislature has no power to limit such authority or to compel appellant to delegate it to another. While appellant's argument has in the main been answered by the foregoing discussion, it may here be emphasized that section 11512 provides that a hearing officer must preside over every hearing and rule upon the admission of evidence, but that the agency itself shall exercise all other powers relating to the conduct of the hearing. The presence of the hearing officer is not to prevent the board from taking any competent and relevant evidence. None of its lawful powers is either taken away or abridged by having unlawful evidence excluded from the board's consideration. Nor does the presence of such presiding officer deprive the board of the power to make final decision.

While the question here involved has not been presented to the appellate courts since the enactment in 1945 of the procedural law, section 11500 et seq. and sections 2360 and 2364, supra, the sentiment of the Supreme Court with reference to the power of the legislature to enact rules for the regulation of appellant and its constituency is indicated in the decision of Gamble v. Board of Osteopathic Examiners, 21 Cal.2d 215, 130 P.2d 382. Doctor Gamble sought by mandamus proceeding to compel the board to issue to him a receipt for the annual tax and registration fee required by section 2496 of the Business and Professions Code. Section 2493 at that time required each osteopathic practitioner to pay an annual tax and registration fee and to submit therewith satisfactory evidence that during the preceding year he has completed a minimum of 30 hours of professional work approved by the board. In declining to submit such evidence with the payment of his fee he contended that since medical doctors are not required to do annual educational work for the renewal of their licenses the requirement made of licentiates of the osteopathic examiners violates not only section 21 of Article I of the Constitution[4] but also the "Osteopathic Act which cannot be amended," citing Article IV of the Constitution. In its decision denying the mandate the Supreme Court emphasizes (1) that all acts amendatory of the medical practice act govern osteopathic physicians pursuant to the initiative act; (2) that so long as the respective jurisdictions of the boards of the medical and osteopathic doctors are not disturbed the legislature is free to impose varying requirements on both classes of practitioners; (3) that the power to regulate the treatment of disease is elastic, and regulations may vary so long as they entail no unreasonable discrimination.

Inasmuch as the legislative enactment of the new procedural law in no respect violates either the cited constitutional section or the osteopathic act the judgment should be and it is affirmed.

McCOMB and WILSON, JJ., concur.

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[4] "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

82 Cal.App.2d 478

## BRAINARD v. BRAINARD.

Civ. 15902.

District Court of Appeal, Second District, Division 2, California.

Nov. 20, 1947.

**1. Divorce 🔑184(10)**

The findings of trial court in a divorce proceeding must be followed in absence of a clear showing that discretion was abused.

**2. Appeal and error 🔑996**

In all matters before appellate court in which issue was tried in trial court upon affidavits, those favoring contentions of respondent establish not only facts stated therein but also all facts which may be reasonably inferred therefrom.

**3. Divorce 🔑161**

On motion to set aside wife's default and ensuing interlocutory judgment of divorce for husband, evidence was insufficient to warrant a finding of fraud on part of husband or of inadvertence, surprise, mistake or excusable neglect on part of wife. Code Civ.Proc. § 473.

**4. Divorce 🔑184(10)**

While appellate court is required to accept factual determination of trial court, wife's challenge to order denying her motion to set aside her default and ensuing interlocutory judgment of divorce for husband, warranted a consideration of evidence in order to ascertain whether order was arbitrarily derived.

**5. Divorce 🔑161**

Where wife knew physical condition of home of parties as well as any one prior to execution of property settlement agreement, wife could not charge husband with deceit in execution of such agreement on the ground that home, which was given to wife, was in a run-down condition, in support of her contention on motion to set aside her default and the ensuing interlocutory judgment of divorce for husband that she was worsted in settlement agreement. Code Civ.Proc. § 473.

**6. Divorce 🔑161**

Evidence adduced on behalf of husband warranted denial of wife's motion to set aside her default and the ensuing interlocutory judgment of divorce on ground that she was innocent party in her relations with husband. Code Civ.Proc. § 473.

**7. Divorce 🔑161**

Evidence did not justify assertion by wife, made in support of her motion to set aside her default and ensuing interlocutory judgment of divorce for husband, that agreement which settled the property rights and obligations and judgment were result of collusion.

**8. Divorce 🔑56**

It is not "collusion" for both spouses to desire a divorce or for either, in aid of such desire, to withdraw from a controversy after a long period of domestic infelicities.

See Words and Phrases, Permanent Edition, for all other definitions of "Collusion".

**9. Divorce 🔑161**

On wife's motion to vacate her default and ensuing interlocutory judgment of divorce for husband on the ground of collusion, evidence failed to sustain wife's assertion that she was paid a consideration for stipulation withdrawing her cross-complaint and indicating that she would not answer husband's amended complaint. Code Civ.Proc. § 473.

**10. Divorce 🔑316**

When a divorce is granted to a husband, his continuing obligation to support his wife ceases.

**11. Internal revenue 🔑867**

Payments made by a husband after a decree of divorce in his favor are deemed a part of property settlement, rather than payments under his obligation to support wife, and are not taxable to wife. 26 U.S.C.A. Int.Rev.Code §§ 22(k), 23(u).

**12. Divorce 🔑56**

Where husband's agreement to pay income taxes on all sums paid to wife except on her share received from a designated parcel of property was his legal obligation, agreement constituted no consideration for stipulation by which wife withdrew her cross-complaint for divorce and signified intention not to answer amended complaint, and hence did not establish collusion.

**13. Divorce ⚷161**

Where no price was paid for wife's stipulation to withdraw cross-complaint for divorce and no agreement was made to withhold evidence from court or to influence its decision by fraudulent means, execution of stipulation did not constitute a legal ground for vacating interlocutory judgment of divorce for husband. Code Civ.Proc. § 473.

**14. Husband and wife ⚷278(1)**

When a marriage has become intolerable and its legitimate ends have been frustrated, parties may properly themselves adjust all matters with respect to their joint and community properties and amicably settle all questions relative to obligations of each for family support and maintenance.

**15. Divorce ⚷161**

Motion to vacate an interlocutory judgment of divorce is to be determined in exercise of a sound discretion from a review of all evidence submitted and not from mere caprice of a disappointed litigant.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by K. Brainard against R. Brainard for divorce wherein defendant cross-complained, which cross-complaint was subsequently dismissed on stipulation and defendant was defaulted. From an order denying defendant's motion to set aside her default and the ensuing interlocutory judgment of divorce, defendant appeals.

Affirmed.

J. Merrill Brown, of Los Angeles, for appellant.

Leon B. Brown, of Los Angeles, for respondent.

MOORE, Presiding Justice.

Mrs. Brainard appeals from an order denying the motion to vacate her default and to set aside the ensuing interlocutory decree of divorce. The complaint was filed January 12, 1946. She filed her answer and cross complaint 19 days later in which she alleged that a satisfactory property settlement had been effected on January 25. On February 27, 15 days after the amended complaint had been filed, the parties stipulated that the cross complaint should be dismissed. Appellant defaulted on the first day of March and the interlocutory decree was entered March 21. Almost four months later, July 17, she served her notice of motion to vacate the default and to set aside the decree, accompanied by an affidavit of merits. Subsequently, in August, rebutting affidavits were filed by respondent to which appellant replied September 17, 1946. The motion was denied on October 2, 1946.

[1,2] Appellant's notice of motion to vacate her default and to set aside the decree was based upon the grounds that they were "obtained by fraud of the plaintiff practiced upon the defendant, and by defendant's inadvertence, surprise, mistake and excusable neglect." Such motion was accompanied by a copy of (1) answer to amended complaint; (2) affidavit of appellant; (3) transcript of the proceedings taken at the trial, and (4) memorandum of appellant's points and authorities. Subsequently respondent's affidavits were made a part of the record. The total evidence considered by the trial court upon the motion consists of a volume in excess of 110 pages. It all represents a body of conflicting statements by witnesses called to support the contentions of the respective parties. Whatever might be the impression of the appellate court with reference to the inferences and findings which should be drawn from diverse proofs, it is the rule that the findings must be followed in the absence of a clear showing that discretion was abused. Trujillo v. Trujillo, 71 Cal.App.2d 257, 260, 162 P.2d 640; Cooper v. Deon, 58 Cal.App.2d 789, 790, 137 P.2d 733. In all matters in which an issue is tried upon affidavits it is the rule that those favoring the contentions of respondent establish not only the facts stated therein but also all facts which may be reasonably inferred therefrom. Doak v. Bruson, 152 Cal. 17, 19, 91 P. 1001; Kettelle v. Kettelle, 110 Cal. App. 310, 313, 294 P. 453.

[3] Not only is the appellant unfortunate in having the findings of the trial court against her contentions but she suffers a technical disadvantage in that while she moved the court to vacate the default and judgment on the ground of fraud as well as the grounds prescribed by section 473, Code of Civil Procedure, the record is utterly devoid of proof that would warrant a finding of fraud on the part of respondent or of inadvertence, surprise, mistake or excusable neglect on the part of appellant. Having evidently discovered that there was a void of evidence to establish any of the grounds named in her motion at the time of its submission, she argued and now contends that the default and the judgment should be vacated on the ground that she "was an innocent and unwilling party to a collusive divorce." Also, she argues that collusion was not included in the notice of her motion "for the reason that the same was not apparent or known to appellant at that time."

[4] Two points are urged as reasons for reversal, namely: (1) appellant is the innocent party and (2) the divorce was collusive. While the appellate court is required to accept the factual determination of the trial court, appellant's challenge warrants a consideration of the evidence in order to ascertain whether the order was arbitrarily derived. She avers the facts of her life with respondent and accuses him of neglect, of deserting his family, of shifting the burden of rearing their three children, of making only infrequent visits to the home after separation, of allowing her meager support, of his refusal to talk with her over the telephone, or to take her to places of entertainment, and of his association with other women.

She alleges that after conferences with her counsel, Mr. Mayo, the latter obtained statements of assets and liabilities of respondent and of his total net income from 1940 to 1944, but not of his gross income for the year 1945; that the property settlement agreement was finally prepared on January 25, 1946; that it was escrowed on the same day with instructions to the effect that if prior to April 1, 1946, "an interlocutory decree of divorce is entered in favor of either of us * * * and if said decree expressly approves said agreement, without reservation of any right of modification and if said decree expressly approves said agreement as a property settlement agreement, without reservation of any right of modification, and if any provisions made in such decree for the support or maintenance of Ruby Clara Brainard are expressly made pursuant to said agreement, then in either of such events you are to deliver said instruments of transfer to the transferees and to deliver to each of us two copies of said agreement."

Her affidavit complains that during the time of her negotiations for a property settlement she did not read all the pages of the proposed agreement and that it was not approved by the Superior Court as provided by the escrow instructions. Her averment is that the settlement is unfair in that the total earnings of respondent for 1945 were not disclosed to her; that the home and furniture transferred to her "are in a worn out and dilapidated condition and require immediate and extensive repairs; that her assent to sell what is described as the Pico property was harsh and unfair as said property was likewise the separate property of affiant prior to 1940.

[5] Such averments were contradicted or explained by the affidavits of attorneys Brown and Mayo and of respondent, and the agreement was approved by the court as stipulated in the escrow instructions. A complete report of his financial condition was furnished by respondent to Mr. Mayo, appellant's attorney, showing respondent's total earnings for each of the years from 1940 to 1945 inclusive. As to the condition of the home, appellant knew that as well as any one prior to her agreement of January 25, 1946, and no deceit on the part of respondent with reference thereto is shown. See Hendricks v. Hendricks, 216 Cal. 321, 323, 14 P.2d 83.

[6] Notwithstanding the copious details alleged by appellant to establish that she was the innocent party in her relations with respondent and that she was worsted

in the property settlement, the proofs of respondent are such as reasonably to warrant a denial of the motion. His affidavit discloses that for some years appellant's conduct toward him had been continuously and acrimoniously querulous, although respondent even after separation had visited the family at reasonable intervals and brought appropriate gifts to each of them. However, her tirades were so violent that the apparently unavoidable result was the filing of an action for divorce.

Notwithstanding respondent's cooperation in supplying appellant with the accurate statement of his total net income for the six years he requested no similar statement from her. The agreement was rewritten several times. Although appellant had urged a sale of the Pico property for $85,000 she refused to execute a deed for the price of $100,000 unless respondent would accede to certain modifications in the property settlement. The agreement provided for the transfer to her of the Altadena home, its furniture, an automobile; for the maintenance of certain insurance policies in favor of the children, for the payment to appellant of $200 and $75 for the children monthly for five years, thereafter $75 monthly to appellant; for him to pay all taxes on their income to December 31, 1945, but not the income taxes on the gain realized from the sale of appellant's one-half interest in the Pico land. In addition to the foregoing appellant received for her share of the Pico property the sum of $44,593.40 which was substantially one-half of the community property aside from the Altadena home.

From the evidence as to the conduct of the parties in their domestic life it cannot be said that the court's implied finding that appellant was at fault was an unreasonable determination. Neither do the facts show that appellant was worsted by the property settlement.

[7] But in order to upset the decree and perhaps the agreement which settled their property rights and obligations appellant contends that the divorce decree was the result of a collusive agreement and for that reason should be vacated. She amplifies such contention with charges that she was paid a price to stipulate that the case might be tried as a default action. There is no reasonable justification for such claim. Its only factual support lies in the coincidental receipt by her of the sum of $44,593.40 on the same day on which she signed the stipulation. It is true that appellant's counsel stipulated on that day that her cross complaint should be dismissed and that the case be tried as a default matter. From such coincidence appellant now seeks to invoke the inference that a collusive agreement was made to deceive the court and to effect the entry of a decree not warranted by the evidence in favor of respondent. Neither the concurrence of the stipulation and the payment of the money nor any other event found in the record would justify such an inference. The facts given in testimony before the court as well as many incidents recited in respondent's rebutting affidavits would have justified a decree in his favor, since the truth of them was established to the satisfaction of the court below.

[8] It is a common practice in divorce litigation where statutory grounds exist for the offending party to withdraw from the contest after a settlement has been effected concerning the support obligations and property rights of the parties. The law imposes no duty upon any person to defend a divorce action, and good morals do not require such defense by the offending party. It is not collusion for both spouses to desire a divorce or for either in aid of such desire to withdraw from a controversy after a long period of domestic infelicities. Briner v. Briner, 63 Cal.App.2d 429, 438, 146 P.2d 709; Erwin v. Erwin, Tex.Civ.App., 40 S.W. 53, 54. On the contrary it is the duty of a wife when conscious of having done cruel acts to her husband, as appellant confessed in October, 1945, in letters to the brother-in law of respondent, not to engage in shadow boxing merely to lengthen the record or to establish a semblance of right on her part. Therefore, appellant's withdrawal from the contest was in all respects regular and proper.

[9] But the contention that she was paid a consideration for the stipulation

is as absurd as it is unjust. The stipulation was without consideration to either party. Its sole effect was to erase appellant's cross-complaint and to indicate that she would not answer the amended complaint. If the stipulation had in fact been a binding agreement on appellant not to answer, no price was paid for it. The implications of appellant's argument are: (1) that the $44,593.40 was payable to her only in the event the property settlement should become effective on February 27, 1946; (2) that some inducement was necessary to cause respondent to pay her the sum on that day; (3) that her stipulation to withdraw her cross-complaint and not to contest the divorce is proof of depravity or corruption in the heart of respondent. Such implications vanish in the presence of the testimony of respondent's counsel. He established that in her cross-complaint filed February 1, 1946, appellant verified that a property settlement "fair and equitable" had been agreed to; that at the time of the sale of the Pico property an escrow was created with the Security First National Bank which provided that appellant should be paid as her share of the proceeds the sum of $44,593.40; that escrow instructions were executed by the vendors on the very day they made their property settlement; that such escrow was closed on February 26, 1946, and on the following day appellant's check was delivered to her attorney. It thus appears beyond a doubt that appellant would have received her check even though she had contested the action.

[10-14] The explanation of appellant's withdrawal from the contest was the discovery by her attorney (1) that the executory obligations of the settlement could be enforced by contempt proceedings, and (2) that while the sums payable to her by respondent would be her taxable income under sections 22(k) and 23(u) of the Internal Revenue Code, 26 U.S.C.A.Int.Rev.Code, §§ 22(k), 23(u), if she should obtain the divorce, yet under section 22(k) of the same code those payments would not be taxable to her if the decree should be entered in favor of respondent. See Regulations 111, Income Tax, Internal Revenue Code, § 29.-22k. Because of these discoveries appellant's counsel wisely advised her to execute the stipulation. When a divorce is granted to a husband his continuing obligation to support his wife ceases. (Lampson v. Lampson, 171 Cal. 332, 333, 153 P. 238; Hamburger v. Hamburger, 60 Cal.App.2d 530, 538, 141 P.2d 453.) Payments made by him subsequently to a decree in his favor are deemed a part of the property settlement and are therefore not taxable to the wife under the cited provision of the Internal Revenue Code. Hogarty v. Hogarty, 188 Cal. 625, 627, 206 P. 79. The stipulation was made a part of the record but before is was signed appellant received a copy of the income tax statement and instructed her attorney that "she wanted a divorce decree entered by April 1, 1946, in order to put the property settlement agreement into effect and that she didn't care which of the parties obtained the decree." It follows that since respondent's agreement to pay the income taxes on all sums paid to appellant except on her share received for the Pico property was his legal obligation it constituted no consideration for the stipulation. And since no price was paid for the stipulation and no agreement was made to withhold evidence from the court or to influence its decision by fraudulent means, the execution of the document was in no sense improper. Bishop's Marriage, Divorce and Separation, Vol. 2, sec. 697. Such an agreement is not unlawful and is not a legal ground for vacating a divorce decree. Hill v. Hill, 23 Cal.2d 82, 93, 142 P.2d 417. When a marriage has become intolerable and its legitimate ends have been frustrated it is proper for, if not the duty of, the parties themselves to adjust all matters with respect to their joint and community properties and amicably to settle all questions relative to the obligations of each for the family support and maintenance. Hill v. Hill, supra; Briner v. Briner, supra.

The only authorities cited by appellant in support of the proposition that "the court will set such a divorce aside upon its own motion are Rehfuss v. Rehfuss, 169 Cal. 86, 145 P. 1020, and Mulkey v. Mulkey, 100 Cal. 91, 34 P. 621. Both of these cases are distinguished by the facts that in one the collusive agreement was forced by fear of losing her child and in the other it was induced by fraud. (See Bancroft v. Bancroft, 178 Cal. 359, 362, 173 P. 579, L.R.A. 1918F, 1029.)

[15] It is true that the courts are obliged to protect the marriage status. Landon v. Landon, 74 Cal.App.2d 954, 958, 169 P.2d 980. But this rule does not enter into the consideration of the claim of a party that her motion to vacate a judgment was unjustifiably denied. Such motion is to be determined, in the exercise of a sound discretion, from a review of all the evidence submitted and not from the mere caprice of a disappointed litigant. Elms v. Elms, 72 Cal.App.2d 508, 513, 519, 164 P.2d 936.

The order is affirmed.

McCOMB and WILSON, JJ., concur.

## In re PIERCE'S ESTATE. *

Civ. 15960.

District Court of Appeal, Second District,

Division 2, California.

Nov. 20, 1947.

Rehearing Denied Dec. 8, 1947.

Hearing Granted Jan. 15, 1948.

**1. Adoption ⇨21**

Under California law, an adopted child becomes issue of its adopted parents and a natural child with respect to his right to inherit. Probate Code, § 257; Civ.Code, § 228.

**2. Wills ⇨497(1), 498**

The phrase "lawful issue" and the word "children", as used in will, are not to be restricted to their common-law meaning, and word "children" relates to status and includes all those upon whom has been conferred the capacity of inheritance.

See Words and Phrases, Permanent Edition, for all other definitions of "Children" and "Lawful Issue".

**3. Wills ⇨498**

The term "lawful issue", as used in testamentary trust created by holographic will, did not exclude adopted children, in view of statutory provisions conferring same right of inheritance upon adopted child as other children of a decedent. Probate Code, § 257; Civ.Code, § 228.

**4. Courts ⇨95(1)**
**Wills ⇨436**

California wills are to be interpreted according to laws of California, and decisions of appellate courts of California must be looked to for guidance in construction of a California will. Probate Code, § 100.

**5. Evidence ⇨53**

Presumptions do not arise contrary to expressed statutes.

**6. Wills ⇨487(3)**

Testimony of testator's widow as to statements allegedly made by testator that he intended to disinherit one of designated annuitants in testamentary trust upon learning of such annuitant's intention to adopt child, for purpose of showing that term "lawful issue" of annuitants as used in testamentary trust was not intended to include adopted children, which statements were allegedly made more than 2 years prior to testator's decease and 13 years before trial, were inadmissible as too remote and as violating rule forbidding admission of parol testimony to vary terms of a writing. Probate Code, § 257; Civ.Code, § 228.

**7. Wills ⇨487(3)**

Statements of testator offered to show state of his mind at time of executing will should be sufficiently near in point of time, that testimony may be of value in determining the question directly in issue.

**8. Wills ⇨439**

Where testator has comprehended nature of his act and thereupon signed an instrument, inquiry into his intent must cease in absence of fraud or other equitable grounds for relief.

**9. Wills ⇨487(3)**

Where no claim was made that testator's will was obtained by inequitable influences, testimony as to testator's declaration with reference to intent to disinherit one of designated annuitants in testamentary trust not made in presence of such annuitant was inadmissible.

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* Subsequent opinion 196 P.2d 1.

**10. Wills** ⚿440

Testator's intention is to be ascertained from words of will itself. Probate Code, §§ 101, 105.

**11. Wills** ⚿488

Where, from very words of will, the intent is clear and there is no latent ambiguity, such intent must be followed therein as indicated, and proof that testator had other desires is inadmissible. Probate Code, §§ 101, 105.

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Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Proceeding in the matter of the estate of Edwin Pierce, deceased. From judgment construing deceased's will, Helen Pierce Sontheimer and others appeal, opposed by Marjorie A. Pierce, as guardian ad litem of Iola Ann Pierce and Delores Amelia Pierce.

Affirmed.

Warner, Peracca & Magana, of Los Angeles, Wagener & Brailsford, of Oakland, and James O. Warner, of Los Angeles, for appellant Helen Pierce Sontheimer.

Henry N. Cowan, of Los Angeles, for appellants Mitta Pierce Forni, Frances Pierce Claudius, Lloyd Pierce, Marie Pierce Murphy, Thelma Pierce Atkinson, Grace P. Holland, Gilbert Holland, and Elliot Holland.

W. C. Shelton and George W. Burch, Jr., both of Los Angeles, for appellants Edna Dyer Pierce, Harry R. Oakley, and Alfred A. Oakley.

Bailey & Poe, Rufus Bailey, and Carl N. Huff, all of Los Angeles, for respondent Marjorie A. Pierce, guardian ad litem of Iola Ann Pierce and Delores Amelia Pierce.

MOORE, Presiding Justice.

The question for decision is whether a bequest to "lawful issue" in a testamentary trust excludes *adopted* children.

By his holographic will of March 1, 1933, Edwin Pierce, a childless man, created a trust whereby to dispose of his entire estate. It provided first for an annuity payable to his widow, Edna. The balance of the net income was to be divided into ten equal shares and distributed annually to the four children of his brother, William A. Pierce, and to the two children of his deceased niece, Mary Oakley. Harry A. Pierce was one of the designated annuitants. The passages in the will requiring construction are as follows:

(1) "Should any of the annuitants, children or grandchildren of my late brother, W. A. Pierce, die before the final distribution of my estate, his or her annuity shall be distributed in equal shares to his or her children (lawful issue), until final distribution.

(2) "At the death of the last of the annuitants, Edna Dyer Pierce, William J. Pierce, Grace P. Holland, Chas. A. Pierce and Harry A. Pierce, it is my will that my estate be liquidated and distributed in equal shares, to and among the surviving grandchildren of my late brother William A. Pierce, said grandchildren being the *lawful issue,* of the children of my late brother William A. Pierce."

Edwin, the trustor, died in 1935; Harry, the adoptive father, deceased ten years later. In 1940 Harry and his wife Marjorie adopted Iola Ann Pierce, born December 2, 1928, and in 1944 they adopted Delores Amelia Pierce, born December 15, 1929. Upon the decease of Harry, Marjorie as guardian ad litem of the adopted girls petitioned the court to declare them to be beneficiaries of two-fifths interest in the trust, as coheirs of their father. Upon a trial of the issue created by the "responses" to the petition of Marjorie the court held that the two girls are beneficiaries under the testamentary trust and "are entitled to receive the share of the net income of the trust estate formerly paid to Harry A. Pierce, to wit, one fifth of such net income remaining after payment of the annuity to Edna Dyer Pierce until final distribution of the trust estate."

The three propositions of appellants asserted as grounds for reversal may be embodied in the one succinct statement, to wit: The term "lawful issue" when used

**in a will refers to heirs of the body of the person designated and not to the adopted children of such person.**

[1, 2] In making such contention they attempt to establish that in the case of a will or trust it is the intent of the testator that governs. However, appellants were predestined to disappointment by virtue of statutory law. "An adopted child succeeds to the estate of one who has adopted him, the same as a natural child." Probate Code, sec. 257; Civil Code, sec. 228. The necessary effect of such statutes is to establish the legal relation of parent and child "with all the incidents and consequences of that relation, including the right of the child to inherit as a child from the adopting parent * * *," otherwise it would not have all the rights of the legal relation of parent and child. In re Darling, 173 Cal. 221, 223, 159 P. 606; In re Estate of Winchester, 140 Cal. 468, 469, 74 P. 10. The adopted child becomes the issue of its adoptive parent and a natural child with respect to his right to inherit. In re Estate of Moore, 7 Cal.App.2d 722, 725, 47 P. 2d 533, 48 P.2d 28; In re Estate of Esposito, 57 Cal.App.2d 859, 862, 135 P.2d 167. The phrase "lawful issue" and the word "children" are not to be restricted to their common-law meaning. "Children" relates to status and includes all those upon whom has been conferred the capacity of inheritance. Wolf v. Gall, 32 Cal.App. 286, 287, 295, 163 P. 346, 350.

[3] Such holdings arise out of the paramountcy of the legislative power in fixing the legal status of adopted children and their new parents and out of the absolute control by the lawmakers of the manner in which property shall descend. In re Estate of Moore, supra; In re Estate of Hill, 179 Cal. 683, 688, 178 P. 710. By virtue of the supremacy of such statutes its technical meaning must be affixed to the phrase "lawful issue" in the absence of qualifying words. Dickey v. Walrond, 200 Cal. 335, 340, 253 P. 706; In re Estate of Watts, 179 Cal. 20, 22, 175 P. 415. Since there are no such modifying words in the will of Edwin Pierce as would defeat the right of the adopted girls as the "lawful issue" of Harry A. Pierce, the court below correctly ruled that they are entitled to receive the share of the income from the trust estate that was paid to their father in his lifetime.

[4] Because the meaning of the term *lawful issue* is determined by legislative enactment, under the law of some states an adopted child does not possess the same right of inheritance as the other children of a decedent. It is because of the statutory law in such states or the lack of it that the decisions of their courts deny adopted children the same rights as are accorded to "issue," "lawful issue," or "children" in California. See New York Life Insurance and Trust Company v. Viele, 161 N.Y. 11, 55 N.E. 311, 76 Am.St.Rep. 238; In re Cuddeback's Estate, 174 Misc. 322, 20 N. Y.S.2d 862, 864; Wyeth v. Merchant, D.C. Mo., 34 F.Supp. 785; In re Wait's Estate, Sur., 42 N.Y.S.2d 735; Miller v. Wick, 311 Ill. 269, 142 N.E. 490, 30 A.L.R. 1407; Pross v. Anson, Sup., 58 N.Y.S.2d 26; Smyth v. McKissick, 222 N.C. 644, 24 S. E.2d 621. In some of these decisions it is pointed out that the statute governing the rights of adopted children differs from the statutes of those states where such children are "lawful issue," as in Rhode Island, Minnesota and California. In re Cuddeback's Estate, supra; Wyeth v. Merchant, supra; In re Olney, 27 R.I. 495, 63 A. 956; In re Holden's Trust, 207 Minn. 211, 291 N.W. 104. The New York statutes exhibit the contrast. Decedent's Estate Law, Article 3, sec. 83 [14], and Domestic Relations Law, Art. 7, sec. 115 of New York.* Those laws disclose a marked difference from section 257 of the Probate Code of California whereby an adopted child succeeds to the estate of the adoptive parent "the same as a natural child." Inasmuch

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* Article 3, section 83, reads: "The right of an adopted child to take a share of the estate and the right of succession to the estate of an adopted child shall continue as provided in the domestic relations law."

Article 7, sec. 115, reads: "The foster parents or parent and the foster child shall sustain toward each other the legal relation of parent and child and shall have all the rights and be subject to all the duties of that relation including the rights of inheritance from each other."

as California wills are to be interpreted according to the laws of this state, Probate Code, sec. 100, the decisions of our appellate courts must be looked to for guidance in the construction of the will of Edwin Pierce.

[5] Appellants' argument that a presumption arises from such language as was used by the testator herein that adopted children are not included within the phrase "lawful issue" is answered by the cited statutes and decisions of this state. Presumptions do not arise contrary to express statutes. But they contend that from those sections of the will first quoted above the trustor "intended to confine his bounty to grandchildren of his brother." The word grandchildren appears nowhere in the will. The testator's evident purpose in composing the quoted passages was to dispose of the income and the corpus of his estate upon the decease of one annuitant and upon the passing of the "last of the annuitants." Had he been solicitous of avoiding the transfer or payment of any portion of the trust to an adopted child of a nephew, words were available for such purpose. He chose words that have definite and established meanings which cannot be voided now.

[6-9] In attempting to establish their claim that the intent of the testator governs in the construction of his will appellants introduced into evidence the testimony of the widow of the testator as to the statements of her husband concerning the adoption of Iola Ann. The will was written on March 1, 1933. The conversation had occurred more than two years prior to Edwin's decease and thirteen years before the trial. Over the objection of respondent Mrs. Pierce testified that "a long time ago" when Charles Pierce and his wife were present her husband, on being advised by Charles that "Harry was going to adopt the little Iola child," said: "If God spares my life until tomorrow, and I can get down to my bank, I am going to disinherit Harry." Also she testified that he subsequently stated he had done so, but thereafter she told Harry of her husband's threat and he and his wife called and told Edwin that they would not adopt Iola. Expressing his belief of Harry's promise Edwin destroyed the will by which he had disinherited Harry and the witness had preserved it.

Such testimony was inadmissible for two reasons: (1) It was too remote. It is the rule that statements of a grantor or testator offered to show the state of his mind at the time of executing the document under consideration should be "sufficiently near in point of time that the testimony may be of value in determining the question directly in issue." Piercy v. Piercy, 18 Cal.App. 751, 762, 124 P. 561, 565. When a testator has comprehended the nature of his act and thereupon signed an instrument, inquiry into his intent must cease in the absence of fraud or other equitable grounds for relief. See Wigmore's 3rd Edition, sec. 2421. In Re Estate of Pagel, 52 Cal.App.2d 38, 125 P.2d 853, it was held that testimony as to the declarations of decedent made two days prior to the execution of his will and 33 days prior thereto were inadmissible to prove testamentary intent. Therefore, since no claim is made herein that the testator's will was obtained by the exercise of inequitable influences, his declaration with reference to his intent was inadmissible since it was in the interest of the testator as well as of the witness and was not uttered in the presence of Harry against whom it was offered. Steinberger v. Young, 175 Cal. 81, 165 P. 432; Barcroft v. Livacich, 35 Cal.App.2d 710, 719, 96 P.2d 951; Belser v. American Trust Company, 125 Cal.App. 344, 352, 13 P.2d 951.

[10, 11] (2) The second reason for rejecting the testimony of the testator's widow is that it violated the cardinal rule forbidding the admission of parol testimony to vary the terms of a writing. The testator's intention is to be ascertained from the words of the will itself. Probate Code, secs. 101, 105; In re Estate of Soulie, 72 Cal.App.2d 332, 335, 164 P.2d 565; In re Estate of Owens, 62 Cal.App.2d 772, 774, 145 P.2d 376; In re Estate of Schaetzel, 44 Cal.App.2d 320, 324, 112 P.2d 324; Gore v. Bingaman, 29 Cal.App.2d 460, 473, 85 P.2d 172; In re Estate of Bourn, 25 Cal.App.2d 590, 602, 78 P.2d 193. The con-

sensus of all the authorities bearing upon the subject is that where from the very words of a will the intent is clear and there is no latent ambiguity, such intent must be followed as therein indicated, and proof that the testator had other desires is inadmissible. In re Estate of Willson, 171 Cal. 449, 456, 153 P. 927, and Gore v. Bingaman, supra. There being no ambiguity in the will of Edwin Pierce, proof other than the document itself was incompetent for any purpose.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

## ABRAMS v. AMERICAN FIDELITY & CASUALTY CO. *

### Civ. 15752.

District Court of Appeal, Second District, Division 3, California.

Dec. 2, 1947.

Rehearing Denied Dec. 29, 1947.

Hearing Granted Jan. 29, 1948.

**1. Insurance 🔑538**

Notice mailed by insured to insurance broker on day of truck accident was not effective as notice to insurer since broker was agent of insured and not of insurer. Insurance Code, § 33.

**2. Insurance 🔑138(1)**

Under statute providing that except in case of life, marine or fire insurance, notice to insurer of an accident, injury or death, may be given at any time within 20 days after the event, requirement in automobile liability policy that notice of accident be given insurer within five days was invalid. Insurance Code, § 551.

**3. Insurance 🔑539(3)**

Under statute providing that notice of accident may be given to insurer at any time within 20 days after the event and that no policy requirement for notice within a lesser period shall be valid, where automobile liability policy required assured to give "immediate" written notice of accident to insurer, the further policy provision defining "immediate" to mean not exceeding five days was to be disregarded because requirement of notice within such period was void, but the policy provision that immediate written notice be given remained in effect. Insurance Code, § 551.

**4. Insurance 🔑539(1)**

Under statute providing that notice of accident may be given to insurer at any time within 20 days after the event and that no policy requirement for notice within a lesser period shall be valid, a notice within 20 days is permissible though policy provides that notice should be given in a lesser period, but the statute does not require that 20 days be substituted for any lesser period specified in policy. Insurance Code, § 551.

**5. Insurance 🔑152(3)**

The statutory provision that notice of accident may be given to insurer at any time within 20 days after the event may properly be read into automobile liability policy requiring assured to give "immediate written notice" of accident to insurer and defining immediate to mean not exceeding five days, but it is not proper to read policy as if it stated that the word "immediate" should be construed to mean not exceeding 20 days. Insurance Code, § 551.

See Words and Phrases, Permanent Edition, for all other definitions of "Immediate Notice".

**6. Insurance 🔑539(1)**

Under statute providing that notice of accident may be given to assured at any time within 20 days after event and that no policy requirement for notice within a lesser period shall be valid, it is permissible to give notice within 20 days, and if so given its timeliness is not to be controverted, but if notice is given after 20 days, sufficiency of notice as to timeliness is controvertible. Insurance Code, § 551.

**7. Appeal and error 🔑996, 1008(1)**

Whether an insurer is prejudiced by breach of provision in liability policy requiring notice of accident to be given to insurer is a question of fact for the trier of the facts, except when only one inference may reasonably be drawn as to prejudice from the facts. Code Civ.Proc. § 1962.

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* Subsequent opinion 195 P.2d 797.

**8. Insurance** ⚷646(9)

An insurer is entitled to rely upon a substantial breach of policy provision requiring insured to give notice of accident unless it has waived compliance with provision, and a substantial breach of such provision is presumed to be prejudicial, but such presumption is not conclusive and may be controverted. Code Civ.Proc. § 1962.

**9. Insurance** ⚷665(7)

In action against insurer to recover amount of judgment against assured, evidence that because of snow and ice there were no road marks indicating the circumstances under which accident happened, that report of sheriff who investigated accident on day thereof was available to insurer, and that information as to physical damage was available to insurer after notice was given sustained finding that insurer was not prejudiced by any delay in giving notice of accident.

**10. Insurance** ⚷646(9)

In action against insurer to recover amount of judgment against assured, evidence that insurer's opportunity to investigate accident after notice was given was practically the same as its opportunity to investigate would have been if notice had been given at any time previously was sufficient to overcome disputable presumption that insurer was prejudiced by lapse of 41 days after event before notice was given to insurer.

**11. Insurance** ⚷665(7)

In action against insurer to recover amount of judgment against insured, evidence established that insurer was not, by reason of delayed notice of accident, deprived of an opportunity to defend action in which judgment was obtained against assured.

**12. Appeal and error** ⚷846(5)

Contention as to estoppel or waiver in connection with conduct of insurer in allegedly assuming defense of assured would not be determined by the District Court of Appeal, in absence of finding by trial court as to estoppel or waiver.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action by Paul Abrams against the American Fidelity & Casualty Company to recover amount of a judgment theretofore recovered by plaintiff against one A. Visser. Judgment for plaintiff and defendant appeals.

Affirmed.

Reginald I. Bauder and Robert E. Ford, both of Los Angeles, for appellant.

Charles A. Son and Joseph D. Taylor, both of Los Angeles, for respondent.

WOOD, Justice.

On December 25, 1940, an automobile which was driven by plaintiff and a motor truck driven by A. Visser collided on a highway near Beaver, Utah, and plaintiff suffered personal injuries. In an action against Visser to recover damages for such injuries plaintiff was awarded $3,910 in a default judgment entered on April 30, 1941. Prior to said collision the defendant herein had issued its policy of insurance agreeing to indemnify Visser against liability to third persons arising out of the operation of his truck, and at the time of said collision said policy was in effect. The judgment became final and remained unpaid, and on December 4, 1941, the plaintiff commenced the present action against the defendant to recover the amount of said judgment. The defendant asserted as a defense that Visser, the insured, failed to comply with a provision of the policy concerning the insured's duty to give notice of the accident to the insurance company, and with a provision concerning the insured's duty to cooperate with the insurance company. In a trial herein without a jury plaintiff obtained judgment, and defendant appeals therefrom. The appeal relates only to the alleged failure to give notice of the accident within proper time, and does not relate to the alleged failure to cooperate.

[1] A. Visser purchased the truck from Fred Kerr, who was an insurance broker, and also purchased from him the said insurance policy. On the day of the accident Visser sent a postal card to Kerr on which was written: "I had an accident this morning 14 miles north of Beaver, Utah on Hiway 91. Please inquire at the Sheriff's

office in Beaver Utah for all particulars My policy number is No. 36803. I remain as ever A. Visser." Although the insured mailed notice to the insurance broker on the day of the accident, that was not effective as a notice to the insurance company. As an insurance broker, Kerr was the agent of the insured and not of the insurer. Insurance Code, sec. 33; Arthur v. London Guar. & Acc. Co., 78 Cal.App.2d 198, 202, 177 P.2d 625.

Kerr did not proceed to notify the insurance company or Markel Service, Inc., the Los Angeles agent for the insurance company, concerning the accident until January 31, 1941, when Visser returned to Los Angeles and went to Kerr's office. At that time Kerr wrote a letter to the Markel Service, Inc., stating the details of the accident, which letter was received by said agent on February 4, 1941, 41 days after the accident, and that was the first notice of the accident the insurance company had.

[2] The policy provided in part as follows: "Upon the occurrence of an accident, or an alleged accident, covered under this Policy, the Assured shall give immediate written notice thereof with the most complete detailed information obtainable at the time to the Company, at its Home Office in Richmond, Virginia, or to its nearest Branch Office or to its duly authorized agent; if a claim is made on account of such an accident or if any suit is brought against the Assured to enforce such a claim the Assured shall forward to the company immediately every written communication, or information as to any verbal communication, and every process, pleading and paper relating to any claim and/or proceeding. The words 'Immediate' or 'Immediately' as used herein shall be construed to mean not exceeding five days."

Although the policy states that notice of an accident shall be given within five days, section 551 of the Insurance Code provides that such a requirement is not valid. That section is as follows: "Except in the case of life, marine, or fire insurance, notice of an accident, injury, or death may be given at any time within twenty days after the event, to the insurer under a policy against loss therefrom. In such a policy, no requirement of notice within a lesser period shall be valid."

[3] Respondent (insured) asserts that since the 5-day provision in the policy is void there is no provision in the policy requiring notice. Even though the definition in the policy of the word "immediate" (that it means not to exceed five days) is to be disregarded because the requirement of notice within such period is void, the provision in the policy that "immediate written notice" shall be given, remains in effect, and there is therefore a provision in the policy requiring notice.

[4-6] Appellant (insurer) asserts that it is implicit in said code section that it was intended that the 20-day provision in the code section should be substituted for the 5-day provision in the policy, and that the policy should be read as if a provision for notice within 20 days were expressly embodied in it. That section does not state that the notice must be within 20 days, and does not state that a notice given after 20 days shall be invalid. It states that notice may be given at any time within 20 days after the event. In other words, a notice within 20 days is permissible even though the policy provides that notice should be given in a lesser period of time. If a policy provides that notice shall be given within a lesser period than 20 days, such a provision is void, and in the event the insured gives notice within 20 days after the accident occurs, the timeliness of the notice is not to be controverted. The statutes do not provide that if a notice provision in a policy is invalid the period of 20 days mentioned in said section 551 shall supersede the invalid provision and be the agreement of the parties. The policy does not provide that if the notice provision in it is invalid by statute the period mentioned in the statute shall supersede the invalid provision and be the agreement of the parties. In some states it is provided by statute that if a limitation in the policy as the time within which notice must be given is invalid because it is at variance with the statute the statutory provision as to when notice must be given shall supersede the invalid pro-

vision in the policy. In some policies it is provided by agreement of the parties that such a statutory provision shall supersede such an invalid policy provision, but, as just stated, the policy herein does not contain an agreement to that effect. Here the insurer, which prepared and issued the policy or agreement between the parties, did not elect to state therein that the 20-day period mentioned in the statute as the time within which notice might be given should be the period within which notice must be given; nor did it elect to insert therein a provision that if its 5-day provision should be invalid under a statute then a period designated by statute as a period within which notice would be permissible should be adopted as the agreement of the parties as the period within which notice must be given. In other words, the 5-day provision in the policy being void, there is no express agreement of the parties within the words of the policy, or under the provisions of the policy by reference to the statutes, or by reference in the statutes to such a policy, as to any stated period of time within which notice must be given. It is proper to read into the policy the provision of the statute that notice of an accident may be given at any time within 20 days after the accident, but it is not proper to read the policy as if it stated that the word "immediate," as used therein in the expression "shall give immediate written notice," shall be construed to mean not exceeding twenty days. In other words, the word "twenty" used in the statute is not to be lifted alone from the context of the statute and be substituted alone in the policy in place of the word "five." If such a substitution were made it would appear thereby that the parties had agreed that the word "immediate" as used therein "shall be construed to mean not exceeding" twenty days, whereas the statute states that "notice * * * may be given at any time within twenty days," and does not state that a notice given after 20 days shall be invalid. As above indicated, it is permissible under the statute to give notice within 20 days, and if so given its timeliness is not to be controverted. If the notice is given after 20 days, the sufficiency of the notice as to timeliness is controvertible as hereinafter indicated in discussing prejudice to the insurer.

[7,8] Appellant contends that a delay of 41 days on the part of the insured in giving notice of the accident was prejudicial to the insurer as a matter of law, and therefore that the insurance company is not liable under the policy. It does not argue that any delay beyond the 20-day period, however short, would constitute a defense. By its argument, based on a delay of 41 days, it seems that appellant concedes that a breach of a notice provision of a policy must be substantial in order to constitute a defense,—otherwise it might argue that a delay even of 21 days would be conclusively presumed to be prejudicial to the insurer.

The trial court found that the defendant (insurer) was not prejudiced by any delay on the part of the assured in giving notice of the accident; that the witnesses to the accident were only the parties involved and the defendant secured written statements as to the facts of the accident from them within twenty days of receipt of the notice; that on account of conditions at the time and place of the accident there were no road marks indicating the circumstances under which said accident happened; that the defendant was informed of all the material facts of the claim by plaintiff within such time after the accident that defendant was not prejudiced in the defense of the action by reason of the failure of Visser (the insured) to give an earlier notice.

Appellant argues that a clause in such a policy imposing a duty to give notice of the accident, and a clause imposing a duty to cooperate with the insurer, stand on different footings with respect to the showing required of the insurer when it relies upon a breach of such clauses as a defense. As to the cooperation clause, it asserts that the insurer must show as a matter of fact that there has been such lack of cooperation on the part of the insured that the insurer has been prejudiced, but as to the clause regarding notice it argues that when an insurer defends on the ground that the contract was breached by the insured in failing to give notice of the accident "similar considerations are not involved." That argument as to notice is in effect that the insurer is not required to show as a matter of fact that it has been prejudiced by reason of such failure to give notice, and further the argument is in effect that a showing by any party that as a matter of fact no prejudice resulted to the insurer is of no consequence. In other words, that argument is in effect that it is immaterial whether as a matter of fact the insurer is prejudiced.

Respondent (plaintiff) asserts that if there is a substantial breach of the notice clause it is presumed that such breach is prejudicial to the insurer, but that such presumption is disputable and may be controverted. The appellant, in support of its argument that a cooperative clause and a notice clause stand on different footings regarding proof of prejudice to the insurer, quotes from Distributors Packing Co. v. Pacific I. Co., 21 Cal.App.2d 505, at page 509, 70 P.2d 253, at page 255 (wherein there was a delay of more than 11 months), as follows: "The cases relied on by plaintiffs are all factually distinguishable from the present case. For example, in Hynding v. Home Acc. Ins. Co., 214 Cal. 743, 7 P.(2d) 999, 85 A.L.R. 13, it was failure to comply with the co-operative clause in the policy that was under consideration by our Supreme Court and not a breach of the clause requiring notice of an accident to be given to the insured." In the Distributors case, upon which appellant herein relies to support its contention that failure to give immediate notice is conclusively presumed to be prejudicial, the court also said (page 508 of 21 Cal.App.2d, page 254 of 70 P.2d): "The law is settled that, if * * * more than eleven months elapses after the accident and before the giving of such notice, such delay is * * * prejudicial to the insurer as a matter of law, and the failure to comply with this term of the insurance policy constitutes a complete defense to any action based thereon against the insurer. Purefoy v. Pac. Auto Indem. Exch., 5 Cal. 2d 81, 88, 53 P.2d 155." In the Purefoy case, cited in support of that statement, prejudice to the insurer as a matter of fact was shown, and the Supreme Court said (page 87 of 5 Cal.2d, page 158 of 53 P.2d): "We are not disposed at this time to enter upon a further consideration of the conflicting decisions *as to whether prejudice must be shown*, for we are of the view in the instant case, as we were in the Hynding case, *supra*, that *prejudice sufficiently appeared*, and the court below so found." (Italics added.) It therefore appears that the implied statement in the Distributors case, *supra*, that cases based upon failure to comply with the cooperative clause and cases based upon failure to comply with the notice clause are distinguishable (in that prejudice must be shown as a fact when there is a breach of a cooperative clause but prejudice is conclusively presumed when there is a substantial breach of a notice clause) is based upon the Purefoy case, *supra*, wherein the Supreme Court did not say whether, in a case involving a notice clause, prejudice "must be shown" as a fact or whether prejudice is conclusively presumed. It seems therefore that the said statement in the Distributors case, relative to such a distinction in the matter of proof between a case involving a cooperative clause and in a case involving a notice clause, being based as it is on the Purefoy case, is not authority for appellant's assertion that prejudice to the insurer is conclusively presumed.

In support of its contention that the delay of 41 days was conclusively presumed to be prejudicial, appellant cites the case of Burbank v. National Casualty Co., 15 Cal. App.2d 483, 59 P.2d 589, wherein it was stipulated that the notice of the accident had not been given to the insurer until 91 days after the accident. The policy therein provided that "immediate written notice" should be given and that failure to give notice within the specified time should not invalidate a claim if it was not reasonably possible to give the notice within the prescribed time. No excuse for the delay was offered, and the question on appeal was whether a delay of "some ninety-one days" was "such a breach of the contract as would absolve it from liability." There was no evidence that the insurer was not prejudiced by the delay. The court therein held that the delay of 91 days was not immediate notice, and said that it only remained to determine whether the insurer was prejudiced by the delay. The court then quoted from Purefoy v. Pacific Automobile Indem. Exch., 5 Cal.2d 81, at page 88, 53 P.2d 155, at page 159, (wherein there was a delay of 3½ months), as follows: "The insurer was deprived of an opportunity to make a prompt investigation while the facts were fresh in the minds of the parties and witnesses, and before physical marks and effects of the accident had been obliterated. As to certain breaches of condition it may more readily be shown whether prejudice had resulted therefrom. But respondent argues with convincing force herein that the lapse of time which removes the opportunity for prompt investigation, also destroys the possibility of showing prejudice arising from delayed inquiry. Where witnesses are interviewed after lapse of time, during which they either may have forgotten the facts, or been approached solely by representatives of the injured party, it virtually becomes impossible to learn what facts, favorable to defendant, could have been ascertained through prompt inquiry. We are impelled to the conclusion that prejudice must be presumed in such situations." As above indicated, it was not held therein that prejudice must be conclusively presumed. The judgment of the trial court therein, which was for plaintiff, was reversed, apparently because the presumption of prejudice had not been overcome.

Appellant also cites the case of Burbank v. National Casualty Co., 43 Cal.App.2d 773, 111 P.2d 740, which is another appeal, after retrial, in the case just mentioned. On the retrial therein, the stipulation regarding the delay of 91 days upon which the prior decision was based, was withdrawn, and the insured attempted to show that he had orally notified an agent of the insurer within proper time, that the agent had investigated the accident, and also that he had a reasonable excuse for the delay in giving the written notice. The trial court therein found that the insured did not know until 41 days after the accident that he had been in an accident. (It appears from respondent's brief therein that the insured while driving his automobile and passing the automobile in which plaintiffs were riding cut in upon plaintiffs' automobile without any noticeable impact and caused plaintiffs' automobile to be driven off the road in such a manner that plaintiffs were injured.) Also in that case, after the 41 days had elapsed (during which period the insured was not aware of the accident) he delayed notifying the insurer for 49 days additional (the court therein stated "some forty days"), that is, the insurer was not actually notified until 90 days after the accident. The only evidence therein to the effect that the insurer was not prejudiced was evidence that an alleged agent of the insurer investigated the accident about five days after the insured knew he had been in the accident. The court therein held that the insured was excused from giving notice until he discovered he had been in the accident, that the person whom he had notified and who made the investigation was not an agent of the insurer, that notice was not given immediately after the insured learned of the accident, and that prejudice to the insurer was presumed. Since it was held therein that the alleged agent of the insurer, who investigated the accident, was not its agent, there was no evidence that the insurer was not prejudiced by the delay, but there was evidence, namely, the presumption of prejudice, that the insurer was prejudiced. In the present case the insured delayed "some forty days" also, that is, 41 days, but the delay of 41 days here was not after a prior delay of 41 days. Since it would seem that greater diligence should be exercised after a delay of 41 days than when there has been no prior delay, it appears that the second Burbank case, supra, is not a holding that a delay of "some forty days" is in itself an unreasonable delay in giving the notice, but rather is a holding that a delay of "some forty days" following a prior delay of 41 days, although the prior delay was excusable, is presumed to be prejudicial.

It also cites Arthur v. London Guar. & Acc. Co., 78 Cal.App.2d 198, 177 P.2d 625, wherein the policy provided that written notice should be given "as soon as practicable" and wherein written notice was given 11 months after the accident. In that case it was said (page 201 of 78 Cal. App.2d, page 626 of 177 P.2d) that it was established by the insurer that as a result of the long delay in receiving notice the insurer was unable to make an effective investigation and was prevented from discovering the two men who were riding with the driver at the time of the collision. The court held therein that the delay of 11 months was not a compliance with the policy.

It appears from said cases so relied upon by appellant that it has been decided that the giving of notice of an accident to the insurer 11 months or 3½ months, or 91 days, or "some forty days," after the happening of an accident, when the policy provides that immediate or prompt notice should be given, is presumed as a matter of law to be prejudicial to the insurer. It was not decided therein that prejudice was conclusively presumed. It is conceded by appellant, as hereinbefore stated, that if an insurer relies on a breach of a cooperation clause it must show that it has been prejudiced by such breach. It was so held in the case of Hynding v. Home Acc. Ins. Co., 214 Cal. 743, at page 752, 7 P.2d 999, at page 1002, 85 A.L.R. 13, where a breach of a cooperation clause was involved, the court stating: "* * * that the violation of the condition [referring to the cooperation clause] by the assured cannot be a valid defense against the injured party unless in the particular case it appears that the insurance company was substantially prejudiced thereby." In the Purefoy case, supra, in stating, as above quoted, the reason for requiring prompt notice and the reason it must be presumed that prejudice results from a breach of a notice clause, the court said (page 88 of 5 Cal.2d, page 159 of 53 P.2d), "As to certain breaches of condition, it may more readily be shown whether prejudice had resulted therefrom." It was thereby indicated that difficulty of proof was the reason for the presumption of prejudice to the insurer. Although it may be more difficult to prove that an insurer was prejudiced by a delay in notifying it than it is to prove that it was prejudiced by a lack of cooperation, that difficulty in proof is not a sufficient reason for a determination that as a result of a breach of a notice it should be conclusively presumed that the insurer was prejudiced. It might well be that in certain instances a substantial breach of a notice clause would not as a matter of undisputed, established, and known fact be prejudicial to the insurer. In the cases relied upon by appellant, concerning the presumption of prejudice, it was not shown by the insurer or at all as a fact that the insurer was not prejudiced, and was not shown by any evidence, other than the presumption of prejudice in favor of the insurer, that the insurer was prejudiced. It might be difficult in most instances for the insured to overcome the presumption of prejudice to the insurer by proving as a fact that the insurer was not prejudiced, and it might also be difficult for the insurer to present evidence that it was prejudiced, but such difficulties should not be the basis for declaring as a rule of law that under such circumstances it is conclusively presumed that the insurer is prejudiced, and thereby deprived the insured of an opportunity to prove as a matter of actuality that the insurer was not prejudiced, as opposed to insured's being bound by a legal fiction that the insurer was prejudiced. The matter as to whether an insurer is prejudiced by a breach of a provision in a liability insurance policy requiring notice of an accident to be given to the insurer is a question of fact for the trier of the facts, except in those instances when only one inference may reasonably be drawn as to prejudice from the facts. The only conclusive presumptions are those so designated in the statutes (Code Civ.Proc. sec. 1962), and the statutes do not so designate such a presumption of prejudice as that involved here. An insurer is entitled to rely upon a substantial breach of a provision in a policy requiring the insured to give notice of an accident unless it has waived compliance with the provision. A substantial breach of such a provision is presumed to be prejudicial, but such presumption is not conclusive and is disputable and may be controverted.

[9, 10] The findings of the trial court that the insurer was not prejudiced by any delay in giving notice of the accident, and that on account of conditions at the time and place of the accident there were no road marks indicating the circumstances under which the accident happened, are supported by the evidence. After the accident the insured, Mr. Visser, took Mr. Abrams to the hospital in Beaver, a dis-

tance of approximately 14 miles, and returned to the scene of the accident soon thereafter accompanied by the sheriff of Beaver County. The sheriff's report of the accident, a copy of which was received by the insured on February 17, 1941, and was received in evidence herein, shows that it was snowing at the time of the accident and that the highway was icy. A copy of a letter to the insurer from an attorney at Beaver, who was acting for the insurer in investigating the accident (which letter was dated February 14, 1941, and in which the sheriff's report was enclosed), stated that the sheriff said to him that "the road was so icy that he could locate no marks on the road whatsoever which might have been caused by the application of brakes or the skidding of the automobiles." Also the insured, Mr. Visser, testified that the road was covered with snow and ice at the time of the accident, that it was snowing when he returned with the sheriff, that he showed the sheriff what happened, and that there were no marks in the snow from the accident. It therefore appears reasonably certain that if a notice of the accident had been given to the insurer even on the day of the accident it would not have afforded the insurer an opportunity to observe any physical marks on the highway resulting from the accident.

The sheriff's report shows that the accident occurred about 5 a. m. on December 25, 1940, on a straight, level, oil-surfaced, 18-foot-wide (24-foot with shoulders), open country, U. S. highway; that Mr. Abrams' automobile was traveling south, straight ahead, at the rate of 30 miles an hour at the time of the accident, and went about 87 feet after the impact; that Mr. Visser's truck was traveling north, straight ahead, at the rate of 35 miles an hour, and went about 267 feet after the impact; that the cause of collision was that on the icy road both cars held too close to center of the road; that the damaged automobile was taken to Terry's garage in Beaver by Andrew Terry; and that the report to the sheriff was made by Mr. Abrams and Mr. Visser. The letter from the attorney (insurer's representative) also stated that the sheriff told him: that the information in the report was given to the sheriff by both drivers; and "that both drivers admitted to him [sheriff] that because of the icy condition of the road and the snowy weather, both drivers were hugging the center of the road." That letter also stated that after the vehicles stopped, following the impact, both were in upright positions on the highway; and that the only persons present at the time of the accident were Abrams, Visser, and Heber Thacker, who was in the Visser truck and who resided at Provo, Utah, R. F. D. No. 1, Box 204.

On February 20, 1941, Heber Thacker made a written statement concerning the accident which statement was received by the insurer on February 26, 1941. In that statement he said: "I had been driving until we reached Beaver changed drivers and I went to sleep was asleep at time of accident. The sound awoke me and I administered first aid to the driver of the Pontiac sedan who was alone."

On February 26, 1941, in the office of the insurer's agent in Los Angeles, Mr. Visser made a written statement concerning the accident. In that statement he said in part that at the time of the accident he was driving his cattle truck; that his helper Heber Tucker (Thacker) of Provo was with him; that the highway was about 16 feet wide; that it had been snowing and raining, and ice was on the highway; that he was traveling north, and the other car which was traveling south and near the center of the road passed the cab of his truck and struck the left front of the body of the truck; that the left side of the other car was damaged badly, and the driver had cuts on his face from flying glass; that after the accident the other car was in the center of the road facing southeast; that he (Visser) and his helper pushed the car off the road and then took the other driver to a doctor in Beaver. On March 10, 1941, in the office of the same agent, he made another written statement. In that statement, after reciting that he had made a statement on February 26th concerning the facts of the accident, he said that on the afternoon of the day of the accident he had mailed a post card to Mr. Kerr, the insurance broker, telling him that he had had an accident near Beaver, and telling him to get in touch with the sheriff there for the details of the accident; that when he returned to Los Angeles about January 4, 1941, Mr. Kerr said he had received the card and had sent a telegram to the sheriff, but the telegram had not been answered; that he told Kerr all about the accident and showed him the truck which had a big hole in it, and Kerr had the truck repaired; that Kerr did not tell him whether he had reported the accident to the insurer, and he (Visser) did not ask him about that because he felt that was Kerr's business; that about February 25th Kerr told him to go to the office of the Markel Service (the insurer's agent), and he went there and gave the statement of February 26th.

It thus appears that on the day of the accident a public officer, the sheriff, observed the scene of the accident and made a written report of it, based upon his observations at the scene and upon information furnished to him by the only persons who saw the accident, namely, the two drivers; that that report was available, and was examined by the insurer after it was notified of the accident; that the insurer's representative (an attorney) interviewed the sheriff, soon after the insurer was notified of the accident, concerning the sheriff's report and observation, and that the representative reported his findings to the insurer; that after the insurer had been notified, Visser, at the request of the insurer, made two written reports concerning the accident; that the only person (other than the two drivers) who was present when the accident occurred was Visser's helper, who was asleep at the time and did not see the accident, but he, at the request of the insurer after it had been notified, made and gave to the insurer a written statement concerning the accident; that no statement was obtained from Mr. Abrams, the plaintiff herein, except the statement he made to the sheriff, but he was available for a further statement after the notice was given; that, as above stated, by reason of the snow and ice on the road at the time of the accident there were no road marks indicating the circumstances under which the accident happened; that information as to the physical damage done to each vehicle was available to the insurer after the notice was given—the Abrams automobile having been taken in its damaged condition to a garage in Beaver, and the Visser truck having been exhibited in its damaged condition to Kerr, the insurance broker in Gardena, and repaired under an arrangement made by him. It appears therefore that, under the circumstances here, defendant's opportunity to investigate the accident after notice was given to it on February 4th was practically the same as its opportunity to investigate would have been if the notice had been given at any time previously. Although it was presumed that the insurer was prejudiced by the delay in giving notice, the evidence was sufficient to overcome that disputable presumption.

[11, 12] A question arises as to whether defendant, by reason of the delayed notice, was deprived of an opportunity to defend the action in which Mr. Abrams obtained judgment against Mr. Visser. That action was filed on March 14, 1941, summons was served on March 19, 1941, default of Visser was entered April 8, 1941, and default judgment was entered April 30, 1941. On March 17, 1941, the attorney for Mr. Abrams in that action told a representative of the insurer that he had filed the action, and the representative said that the insurer would deny liability under the policy by reason of insufficiency of notice. On April 3, 1941, the attorney for Mr. Abrams told the insurer by telephone that the defendant in that action was in default and that if the insurer wanted to defend the action he would give it time to plead and would not enter the default. In reply thereto the insurer said it would resist liability. It therefore appears that after the action had been filed and before default was entered, and after the insurer had received all the statements and reports above mentioned, it had an opportunity to defend the action.

It appears also that on March 10, 1941, a representative of the insurer discussed in detail with Mr. Visser the matter of notice of the accident and said to him that the company might disclaim liability, and the representative also said that the matter of disclaiming liability under the policy would be submitted to the company's attorney, but in the opinion of the representative the company would not proceed further until the insured had executed a reservation of rights agreement. The insured then said he would not sign such an agreement. Thereafter the representative told the insured and Kerr that the company would have to have the reservation of rights agreement before it could proceed with the defense. On March 11th (more than a month after notice was given), in a memorandum from that representative to the manager of the insurance company in San Francisco, he said, "We haven't as yet served a reservation of rights notice upon our assured, because we don't know whether you will want us to go ahead and defend this claim in suit or turn it back to the assured." On April 8th and 25th, 1941, the insurer wrote letters to the insured stating that it had been informed that the insured was in default in the action filed against him, and that unless it received from him an agreement in writing which would provide that by taking further action it did not waive its rights under the policy, it would not take any further action. When the summons and complaint in that action were first taken to the insurer's office by the insured (the date is not shown) they were not accepted because the reservation of rights agreement, which had theretofore been submitted to him, had not been signed. In the latter part of June, 1941, the insured returned to the office with the summons and complaint and the reservation of rights agreement which he had signed. The insurer then sent those documents to its attorney. The attorney testified that the answer to the complaint had been prepared in March from information furnished to him by the insurance company; that the insured came into the attorney's office later and signed the answer; and that the attorney had an understanding that the answer would not be filed until the reservation of rights agreement was signed. The answer was verified on May 20, 1941. On July 18, 1941, the attorney for the insurer wrote a letter to the insured stating that, "Since your execution of the reservation of rights agreement and your verification of the answer which I prepared on your behalf we have learned that a default has been entered against you some months ago by the attorney representing the plaintiff, and that it therefore appears that it is too late to enter an appearance for you. Since your failure to report the accident and to deliver the summons and complaint has made it impossible for the carrier to assume its obligation under the policy to defend you, they have instructed me to advise you that it will be necessary for you to employ your own counsel, should you desire, to make an effort to set the default aside."

Respondent asserts that the insurer is estopped to set up the matter of delay as a defense. He argues that there was a failure of consideration for the reservation of rights agreement, in that, the consideration for the agreement was the promise of the insurer to defend the action of Abrams v. Visser, and the insurer failed to defend. That there was such a consideration for the agreement is shown, he asserts, by said letter of July 18, 1941, written by the insurer's attorney to Visser, a part of which is as follows: "You will recall that thereafter [referring to conversations and correspondence regarding failure to give notice] the carrier agreed to proceed with the defense of the case upon your execution of a reservation of rights agreement and to assume the burden of defending the case in your behalf, even though the above matters constituted a violation of your policy provisions." Respondent argues that had it not been for the reservation of rights agreement the conduct of the insurer, in assuming control of the litigation by preparing the answer and having Visser verify it, would have been a waiver of the alleged breach of the policy regarding notice, and that Visser was not bound by the reservation of rights agreement after the consideration for it failed and the company had repudiated the agreement. As to the company's alleged reason for refusing to proceed with the defense, namely, that "We have learned that a default has been entered," it appears that the company was not in a position to urge such a reason as a ground for repudiating its agreement, since the company was informed on April 3, 1941 (about three months before the agreement was made), that the action was in default, and that a default would not be entered if the company desired time to plead. Since the company rejected the offer of time to plead, its counsel should have anticipated at the time the agreement was made (in the latter part of June—about three months after said offer was rejected) that, under such circumstances, a default had been entered and that the defense would include the matter of seeking to set aside a default. The company had held the reservation of rights agreement approximately three weeks after receiving it from Visser and before repudiating it. From May 20th, when the answer was verified, to July 18th, when the letter of repudiation was written, 58 days had elapsed. The trial court here made no finding as to estoppel or waiver in connection with the conduct of the company in allegedly assuming the defense of Visser, and therefore the contention as to estoppel or waiver is not to be determined by this court.

The judgment is affirmed.

SHINN, Acting P. J., and VALLEE, J. pro tem., concur.

## LINEMAN v. SCHMID et al.*

Civ. 15833.

District Court of Appeal, Second District, Division 1, California.

Nov. 21, 1947.

Rehearing Denied Dec. 12, 1947.

Hearing Granted Jan. 19, 1948.

**1. Appeal and error 🔑1207(3)**

Where Supreme Court remanded action for breach of contract to superior court without mention of interest and directed superior court to compute amount of plaintiff's damages, superior court properly awarded interest. Civ.Code, § 3287.

**2. Appeal and error 🔑1214**

In action for breach of contract for purchase of flour from plaintiff where the evidence on market price of flour on date plaintiff elected to terminate contract and hold defendants liable for breach was conflicting, and Supreme Court on appeal remanded case for trial court to make a finding and remarked that trial court could take further testimony but did not direct the taking of further testimony, trial court was not required to take additional testimony and its finding on the existing conflicting evidence would not be reversed on appeal.

**3. Sales 🔑383**

In seller's action for breach of contract for purchase of flour when defendants failed to instruct shipment within required time, where the damages were the difference between contract and market price at time flour should have been accepted, evidence sustained finding as to market price of various qualities of flour contracted for.

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Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by H. M. Lineman, as executor of the last will and estate of Robert L. Rice, also known as R. L. Rice, deceased, against Augusta Schmid, as administratrix of the estate of John Schmid, deceased, Anthony Marik, and others, doing business under the fictitious firm name of Eagle Bakery, for breach of contract for purchase of flour. From an adverse judgment, defendants appeal.

Judgment affirmed.

W. W. Wallace, of Los Angeles, for appellants.

H. M. Lineman, Mab Copland Lineman, and Benjamin Lewis, all of Los Angeles, for respondent.

DORAN, Justice.

This action has been before the Supreme Court of California on two different occasions, namely in Rice v. Schmid, 18 Cal. 2d 382, 115 P.2d 498, 138 A.L.R. 589, and in Rice v. Schmid, 25 Cal.2d 259, 153 P.2d 313. From a judgment entered in the Superior Court in accordance with the directions of the Supreme Court, the defendants now appeal.

Briefly, the facts leading up to the present litigation are that on July 16, 1937,

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* Subsequent opinion 195 P.2d 408.

Robert L. Rice, now deceased, a wholesale flour merchant, entered into a written contract with John Schmid, also now dead, who was the proprietor of the Eagle Bakery, to sell Schmid 6,000 barrels of flour, namely, 2,000 "Ravalli" brand wheat flour at $7.10 per barrel, 2,750 "Gold Cross" brand wheat flour at $7.65 per barrel, and 1,250 "Isis" brand wheat flour at $7.15 per barrel. Shipment was to be made upon the buyer's instructions within 90 days.

On December 2, 1938, according to the opinion in 25 Cal.2d 259, 260, 153 P.2d 313, "defendants having failed and refused to order the balance of the flour, plaintiff elected to terminate the contract, pursuant to its terms, and to hold defendants liable for the breach. * * * On the first trial, the court found that defendants had breached the contract and gave judgment for the plaintiff against all defendants (in the amount of $712.45). In arriving at the amount of damages, the court rejected plaintiff's claim for liquidated damages as specified in the contract, and computed plaintiff's damages on the basis of the difference between the price Schmid agreed to pay plaintiff and the price plaintiff agreed to pay the mill (in procuring the flour sold to defendant)." In 18 Cal.2d 382, 388, 115 P.2d 498, 500, 138 A.L.R. 589, this judgment was reversed with directions to determine damages based upon "the difference between the contract price and the *market price* at the time when the goods should have been accepted."

At the second trial, also heard by Judge Thurmond Clarke who had presided at the first trial, judgment was rendered for plaintiff in the sum of $190. Plaintiff then appealed for the second time, asserting that the trial court had failed to follow the directions of the Supreme Court in rendering such judgment. On this second appeal it was held, in 25 Cal.2d 259, 153 P.2d 313, that such judgment was erroneous since it only permitted recovery for 200 barrels of flour which was all that plaintiff had on hand on the 91st day after the contract was made, whereas plaintiff was entitled to recover for the entire balance of 2,755 barrels which defendants had refused to accept. In reversing this second judgment the court, at page 263, of 25 Cal.2d, at page 315 of 153 P.2d, said: "It appears, however, that there is a conflict in the evidence as to the market price of each of the brands of flour on December 2, 1938, and since no finding is made by the court resolving this conflict the case must be remanded a second time for the purpose of ascertaining that price. The trial court *may,* of course, take such additional evidence as may be necessary to determine this issue." (Italics added.) After ascertaining such market price, the trial court was directed "to enter judgment in favor of plaintiff and against all defendants for the amount of such damages."

Thereafter, on plaintiff's motion, the matter was presented to Judge Harry R. Archbald, in the Superior Court, for the purpose of ascertaining the market price of the flour as directed by the Supreme Court, and the corresponding judgment to be entered in plaintiff's favor. At this hearing plaintiff offered no new evidence but placed in the trial court's hands a copy of the official reporter's transcript of the testimony taken at the previous trial before Judge Clarke. It was stipulated that the official record might go in evidence. The defendants, however, offered the testimony of two flour salesmen, namely Roy W. Fiske and E. V. Haley, as to market value. Plaintiff then maintained that the matter should be submitted solely upon the testimony found in the transcript of the previous trial, and after argument concerning this point, Judge Archbald permitted the defendants to take the testimony of the two witnesses subject to the plaintiff's later motion to strike. As set forth in appellant's brief, "the court spent the better part of two days taking the additional testimony," but after hearing the witnesses, "entered an order striking all the testimony taken on November 1st and 2nd, 1945. The findings of fact and conclusions of law were signed on May 20, 1946." After ascertaining the difference between the contract and market prices to be $4.00 as to the "Isis" brand flour, $3.70 as to the "Gold Cross" flour, and $3.95 as to the "Ravalli" flour, the trial court rendered judgment against defendants in the amount of $10,905.95 with interest at 7% per annum from

December 2, 1938. The defendants have now appealed from this judgment.

Appellants' brief presents the following points: "1. The trial court erred in awarding interest on the judgment. Such ruling is contrary to the decision of the Supreme Court. 2. The trial court erred in striking out all of the testimony of appellant's witnesses. 3. The findings of the trial court are not supported by the evidence, in that: a. The testimony on which the findings are based was improperly received and could not therefore, support the findings; and, b. The trial court erred in overruling the objections to the testimony offered by respondent as to market value on December 2, 1938."

[1] Appellants' contention that "the trial court erred in awarding interest on the judgment," is based on the argument that "The Supreme Court did not direct a judgment to be entered for any interest on the damages. Had the Supreme Court intended that interest should be added, the opinion would have so directed. The trial court had no authority whatsoever to change the decision of the Supreme Court or to enter judgment for anything but the amount of damage." However, as pointed out in the respondent's brief, the decision of the Supreme Court directed the trial court "to compute the amount of plaintiff's damages." The value of the loss of use of money is called "interest," and this item, important in its own right, has received statutory recognition in Section 3287 of the Civil Code, which provides that "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, *is entitled also to recover interest thereon from that day,* except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt." (Italics added.) This being a statutory matter, there was no reason for the Supreme Court to mention it, and certainly there is nothing in the decision to indicate that the plaintiff was to be deprived of this statutory right. The contention is clearly without merit.

The claim that "The trial court erred in striking out all of the testimony of appellant's witnesses," is likewise untenable. As noted in respondent's brief, "The Court did not strike any of the testimony of any witnesses of defendants appearing in the original transcript of the testimony," but merely struck out the testimony of the witnesses Haley and Fiske offered by the appellants at the hearing before Judge Archbald. In reference to this matter it has already been noted that the Supreme Court in 25 Cal.2d 259, 264, 153 P.2d 313, 315, did not *direct* the trial court to take further testimony but merely remarked that "The trial court *may,* of course, take such additional evidence as may be necessary to determine this issue (marked price of the flour)." (Italics added.)

"The stenographic record does not disclose that the trial judge deemed it necessary to hear additional evidence, and at page 35 of the Reporter's Transcript the following statement of the trial court is found: "I think probably the way to make this record is to go ahead as you have been doing and get that evidence that the Supreme Court had before it. Then we can take up the question of the additional evidence." Thereafter, defendants' attorney insisted on taking the testimony of the two witnesses as to market value, and the trial court said: "Well, suppose we do this for the convenience of the witnesses. Suppose, over your objection, Mr. Lewis, (respondent's attorney), we let Mr. Wallace (appellants' attorney) put his testimony on. Then you can show me if you like if it isn't material, and I can sustain the objection." The testimony was then received subject to the plaintiff's motion to strike which was later sustained.

In a "Memo. of Decision on Question of Damages as Directed by the Supreme Court," Trial Judge Archbald said: "As I was not familiar with the two transcripts of evidence presented to me by the parties, I granted such permission (to take additional evidence) over the objection of plaintiff and subject to the right of plaintiff to move to strike such evidence. In view of the fact that the Supreme Court found a conflict in the evidence before them, which is the same evidence that I have before me in transcript form, as to the price of flour on the market on December 2, 1938, and the further fact that it seems to me that such conflict already existing makes it unnecessary that further evidence be taken. I hereby grant plaintiff's motion to strike such additional evidence so taken." The trial court thereafter determined the market price as hereinbefore mentioned and gave judgment accordingly.

[2] In the above procedure there appears to have been nothing improper, and the judgment of the trial court has accomplished the purpose of the reversal. Moreover, additional testimony of the two witnesses is, as respondent's brief suggests, of an unsatisfactory nature even if not entirely irrelevant and immaterial. In any event, quoting from respondent's brief, "Even if Haley and Fiske had given competent testimony of the market price of the brands of flour here involved, the testimony would have merely raised a theoretical conflict, and that conflict would not under the law be disturbed by the appellate court." The Supreme Court had already found that there was such a conflict in the evidence. In this state of the record, no reversible error is presented.

[3] The same may be said in response to appellants' argument that the findings of the trial court as to market value were not supported by the evidence. The record discloses substantial evidence in support of the trial court's finding, and although, as the Supreme Court found in 25 Cal.2d 259, 263, 153 P.2d 313, 315, "It appears, however, that there is a conflict in the evidence as to the market price of each of the brands of flour on December 2, 1938"; this fact, under the well established rule of appellate procedure, does not warrant a reversal. According to the findings of fact, Judge Archbald "took the matter under submission, after it was stipulated that this court could read all of the testimony pertaining to the issues here involved from all the official reporters' transcripts and clerks' transcripts in the above entitled action," and then and there resolved any conflict in the evidence as directed by the Supreme Court. Having carried out such mandate, the matter must now, for all time, be deemed at rest. Appellants' claim that the findings and judgment are based only upon evidence which was improperly received, is not supported by the record.

The judgment is therefore affirmed.

YORK, P. J., and WHITE, J., concur.

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82 Cal.App.2d 670

## ROMANO v. WILBUR ELLIS & CO. et al.

Civ. 13440.

District Court of Appeal, First District, Division 2, California.

Dec. 3, 1947.

Rehearing Denied Jan. 2, 1948.

Hearing Denied Jan. 29, 1948.

**1. Torts ⚷12**

One who fraudulently and wrongfully induces another not to perform a contract is liable for the harm thus caused.

**2. Torts ⚷26(1)**

A complaint alleging that plaintiff and another as copartners contracted with foreign corporation to act as its exclusive agent in the sale of corporation's products, that partnership was dissolved, that by oral consent contract was continued in force, that plaintiff continued business under partnership name, and that, for purpose of inducing corporation to terminate agency with plaintiff and employ defendants, the defendants falsely represented that plaintiff was not qualified to act as agent, stated a cause of action though contract after dissolution of partnership was one at will.

**3. Limitation of actions ⚷37(2)**

The gist of action for damages set forth by complaint, alleging that defendants by false representations sought to induce corporation to terminate its agency with plaintiff and employ defendants in same capacity, was fraud, and hence complaint filed within three-year limitation period applying to actions based on fraud was not barred by limitations. Code Civ.Proc. §§ 338, subd. 4, 340; Civ. Code, § 1573.

**4. Frauds, statute of ⚷125(3)**

An oral contract is not void on its face because it may continue an obligation for more than one year, since the promisor may waive the statute if he sees fit.

**5. Assignments ⚷70**

Assignment of a partnership interest in an agency contract is not voidable at will of a third party.

**6. Frauds, statute of ⚷146**
**Partnership ⚷96**

A complaint, alleging that plaintiff and another as copartners contracted with foreign corporation to act as its exclusive sales agent for ten year period, that upon dissolution of partnership plaintiff took over the business, and that by oral consent contract was continued in force, was not insufficient on the ground that assignment of agency contract by copartner to plaintiff was invalid, or on the ground that oral consent continuing written contract in force was invalid under the statute of frauds because covering a period of more than one year.

**7. Pleading ⚷34(1), 229**

Pleadings should be construed with a view to substantial justice between the parties and right to amend should not be lightly denied, so that, if there are material imperfections or uncertainties, plaintiff should be granted leave to amend.

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Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Judge.

Action by John B. Romano against Wilbur Ellis & Company and others arising from alleged representations of defendants inducing a third party to repudiate its contract with plaintiff. Judgment for defendants, and plaintiff appeals.

Reversed

McLaughlin, McGinley & Hanson, of Los Angeles, for appellant.

Walter Slack, McNab, Gavin, Schmulowitz, Aikins, Wyman & Sommer, and Sidney De Goff, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued in tort arising from the alleged representations of defendants which induced a third party to repudiate its contract with plaintiff. A demurrer to the complaint was sustained without leave to amend, a timely request for leave to amend was denied, and judgment was entered for defendants.

[1,2] 1. Does the complaint state a cause of action? It is alleged that in 1941 a Peruvian corporation named "Industrial Pesquera, S. A." executed a written contract with plaintiff and one Reed, co-partners, for the exclusive right for the period of ten years to sell its fish and fish products. In June 1942, the partnership of appellant and Reed was dissolved. Appellant took over the entire business and with the oral consent of Pesquera, the written contract was continued in force, and appellant continued the business under the old partnership name having duly filed a certificate for that purpose. In June, 1943, defendants falsely represented to Pesquera that appellant was not fit or qualified to represent them, that Pesquera could deal more profitably and advantageously with defendants if it would discontinue its contractual relations with plaintiff and deal solely through defendants, and persuaded them to cancel their contract with appellant and to refuse to pay him the agreed commissions as agent.

The pleadings present a case closely akin to Elsbach v. Mulligan, 58 Cal.App.2d 354, 136 P.2d 651. One who fraudulently and wrongfully induces another not to perform a contract is liable for the harm thus caused. Restatement Torts, sec. 766; Remillard-Dandini Co. v. Dandini, 46 Cal. App.2d 678, 116 P.2d 641; H. G. Fenton Material Co. v. Challet, 49 Cal.App.2d 410, 121 P.2d 788; Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 112 P.2d 631; Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 172 P.2d 867.

Neither the complaint nor the proposed amendment is a model of good pleading but a triable cause of action is pleaded. It is said in Imperial Ice Co. v. Rossier, supra, 18 Cal.2d at page 35, 112 P.2d at page 632: "Most jurisdictions also hold that an action will lie for inducing a breach of contract by the use of moral, social, or economic pressures, in themselves lawful, unless there is sufficient justification for such inducement. See cases cited in 84 A.L.R. 55; 24 Cal.L.Rev. 208, 209; see Sayre, Inducing Breach of Contract, 36 Harv.L.Rev. 663, 671; Carpenter, Interference with Contractual Relations, 41 Harv.L.Rev. 728, 732; Restat., Torts, sec. 766." Again, in 18 Cal.2d at page 39, 112 P.2d at page 634, the court said: "By inducing Coker to *violate* his contract, as alleged in the complaint, they sought to further their own economic advantage at plaintiff's expense. Such conduct is not justified." (Emphasis added.)

In the Speegle case, however, the defendants were charged with having caused the termination of plaintiff's contracts as an insurance broker because he refused to comply with their demand to cease to represent non-board companies. The court cited with approval the Imperial Ice Co. case to the point that: "Intentional and unjustifiable interference with contractual relations is actionable in California as in most other jurisdictions." (29 Cal.2d at page 39, 172 P.2d at page 870). The Speegle case seems to rest on the question whether the activities of defendants were "justifiable" (29 Cal.2d at page 41, 172 P.2d at page 871). This expression is used in many of the cases cited, but without definition. By way of illustration it is said in the Imperial Ice Co. case that employees may bring pressure upon others to induce breaches of contract between an employer and his employees to improve their economic relations. On the other hand it is said (18 Cal.2d at page 37, 112 P.2d at page 633): "A party may not, however, under the guise of competition actively and affirmatively induce the breach of a competitor's contract in order to secure an economic advantage over that competitor."

In 41 Harv. L. Rev. p. 747, cited in the Speegle case the principles here are thus recapitulated:

"The interest in freedom from interference with contracts cannot be invaded with impunity in futherance of an interest in freedom to enter into contract relations, an interest less highly protected in the law than the interest in contracts. Therefore, if the defendant enters into a contract with a person, who is already under contract with the plaintiff, with knowledge or surmise of the existence of the prior contract, and of the fact that performance to the defendant will prevent performance to the plaintiff, he is merely furthering his interest to enter into contracts and he should not only not be able to recover on the contract which he has made, but should be held liable for inducing breach of contract, or be enjoined from interference, even though the prior contract does not give the third person a property interest."

The proposed amended complaint presents such a case. It charges the defendants with falsely representing to Pasquera that plaintiff was "not fit or qualified to act as agent" for the purpose of convincing Pesquera to terminate its agency with the plaintiff and to employ the defendants in that capacity.

It is immaterial whether after the dissolution of plaintiff's partnership his contract with Pesquera was one "at will." Speegle v. Board of Fire Underwriters, supra, says (29 Cal.2d at page 39, 172 P.2d at page 870) that "at the will of the parties, respectively does not make it one at the will of others," and that "the great majority of the cases have held that unjustifiable interference with contracts terminable at will is actionable."

[3] 2. Is the action barred by the statute of limitations? This is not an action for breach of the contract between appellant and Pesquera. The latter is not a party to the action. The suit is for damages for fraud. The accepted rule of the cases hereinabove cited is that the gist of this type of action is fraud. Section 1573 of the Civil Code provides: "Constructive fraud consists:

"1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him."

In Imperial Ice Co. v. Rossier, supra, the court said:

"It is universally recognized that an action will lie for inducing breach of contract by a resort to means in themselves unlawful such as libel, slander, fraud, physical violence, or threats of such action." (18 Cal.2d at page 35, 112 P.2d at page 632). If a party were suing for simple libel, slander or physical violence the cause would be limited to the one year period of section 340, Code Civ. Proc. But the gist of the action is the "fraudulent inducement" leading to the breach of the contract. Eisbach v. Mulligan, 58 Cal.App.2d 354, 366, 136 P.2d 651. The complaint sets forth that these false representations were relied on by Pesquera, that they were uttered with the intent to mislead Pesquera to the prejudice of plaintiff and that they were made for the purpose, and accomplished the result, of gaining "an advantage to the person in fault." This is fraud under section 1573 of the Civil Code. As an action based on fraud it comes within the three year limitation of sub. 4, sec. 338, Code of Civil Procedure. Since the complaint was filed within three years of the act complained of it is not barred by the statute.

[4-6] 3. Respondents attack the validity of the assignment of the agency contract by Reed to his partner Romano; they also attack the validity of the oral consent of Pesquera accepting the assignment and continuing the written contract in full force. From this they argue that since the oral contract covered a period of more than one year it was within the statute of frauds and so unenforceable. Practically all the authorities are contra. See 41 Harv.L.Rev. p. 739, note 12. An oral contract is not void on its face because it may continue an obligation for more than one year. The promissor may waive the statute if he sees fit. An assignment of a partnership interest in an agency contract is not voidable at the will of a third party, such as the defendants herein. There are many factors such as acquiescence, confirmation and estoppel which may arise when these issues come to trial on the merits. In the Speegle case, supra, it was held that this type of action would lie in relation to a contract terminable at will. From the allegations in the complaint it appears that appellant contends that his contract with Pesquera was terminated through the fraud of respondents, not because of the elimination of the partnership nor because some subsequent oral contract to continue the agency might have been terminable at will.

[7] Appellant complains of the order of the trial court denying him leave to amend. A proposed amended complaint was offered with a request for leave to file. This is no great improvement on the pleading upon which the demurrer was argued. But the pleadings should be construed "with a view to substantial justice between the parties." See Speegle v. Board of Fire Underwriters, supra, 29 Cal.2d at page 42, 172 P.2d at page 872, and the right to amend should not be lightly denied. If there are material imperfections or uncertainties in the pleading the plaintiff should be granted leave to amend.

Judgment reversed.

GOODELL, and DOOLING, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

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82 Cal.App.2d 657

## TAYLOR v. TAYLOR.

Civ. 15812.

District Court of Appeal, Second District, Division 1, California.

Dec. 2, 1947.

Hearing Denied Jan. 29, 1948.

**1. Divorce** 🔑**129(16), 130**

Evidence sustained judgment of divorce for wife on ground of husband's extreme cruelty and adultery.

**2. Divorce** 🔑**115, 116**

Though wife's action for divorce could not be based on husband's alleged adultery that took place more than two years prior to commencement of action, evidence as to such acts was admissible to show husband's adulterous disposition and to support wife's charge of extreme cruelty. Civ.Code, § 124.

**3. Divorce ⚷184(12)**

On appeal by husband from judgment, husband could not complain of wife's failure to comply with statute dealing with the serving of a copy of pleadings charging adultery on the corespondent, in absence of showing that husband was substantially prejudiced. Code Civ.Proc. § 1019.

**4. Divorce ⚷253**

Where wife obtained divorce on ground of husband's adultery and extreme cruelty, evidence established that court's division of property was equitable.

**5. Divorce ⚷253**

In divorce action, court's finding that war savings bonds were community property and were not held in joint tenancy, was not erroneous, as contended by husband, where husband failed to deny wife's allegation that bonds were community property, and his cross-complaint described bonds as "community in character" and as having been acquired by the parties during their marriage.

**6. Divorce ⚷240(1)**

Wife who was awarded a divorce on ground of adultery and extreme cruelty, was properly awarded alimony of $150 a month, where husband's annual earnings approximated $9,500.

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Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Suit for divorce by Jeannette E. Taylor against Clarence E. Taylor, wherein defendant filed a cross-complaint. From a judgment for plaintiff, the defendant appeals.

Judgment affirmed.

Cantillon & Clover, of Los Angeles, for appellant.

Clifford A. Rohe, of Sherman Oaks, for respondent.

WHITE, Justice.

This is an appeal by the husband, defendant and cross-complainant, from an interlocutory judgment of divorce granted to the wife. Plaintiff's complaint contained three causes of action, charging respectively extreme cruelty, habitual intoxication, and adultery. The trial court found in favor of plaintiff on the charges of cruelty and adultery and against her on the charge of habitual intoxication.

Appellant's first assignment of error is that the court erred in admitting evidence of adultery on the part of the husband, particularly acts alleged to have occurred more than two years prior to the filing of plaintiff's complaint. Appellant in this respect relies upon the case of Klemmer v. Klemmer, 42 Cal.App. 618, 187 P. 85, as authority for the proposition that evidence of an act of adultery is inadmissible where the alleged corespondent is known to the complaining party and such corespondent is not served with a copy of the pleadings charging such adultery, as required by section 1019 of the Code of Civil Procedure. Appellant further urges that the "court erred in awarding virtually all the community property to respondent and was influenced in so doing by the evidence objected to under Assignment of Error No. 1"; that the court improperly found certain war savings bonds in the joint names of the parties to be community property; and that the award of $150 per month for support of the wife is excessive. None of these contentions can be sustained.

[1] No useful purpose would be served by setting forth the evidence disclosed by the record. It is sufficient to say that there was ample evidence to support the findings of the trial court as to extreme cruelty and adultery.

[2] The trial court found "that on or about the 4th day of July, 1943, but more than two years prior to the institution of this action, the defendant and cross-complainant committed adultery with a person unknown to the plaintiff and that the defendant and cross-complainant has committed adultery with various persons during the period between the 4th day of July, 1943, and the 31st day of July, 1945, in

the City and County of Los Angeles, State of California, and has lived in adulterous intercourse and committed adultery with persons unknown to the plaintiff." This action was commenced August 23, 1945. While a divorce may not be based upon the acts which took place more than two years prior to the commencement of the action (Civ.Code, sec. 124), evidence as to such acts of adultery was admissible to show the adulterous disposition of the defendant (19 C.J. 129; 27 C.J.S., Divorce, § 129; Derby v. Derby, 21 N.J.Eq. 36, 60; Carpenter v. Carpenter, 56 Hun 643, 9 N.Y.S. 583; Zeiner v. Zeiner, 120 Conn. 161, 179 A. 644; Pierpoint v. Pierpoint, 108 Pa.Super. 108, 164 A. 808), and also in support of the general charge of extreme cruelty set forth in the first cause of action (see 9 Cal.Jur. 657; Van Camp v. Van Camp, 53 Cal.App. 17, 22, 199 P. 885). There was ample evidence, which it is unnecessary here to narrate, to sustain the finding of adulterous conduct with persons unknown within the statutory period of two years prior to the commencement of the action.

[3] Our conclusion in this regard makes it unnecessary to consider the case of Klemmer v. Klemmer, supra, cited by appellant, but it may be noted that in denying a hearing in that case the Supreme court expressly withheld approval of that portion of the opinion upon which appellant relies. It would appear that the error, if any, in admitting evidence of adultery with a known corespondent without requiring compliance with section 1019 of the Code of Civil Procedure, is not an error of which appellant can complain in the absence of a showing that he has been substantially prejudiced thereby. No such showing has been here made.

[4, 5] In dividing the property, the court awarded to the wife the home of the parties, the household goods, a 1938 Willys sedan automobile, and $1,700 in war savings bonds. The defendant husband was awarded a 1942 DeSoto automobile, a horse, and the proceeds of the sale of some chickens. It is urged that the award was error because "the trial judge, by his own remarks, was greatly influenced by the evidence that appellant twice in his own home had committed an act of adultery." Since, as hereinabove stated, the evidence of adultery was properly admitted, appellant's contention is without merit. Moreover, the division made by the court, in view of the evidence of the circumstances of the parties, and the husband's conduct, exclusive of the alleged adultery, appears to be well within the wide discretion vested in the trial court. The contention that there is no evidence that the bonds were held other than in joint tenancy and that the court therefore erred in finding them to be community property, is answered by the fact that defendant failed to deny plaintiff's allegation that the bonds were community property, and in fact, his cross-complaint described the bonds as "community in character" and as having been acquired by the parties during their marriage.

[6] With respect to the award to the wife of $150 per month, the record discloses substantial testimony as to the needs of the wife and that the husband's annual earnings approximated $9,500.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

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82 Cal.App.2d 660

## SPATES v. BREWER et al.

Civ. 15813.

District Court of Appeal, Second District,
Division 1, California.

Dec. 2, 1947.

Hearing Denied Jan. 29, 1948.

**1. Husband and wife 🔑264**

In action by husband against executors of estate of deceased wife to establish a trust in real estate on ground that title was held in wife's name for convenience only and that property was actually community property, evidence sustained conclusion that property was separate property of deceased, purchased with her separate funds. Civ. Code, § 164.

**2. Appeal and error** ⚷989

Power of appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion of trier of fact.

**3. Appeal and error** ⚷996

Where two or more inferences can reasonably be deduced from facts, appellate court is without power to substitute its deductions for those of trial court.

**4. Husband and wife** ⚷264
**Limitation of actions** ⚷197(1)
**Trusts** ⚷372(3)

Where husband had never disputed allegations in wife's occasional divorce actions that there was no community property, in husband's subsequent action against deceased wife's estate to establish a trust in such property as to his alleged community interest therein, instituted seven years after notice that wife disputed his community interest, evidence was insufficient to overcome presumption that wife held property as her separate property, and authorized finding that husband was guilty of laches, in asserting his claim only after wife had died and that action was barred by limitations. Civ.Code, § 164; Code Civ. Proc. § 343.

◆

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by Harry Spates against Tomesue Brewer, Patsy Sims and Frank Burr, executors of the estate of Chancey Spates, deceased, Patsy Sims individually, and Patsy Chancey Sims, an infant, to establish a trust in certain real property. Judgment for defendants and plaintiff appeals. Plaintiff died pending the appeal and Autoro Spates, administrator of the estate of Harry Spates, deceased, was substituted as plaintiff and appellant.

Affirmed.

Gordon, Ragland & Porter, of Los Angeles, for appellant.

Ovila N. Normandin, of Los Angeles, for respondents.

WHITE, Justice.

This is an appeal by plaintiff from a judgment for defendants in an action to establish a trust in certain real property. The suit was instituted by Harry Spates against the executors of the estate of his deceased wife, Chancey Spates, and the beneficiaries under her will. Upon the death of Harry Spates pending the appeal, his administrator was substituted as plaintiff and appellant.

In the amended complaint it was alleged, in substance, that between 1935 and 1945, Harry Spates advanced to his wife various sums approximating $5,000, which sums were community property of the parties, for the purpose of acquiring the real property in dispute; that title to the property was taken in the name of the wife solely for convenience, and that in fact the property was community. The prayer of the complaint was that plaintiff be adjudged the owner of a one-half interest in such property and that defendants be declared constructive trustees thereof.

The sole ground upon which a reversal is sought is that the evidence is insufficient to sustain the findings and decision of the trial court. Harry Spates testified that in the latter part of 1936 he and his wife contemplated purchasing the property in question; that the owner thereof refused to sell to a Negro, but that Mrs. Spates, "she being so fair, there was no question about her"; that Mrs. Spates said that "she would sign over the community deeds" when the property was paid for; that she told him on several occasions she would put the property in his name; that he gave his wife all the money he made after they married; he would give her hundreds of dollars at a time; that he sold his car for $500 and gave her that to apply on the monthly payments on the property.

Contradicting plaintiff's testimony, however, it was brought out that at the time of the marriage Mrs. Spates owned as her separate property a residence in San Francisco and income property in Petaluma from which she received a substantial income; that at the time of the purchase of the property in question she had a term savings account; that at or about the time the down payment of $2,536.35 was made she withdrew $2,400 from the savings account. The payments made on the property, at the rate of $90 per month, were all made by checks drawn by Mrs. Spates on her separate commercial account in a branch of the Security-First National Bank. No payments were made by plaintiff. The deed named as grantee "Chancey Spates, a married woman, as her sole and separate property." The grantor, Mr. Butterworth, testified that the property was not restricted against the colored race, and that whether the buyer was white or colored had no influence on him in making the sale. Harry Spates did not at any time demand that his wife convey him an interest in the property. He could not name any specific sum which he claimed to have given his wife nor the dates upon which he had given her any sums, with which to purchase the property. He produced no receipts or cancelled checks. Mrs. Spates told her granddaughter that the property was hers (Mrs. Spates'). She gave the deed to her daughter for safekeeping.

During their married life Mr. and Mrs. Spates frequently separated. Between 1936 and 1945 Mrs. Spates instituted four divorce actions, and in her complaint in each case alleged that there was no community property. Mr. Spates was personally served with summons and complaint in three of these cases; he made no appearance in any of them; an interlocutory judgment was entered in one case, but the action was subsequently dismissed by stipulation. In an action commenced in San Francisco in December, 1944, Mr. Spates was personally served with process but did not appear, and both an interlocutory judgment and a final judgment were entered.

[1-4] From the foregoing recital it is manifest that the appeal herein is without merit. There was substantial evidence to support the conclusion of the trial court that the property was the separate property of the deceased, purchased with her separate funds. The power of this court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion of the trier of fact; and where two or more inferences can reasonably be deduced from the facts, this court is without power to substitute its deductions for those of the trial court. In re Estate of Gillett, 73 Cal. App.2d 588, 598, 166 P.2d 870. The trial court was not bound to believe Mr. Spates' version of the conversations with his wife, nor his vague statements with reference to money furnished by him, nor the unconvincing evidence of his corroborating witnesses. As early as 1938 Mr. Spates was informed of his wife's contention that there was no community property, yet he made no claim that the property in controversy was community until his wife had been silenced by death in 1945. Our examination of the transcript, which includes evidence which it is not necessary to here set forth, impresses us that the trial court could not but conclude that, instead of the situation being one in which the husband furnished funds to the wife, exactly the contrary was true. The case presented by the plaintiff was properly found to be wholly inadequate to overcome the presumption, under section 164 of the Civil Code, that the property was conveyed to Mrs. Spates and held by her as her separate property. The evidence is ample to support the view that the husband agreed to the acquisition and holding of the property as the separate property of the wife; that he was guilty of laches in asserting his claim, and that his cause of action is barred by the provisions of section 343 of the Code of Civil Procedure.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

## ELBERT, Limited, v. NOLAN et al. *

**Civ. 15844.**

**District Court of Appeal, Second District, Division 1, California.**

**Dec. 5, 1947.**

**Rehearing Denied Dec. 19, 1947.**

**Hearing Granted Jan. 29, 1948.**

**1. Partition 🔑13**

Under codal provision authorizing action for partition where real property is subject to a lien on a parity with that on which the owner's title is based by the owner or by the holder of such lien, no action for partition was authorized by a holder of special improvement bonds against purchasers of tax title, since there was no parity. Code Civ.Proc. § 752.

**2. Appeal and error 🔑1008(1)**

Where the trial court determined the equities and there was no dispute as to the facts or sufficiency of the evidence, the trial court's determination was conclusive on appeal.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Elbert, Ltd., against Whitfield P. Nolan and others for partition and declaratory relief. From the judgment rendered, the plaintiff appeals.

Judgment affirmed.

Robert E. Rosskopf, John F. Bender and G. Loshoncy, all of Los Angeles, for appellant.

Arthur V. Kaufman, of Los Angeles, for respondents.

DORAN, Justice.

The within action relates to three vacant city lots. Plaintiff is the owner of street improvement bonds on the lots in question issued under the Improvement Act of 1911. St.1911, p. 730. No action has ever been taken to foreclose the bonds or collect the amount due thereon. The lots were acquired by the present owners at a tax sale.

Plaintiff brought the within action "for partition and declaratory relief against the tax buyers". Following a trial, "The trial court denied plaintiff's right to partition, but found that a bona fide controversy did exist and rendered its judgment quieting title in the defendant tax buyers against all parties, subject to the liens of plaintiff's bonds. With reference to the bonds the Court found and adjudged: 'That all amounts unpaid upon said bonds and until paid constitute valid and subsisting liens on said parcels of real property.'" The appeal is from the judgment.

On appeal, plaintiff asserts, "the right to maintain partition action upon said bonds" and therefore contends that "a decree of partition should have been rendered", the property sold and "the proceeds distributed on the basis of the bond liens being on a parity with the tax titles".

[1, 2] Appellant relies on section 752 of the Code of Civil Procedure as authority for the within action, the pertinent portion of which provides that the action may be brought "where real property is subject to a lien on a parity with that on which the owner's title is based, by the owner or by the holder of such lien." The bonds here in question were issued long before the above amendment was adopted. Assuming, but by no means deciding, that the amendment is merely procedural and hence applicable nevertheless, it provides no authority for the within action. As between an asserted lien based on an unforeclosed bond and a title based on a tax deed, there is no "parity". Monheit v. Cigna, 28 Cal.2d 19, 168 P.2d 965, 167 A.L.R. 995, upon which appellant relies, is no authority for appellant's contention in this regard; the within action is not an action to quiet title among holders of tax deeds. At most, plaintiff's action is a suit in equity. Assuming again, but not deciding, that, partition in such circumstances is a proper equitable remedy, the equities were determined by the trial court and there being no dispute as to the facts or sufficiency of the evidence the trial court's determination is conclusive on appeal. Appellant's contentions, therefore, cannot be upheld.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

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* Subsequent opinion 197 P.2d 537.

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